No.

OCTOBER TERM 2018

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IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DEWAYNE RILEY,
*Petitioner,*

v.

ALABAMA,
*Respondent.*

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On Petition for a Writ of Certiorari
to the Alabama Supreme Court

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# PETITION FOR WRIT OF CERTIORARI

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January 22, 2019

## CAPITAL CASE

## QUESTION PRESENTED

David Riley filed a *pro se* state post-conviction petition because, unlike every other state, Alabama does not provide counsel to death-sentenced inmates to file collateral attacks to their capital convictions. The trial court appointed an attorney for Mr. Riley, and the sum total of that attorney's actions were to visit Mr. Riley once and read aloud from his *pro se* pleading at an "evidentiary" hearing where she put on no evidence, while telling the court that she did not know how to prove Mr. Riley's case.

The Alabama courts held that because this Court's precedent concluded that Mr. Riley was not entitled to post-conviction counsel, he was not entitled to effective assistance of such counsel; therefore, he was not entitled to new capital post-conviction proceedings.

Should this Court revisit its precedent to consider whether death-sentenced inmates are entitled to the effective assistance of counsel on initial collateral review in state court?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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## PETITION FOR A WRIT OF CERTIORARI

David Riley respectfully requests that this Court grant a writ of certiorari to review the decision of the Alabama Supreme Court.

## OPINIONS BELOW

The Alabama Supreme Court denied discretionary review in this case, summarily affirming the decision of the Alabama Court of Criminal Appeals.[1] The Alabama Court of Appeals' opinion, which is the last reasoned opinion in this case, is included in Petitioner's Appendix.[2]

## JURISDICTION

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

On November 13, 2015, Mr. Riley filed a *pro se* petition for relief from his capital murder conviction and death sentence under Rule 32 of the Alabama Rules of Criminal Procedure. On November 18, 2015, the court

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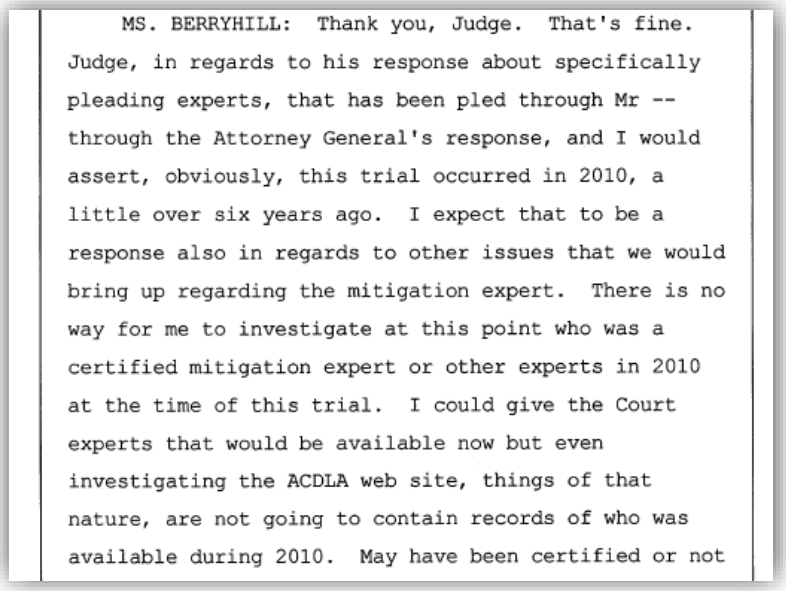
[1] Pet. App. 1a.

[2] Pet. App. 2a-30a.

appointed Kellian Berryhill as counsel for Mr. Riley. Ms. Berryhill had, at the time, been a licensed attorney for four years. Ms. Berryhill did not attempt to amend Mr. Riley's *pro se* petition, and filed no substantive pleadings prior to the July 19, 2016 hearing. The only document she filed was a request to be compensated for her one visit to Mr. Riley.

