No. 18-1158

In The Supreme Court of the United States

JARROD TAYLOR,

Petitioner,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE FEDERAL DEFENDERS FOR THE MIDDLE DISTRICT OF ALABAMA, INC. AND THE ALABAMA POST-CONVICTION RELIEF PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE
QUESTIONS PRESENTED

(1) Did the United States Court of Appeals for the Eleventh Circuit (the "Circuit Court" or "Eleventh Circuit") apply an incorrect standard for obtaining a certificate of appealability ("COA") by engaging in de novo fact finding and deciding the merits of Jarrod Taylor's habeas corpus claims, contrary to this Court's precedents?

(2) Under the correct COA standard, did the Eleventh Circuit err by denying Jarrod Taylor a COA where, during the guilt phase of his trial, the State secreted to the jury evidence of Taylor's prior felony conviction and other unrelated bad acts, and then repeatedly concealed the fact that it had presented such evidence to the jury?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amicus Middle District of Alabama Federal Defenders Program, Inc. was incorporated on April 22, 1994. In 2003, the Defender Services Office approved creation of a Capital Habeas Unit ("CHU") for the federal defender program. The CHU has nine attorney positions, four investigators, three support staff, and two paralegals. The CHU has 28 pending federal habeas corpus cases, and also litigates method of execution challenges, successor habeas petitions, and represents clients during clemency proceedings.

Amicus Alabama Post-Conviction Relief Project ("APCRP") was created at the same time as the CHU. Alabama, before 2017, did not statutorily provide counsel to prepare state post-conviction pleadings for death-sentenced prisoners. APCRP recruits volunteer counsel to represent Alabama Death Row prisoners in state post-conviction proceedings and provides support and resources to those counsel.

Amici have a deep interest in the issues raised in the petition, and urge that it be granted. The District Court's finding that Mr. Taylor's serious prosecutorial misconduct claim was defaulted for purposes of federal review was based on a belief that Alabama's rule concerning amendment of post-conviction petitions is adequate to bar federal review. It is not. *Amici* are

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[1] No party authored this brief in whole or in part, and no one other than *amici* and counsel for *amici*, made any contribution toward the preparation or submission of this brief. Both parties have consented in writing to the submission of this brief.

uniquely qualified to provide this court with a history of Alabama law on the inadequacy of Alabama's procedural rules and its effect on habeas corpus practice.

SUMMARY OF THE ARGUMENT

The faults of Alabama's capital post-conviction system are well known to this Court. One of those faults – the inconsistent application of Alabama's judge-made rules concerning amendment of state post-conviction petitions – operated to deny Mr. Taylor habeas corpus review of a significant claim of prosecutorial misconduct. Two very straightforward sentences in a state court rule have had various caveats grafted onto them, and in this case, the rule was applied inconsistently in a manner that denied Mr. Taylor review of a significant claim.

This Court should grant certiorari in this case to resolve the question of whether a COA should have been granted to review the District Court's decision that a substantive claim of prosecutorial misconduct was procedurally defaulted. Reasonable jurists could disagree as to whether Alabama's state procedural rule that barred review of the claim was adequate and independent.

Alabama regularly invokes procedural bars to prevent habeas corpus review of convictions and death sentences. Ronald Smith was executed without any habeas corpus review of his sentence and conviction because a request in a pleading for appointment of

counsel was not deemed a sufficient request to proceed *in forma pauperis*, rendering his petition not timely filed.[2] Robert Melson was denied habeas corpus review of his conviction and sentence prior to his execution because his attorney, who signed his post-conviction petition, failed to also include a separate verification page, and the later-submitted verification page was not deemed to relate back to the petition.[3]

In Mr. Taylor's case, Alabama's rules concerning amendment of post-conviction petitions would seem to have allowed him to amend his state court petition to include his significant claim of state misconduct, thus preserving the issue for federal review. Even the precedent interpreting the rule indicates he should have been allowed to do so. Yet, he was not.

While Alabama applies its procedural rules inconsistently, it does so with a consistent theme – to deny substantive review of claims whenever possible. The ripple effect of that situational interpretation is to deny habeas corpus review to petitioners like those mentioned above and to Mr. Taylor. This Court should grant *certiorari* to clarify that rules interpreted and applied in an inconsistent manner cannot be used to render a claim procedurally defaulted for federal habeas corpus purposes.

[2] *Smith v. Comm'r, Ala. Dep't of Corrs.*, 703 F.3d 1266 (11th Cir. 2012).

[3] *Melson v. Allen*, 713 F.3d 1086 (11th Cir. 2013).

REASON FOR GRANTING THE WRIT

The writ should be granted to clarify that Alabama's rules concerning when a post-conviction petition may be amended are not adequate to preclude federal review of a claim because they are not firmly established or regularly followed.

Rule 32.7(b) of the Alabama Rules of Criminal Procedure states, "Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." Ala. R. Crim. P. 32.7(b). Subsection (d) of the same rule states, "Leave to amend shall be freely granted." Ala. R. Crim. P. 32.7(d). These simple statements have, through judge-made caveats designed to limit their clear application, been interpreted inconsistently and in such a manner to render them ineffective to protect the rights of those seeking post-conviction relief. Three examples spanning the history of the rules illustrate the inconsistency of the interpretation and why the rule is not adequate to bar review.[4]

A. The judge-created diligence requirement.

Despite the word "diligence" not appearing in the rule, the Alabama Court of Criminal Appeals grafted a diligence component onto it, holding that amendment prior to judgment was not permitted without a

[4] One other aspect that contributes to this inconsistency is the fact that all review in the Alabama Supreme Court is discretionary, leaving the bulk of the decisions on these matters to the Alabama Court of Criminal Appeals.

showing of diligence.[5] This interpretation remained in place until 2004.

In 2004, the Alabama Supreme Court accepted review in a case where the petitioner moved to amend his petition 16 days after the initial petition was tendered to the court and before the trial court had ruled on the petition.[6] He was not allowed to amend. In the Alabama Court of Criminal Appeals, the State conceded that the trial court had abused its discretion by not allowing the amendment in the first instance.[7] Ignoring the concession, the Alabama Court of Criminal Appeals held that because the petitioner did not meet his "initial burden" to show diligence, the amendment was properly refused.[8]

The Alabama Supreme Court reversed, concluding that the judge-made diligence requirement was inconsistent with its decisions and the rules themselves. While the Alabama Court of Criminal Appeals had expressed fear that any other interpretation would allow unfettered amendment to post-conviction petitions, the Alabama Supreme Court disagreed, concluding: "[t]he right to amend is limited by the trial court's discretion to refuse an amendment based upon factors such as undue delay or undue prejudice to the opposing party."[9]

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[5] *Cochran v. State*, 548 So. 2d 1062, 1075 (Ala. Crim. App. 1989).

[6] *Ex parte Rhone*, 900 So. 2d 455 (Ala. 2004).

[7] *Id.* at 458.

[8] *Id.*

[9] *Id.* at 459.

This however, would not be the only time that the Alabama Court of Criminal Appeals interpreted these straightforward rules in a manner to deny review.

B. Must an amendment relate back to the initial pleading?

In 2002, despite no language in the rules supporting this conclusion, the Alabama Court of Criminal Appeals ruled that it was proper for the trial court to refuse to consider amendments to a post-conviction petition filed after the statute of limitations period had expired if those claims did not relate back to the initial pleading.[10] This restriction lasted three years before the Alabama Supreme Court reiterated to the Alabama Court of Criminal Appeals that the language of Rule 32 was plain, and that "[w]e decline to rewrite the Rules of Criminal Procedure by sanctioning the incorporation of the relation-back doctrine into those rules when nothing of that nature presently appears in them."[11] In doing so, the Alabama Supreme Court explicitly overruled numerous cases in which the doctrine was applied.[12] This again illustrates the Alabama Court of Criminal Appeals' willingness to judicially rewrite Rule 32.

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[10] *Charest v. State*, 854 So. 2d 1102 (Ala. Crim. App. 2002).

[11] *Ex parte Jenkins*, 972 So. 2d 159, 164-65 (Ala. 2005).

[12] *Harris v. State*, 947 So. 2d 1079 (Ala. Crim. App. 2004); *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004); *Giles v. State*, 906 So. 2d 963 (Ala. Crim. App. 2004); *Ex parte Mack*, 894 So. 2d 764 (Ala. Crim. App. 2003); *DeBruce v. State*, 890 So. 2d 1068 (Ala. Crim. App. 2003); *Charest*.

C. What does "reversed and remanded" mean for amendments?

A third attempt to limit the plain reading of the rules came in a situation involving remand. In Andrew Apicella's case, the Alabama Court of Criminal Appeals ordered the case returned to the trial court for a hearing on whether he had been denied the right to individualized sentencing.[13] The Court informed the parties that the question of whether Mr. Apicella would be allowed to amend his petition would be left to the lower court, but that it was to apply the Alabama Supreme Court's decision in *Rhone* when it made such a decision.[14]

Shortly after the case was returned to the trial court, Mr. Apicella filed his third amended petition. The trial court concluded that *Rhone* did not apply because there was already a judgment on the original petition, and any amendment would be after that judgment.[15] The Alabama Court of Criminal Appeals affirmed this decision.[16]

The Alabama Supreme Court again reversed, concluding that the Alabama Court of Criminal Appeals order reversing the summary dismissal of the petition and remanding the case with directions restored the parties to the positions they were in prior to the judgment, and as such, amendment was appropriate under

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[13] *Ex parte Apicella*, 87 So. 3d 1150, 1151 (Ala. 2011).