At the "evidentiary" hearing, counsel presented no evidence, but merely read aloud from the petition. While reading about trial counsel's failure to hire experts, the State interjected, pointing out that under Alabama law, to prevail on such a claim, the petitioner was required to name an expert, show that the expert would have been available to testify at trial, state what that expert would have testified to, and how that would have assisted the defendant at trial. Ms. Berryhill's response evinced a complete lack of understanding of what she was required to do to represent Mr. Riley:



MS. BERRYHILL: Thank you, Judge. That's fine. Judge, in regards to his response about specifically pleading experts, that has been pled through Mr -- through the Attorney General's response, and I would assert, obviously, this trial occurred in 2010, a little over six years ago. I expect that to be a response also in regards to other issues that we would bring up regarding the mitigation expert. There is no way for me to investigate at this point who was a certified mitigation expert or other experts in 2010 at the time of this trial. I could give the Court experts that would be available now but even investigating the ACDLA web site, things of that nature, are not going to contain records of who was available during 2010. May have been certified or not

Counsel's view that there was "no way" she could meet her burden of proof is patently wrong. She merely had to ask the court for funding to hire experts, talk with the experts, have them test the evidence, and call them to testify. If she had spoken with some experts, she could have asked them whether they or someone else in the field was doing this work in 2010, and what the state of the scientific knowledge was at the time. Instead, she did nothing.

This was not the only instance where counsel showed her failure to understand her role and responsibilities. After reading to the court the *pro se* claim concerning failure to investigate mitigation, the State again noted that a claim of ineffective assistance of counsel could only be proven by presenting evidence at a post-conviction hearing. Counsel's response?

> MS. BERRYHILL: Judge, without -- Judge, essentially the only way to know how that evidence would have fit into a mitigation plan would have been to hire an entirely new mitigation expert. And in a Rule 32 petition, that would have been unlikely to be

> productive as it would have included essentially going through -- re-going through the entire trial for purposes of the mitigation plan. However, as I

What Ms. Berryhill claimed would not "be productive" is exactly what happens in all properly litigated collateral attacks that claim trial counsel was ineffective for failing to investigate.

After the "evidentiary" hearing concluded, the circuit court granted the State's motion for an opportunity to file a post-argument brief or proposed order. The State filed its proposed order soon thereafter. New counsel for Mr. Riley filed appearances on September 19, 2016. On September 20, 2016, Ms. Berryhill moved to withdraw. Her motion was denied.

On September 26, 2016, Mr. Riley's new counsel moved the trial court to re-open the case to allow them to properly litigate his claims for relief, arguing that Mr. Riley was entitled to effective assistance of counsel. Ms. Berryhill renewed her motion to withdraw. The circuit court denied new counsel's motion to re-open the Rule 32 proceedings and Ms. Berryhill's motion to withdraw, and ordered Mr. Riley to file a response to the State's proposed order. The response was filed on October 7, 2016 by Ms. Berryhill.

The circuit court denied Mr. Riley's Rule 32 petition on October 12, 2016, adopting the State's proposed order in its entirety and finding that the claims of ineffective assistance of counsel were not proven. New counsel appealed from this ruling, arguing that Mr. Riley was entitled to the effective assistance of counsel on initial collateral review. The Alabama courts affirmed the trial court's decision and rejected Mr. Riley's argument.

## REASONS FOR GRANTING THE WRIT

**The writ should be granted so that this Court may reconsider the holding in *Murray v. Giarratano*[3] in light of changes to caselaw, and the reality of capital post-conviction representation at the state level in Alabama.**

[3] 492 U.S. 1 (1989).

"Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in post-conviction proceedings."[4] The practical (and fatal) results of Alabama not ensuring that qualified counsel are appointed to prepare and litigate a death-sentenced inmate's capital post-conviction petition are seen here. This Court should, in this case where counsel was appointed after a *pro se* petition was submitted, did not amend the petition, and did not understand what was required to prove the claims in the petition, resolve the question of whether a capital defendant is entitled to the effective assistance of counsel on initial state collateral review of a capital conviction.

**1. Death-sentenced inmates in Alabama are regularly denied the effective assistance of counsel on initial collateral review and the State uses this Court's decisions to prevent counsel from being effective.**

Several terms ago, this Court confidently stated: "[i]t is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms."[5] Experience in Alabama has shown that Alabama is an—if not *the*—outlier State. Until 2017, Alabama relied on a network of volunteer attorneys from inside and outside Alabama to represent inmates in capital post-conviction cases.[6] This system

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[4] *Maples v. Thomas*, 565 U.S. 266, 272 (2012).

[5] *Martinez v. Ryan*, 566 U.S. 1, 15 (2012).

[6] *See, e.g., Maples*, 565 U.S. at 272-73. In 2017, Alabama enacted a law changing the process for capital post-conviction cases. It now requires that if a death sentenced petitioner wishes to file a collateral attack to his conviction and sentence, it must be filed within one year of the filing of the initial direct

was and is fraught with difficulty and left indigent death-sentenced inmates at the mercy of well-intentioned out of state lawyers and inexperienced (or worse) local counsel.

In *Maples*, volunteer out-of-state counsel representing Mr. Maples missed a filing deadline for appeal. The filing date was missed because out-of-state counsel had not notified the court that they no longer represented Mr. Maples, and local counsel, who admittedly took no role in the case other than to move for *pro hac vice* admission for out-of-state counsel, did not advise anyone that the petition had been denied. This Court found that Mr. Maples had shown cause to excuse procedural default.[7]

In *Smith v. Commissioner*,[8] out-of-state counsel who neither wrote nor filed any pleading in the case, was associated with local counsel who surrendered his law license and eventually committed suicide due to drug addiction.[9] Neither out-of-state counsel nor local counsel paid the state post-conviction petition filing fee until early 2002, which rendered Mr. Smith's state-post conviction petition not properly filed, thus failing to toll the one-year AEDPA statute of limitations. Mr. Smith's state petition was denied on

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appeal brief in the case. The act also establishes that a list of "qualified" attorneys will be created. Pet. App. 31a-33a. The law has no definition of "qualified" and only applies to those sentenced to death after the effective date of the statute.

[7] *Maples*, 565 U.S. at 289.

[8] 703 F.3d 1266 (11th Cir. 2012).

[9] *Smith*, 703 F.3d at 1272.

the merits, but Mr. Smith's habeas corpus petition was dismissed as untimely in 2005. That dismissal was upheld by the Eleventh Circuit in 2012.[10] This Court denied Mr. Smith's petition for writ of *certiorari*[11] and Mr. Smith was executed on December 8, 2016, without federal habeas corpus review of his conviction and sentence.

Robert Melson had an attorney from Colorado who was recruited to represent him despite having no post-conviction experience and an inexperienced local counsel.[12] Mr. Melson's habeas corpus petition was dismissed as untimely because counsel did not file the proper verification form in state court when the initial state collateral review was filed.[13] Mr. Melson was executed on June 8, 2017, without habeas corpus review of his conviction and sentence.

The State not only uses this Court's prior decisions as a shield against relief, but as a sword to prevent effective representation. Even when counsel is appointed to represent someone on initial collateral review, the State takes the position that appointed counsel is not entitled to be reimbursed for

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[10] *Id.*

[11] *Smith v. Thomas*, 134 S. Ct. 513 (2013). Perhaps most troublesome about Mr. Smith's case was that he was the first post-*Hurst v. Florida*, 136 S. Ct. 616 (2016), capital defendant to be executed despite a jury verdict of life.

[12] *Melson v. Comm'r*, 713 F.3d 1086 (11th Cir. 2013).

[13] *Id.* at 1089.

expenses used to meet his client because his client is not entitled to effective post-conviction representation.[14]

> 1. Van Pelt's motion cites a single justification for the expenses sought: that an unnamed attorney at the Equal Justice Initiative told Van Pelt's counsel, Nathan Johnson, that a visit was required in order to avoid "ineffective assistance of counsel." The State notes that this justification is unfounded because Van Pelt does not have a Constitutional right to counsel in postconviction proceedings. Thus, he cannot raise a cognizable ineffective assistance claim.

An affidavit from counsel filed in the above case illustrates the reality of the representation death-sentenced inmates in Alabama receive on initial collateral review. Appointed counsel in that case had never represented anyone in collateral review, let alone a death-sentenced inmate; and despite attempts, he was not permitted to speak to his client, was not permitted to hire an investigator, and was not even provided with a transcript of the trial until two months after he was appointed.[15]

Alabama's capital post-conviction system is broken, and allowing the State to continue to appoint ineffective attorneys like Mr. Riley's first counsel

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[14] *See* Pet. App. 34a-36a. The post-conviction court adopted the State's position, Pet. App. 37a, thus denying a modest sum (under $200) to permit post-conviction counsel to travel 320 miles each way to meet his client just once during post-conviction proceedings.