[14] *Id.*

[15] *Id.* at 1152.

[16] *Id.* at 1152-53.

the rules.[17] While the Alabama Court of Criminal Appeals "may have doubts about the propriety" of its earlier ruling, the judgment unambiguously reversed the trial court's dismissal and therefore, "when Apicella filed his third amended petition, no final judgment was in effect."[18]

D. *Apicella* is not consistently applied by the Alabama courts.

It is the interpretation of *Apicella* that has not been consistently applied in Mr. Taylor's case, an event that should not be surprising given the Alabama Court of Criminal Appeals' history. In *Bryant v. State*,[19] the Alabama Court of Criminal Appeals ruled that the trial court erred when it summarily dismissed Mr. Bryant's entire petition, and remanded the case for an evidentiary hearing on certain delineated claims.[20] This is exactly what happened in Mr. Apicella's case.

After remand, Mr. Bryant moved for leave to file a second amended petition, which was denied. The Alabama Court of Criminal Appeals affirmed this denial, holding that Mr. Bryant's case was distinguishable from *Apicella* because in *Apicella*, the court reversed and remanded, while in Mr. Bryant's case, it had remanded with instructions.[21] The Alabama Supreme

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[17] *Id.* at 1154.

[18] *Id.*

[19] 181 So. 3d 1087 (Ala. Crim. App. 2011).

[20] *Id.* at 1130.

[21] *Id.* at 1135-36.

Court did not review Mr. Bryant's case, despite the fact that the actions in the two cases were identical, with the only difference being the line at the end of the *Bryant* opinion, which said remanded with instructions, rather than reversed and remanded.

In *Ingram v. State*,[22] the Alabama Court of Criminal Appeals again considered the question of amendments after remand. Mr. Ingram's state post-conviction petition was summarily dismissed by the trial court, which had signed an order written by the state and which contained patently erroneous statements.[23] The Alabama Court of Criminal Appeals affirmed that ruling, but the Alabama Supreme Court reversed.[24]

On remand to the trial court, Mr. Ingram tried to amend his petition, and the trial court would not allow amendment. The Alabama Court of Criminal Appeals, applying *Apicella*, concluded the trial court abused its discretion when it denied Mr. Ingram the ability to amend his petition, because doing so would not have caused any undue prejudice or delay in the proceedings.[25]

Mr. Taylor's case is identical to *Bryant*, *Apicella*, and *Ingram*, and illustrates the inconsistent application of the rules. As in all three cases, the trial court

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[22] 103 So. 3d 86 (Ala. Crim. App. 2012).

[23] *Ingram*, 103 So. 3d at 88-89.

[24] *Id.* at 86.

[25] *Id.* at 97.

summarily dismissed Mr. Taylor's entire state post-conviction petition. As in *Bryant* and *Apicella*, the Alabama Court of Criminal Appeals found that ruling to be improper, and ordered that the trial court hold hearings on specific issues. In all four cases, on remand, the petitioner sought to amend his post-conviction petition. It is there where the cases diverge.

Despite being procedurally identical (summary dismissal of all claims in lower court/remand by appellate court) the Alabama appellate courts treated these cases differently. Mr. Apicella and Mr. Ingram were allowed to amend their petitions, while Mr. Bryant and Mr. Taylor were not.

The effect of this inconsistent application of judge-made rules is evident in Mr. Taylor's case. Mr. Taylor raised a significant issue of state misconduct in the prosecution of his capital murder case, as was his right under the plain language of the rules. The Alabama courts, despite those rules and precedent applying those rules, refused to allow the amendment.

The federal courts concluded that the claim was defaulted due to the application of a regularly followed and consistently applied state rule. As illustrated above, nothing could be further from the truth. Alabama's rules concerning amendment of post-conviction petitions are not firmly established or regularly followed. In particular, with respect to the application of the rules as they apply to cases in the trial court on remand, any distinctions are without a difference. The rules are simple and direct. The Alabama appellate

courts' interpretations are not, and the application of the interpretations is selective. Therefore, the claim is not procedurally barred from federal review.

CONCLUSION

For the above reasons, *amici* urge that this Court grant Mr. Taylor's petition for writ of *certiorari*.

Respectfully submitted,

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