[15] *Van Pelt v. Comm'r*, 3:16-cv-01849, Doc. 1, pp. 115-17 (N.D. Ala. Nov. 15, 2016); Pet. App. 38a-40a.

to represent indigent capital defendants, and allowing the State to use this Court's prior decisions to prevent counsel from being effective, makes a broken system worse. The only way for this system to improve is for this Court to intervene and rule that death-sentenced inmates are entitled to the effective assistance of counsel on initial collateral review.

**2. This court should grant certiorari to resolve the tension between the reasoning of *Martinez* and *Giarratano*.**

In *Martinez*, this Court recognized the importance of counsel in initial state collateral proceedings, holding that a habeas petitioner could allege ineffective assistance of state post-conviction counsel as cause for procedural default of a claim that trial counsel was ineffective.[16] This Court reasoned that initial collateral proceedings are, with respect to ineffective assistance of trial counsel claims, the equivalent of direct appeal.[17] As the Court detailed, *Evitts v. Lucey*,[18] and *Douglas v. California*,[19] stand for the proposition that an indigent defendant is denied fair process to obtain an adjudication on his claims on direct appeal if he does not have effective counsel. It followed, for the Court, that "[t]he same would be true if the State did not appoint an

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[16] "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 17.

[17] *Id.*

[18] 469 U.S. 387 (1985).

[19] 372 U.S. 353 (1963).

attorney to assist the prisoner in the initial-review collateral proceeding."[20] The Court further concluded that because the petitioner was not using this as an independent basis to overturn his conviction, it did not prevent a habeas petitioner from using such ineffectiveness to establish cause to cure procedural default.[21]

In dissent, Justice Scalia pointed out what to him, was an obvious inconsistency between the decision in *Martinez* and this Court's precedent:

> The argument is quite clearly foreclosed by our precedent. In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Murray v. Giarratano*, 492 U.S. 1 (1989), we stated unequivocally that prisoners do not "have a constitutional right to counsel when mounting collateral attacks upon their convictions." *Finley*, supra, at 555. See also *Giarratano*, 492 U.S., at 10 (plurality opinion) ("[T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases").[22]

Indeed, Justice Scalia opined that the majority opinion would call into question the practice of not appointing counsel in all first collateral proceedings in state court.[23] This Court's opinion in *Martinez*, does, in fact, raise that question, which can, and should, be answered here.

As in *Martinez*, Mr. Riley has not argued—and is not arguing now—that ineffective assistance of state collateral review counsel entitles him to a

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[20] *Martinez*, 566 U.S. at 12.

[21] *Id.* at 17.

[22] *Id.* at 27 (Scalia, J., dissenting).

[23] *Id.* at 28 (Scalia, J., dissenting).

new trial. Instead, he argues that he is entitled to remand to state court for fair state initial collateral review proceedings with effective representation.

**3. This case is an appropriate vehicle for resolving this issue.**

Mr. Riley raised this question throughout his post-conviction proceedings. After original state post-conviction counsel failed to introduce any evidence at an evidentiary hearing, and while the case was still before the trial court, new counsel attempted provide Mr. Riley with competent post-conviction representation. Counsel moved to reopen the case to allow investigation and amendment of Mr. Riley's *pro se* petition, citing this Court's decision in *Martinez*.[24] While new counsel were permitted to enter appearances, they were not allowed to amend the petition or take any actions to cure the failures of previous counsel.

New counsel appealed the trial court's ruling challenging the dismissal of all of the claims and also raised this claim. The Alabama Court of Criminal Appeals rejected the claim, citing to this Court's decisions in *Giarratano* and *Finley*.[25] Mr. Riley raised this claim to the Alabama Supreme Court in discretionary review, and that Court declined to review it.[26]

This case is, therefore, ripe for review and the appropriate case to resolve whether this Court's pre-*Martinez* precedent still allows states to

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[24] Pet. App. 32a.

[25] Pet. App. 23a.

[26] Pet. App. 1a.

refuse to appoint counsel to capital defendants at one of the most critical stages of their proceedings.

## CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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