

No. 18-7540

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DEWAYNE RILEY,
Petitioner,

v.

ALABAMA,
Respondent.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Christine A. Freeman, Executive Director
John A. Palombi*
Natalie C. R. Olmstead
Federal Defenders for the Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: (334) 834-2099
Facsimile: (334) 834-0353
John_Palombi@fd.org

Counsel for David Dewayne Riley

*Counsel of Record

April 24, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. This case is an appropriate vehicle to raise and resolve this issue.....	2
II. Alabama’s post-conviction system is broken, despite the State’s assertions.	5
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	31

TABLE OF AUTHORITIES

Federal Cases

<i>Garza v. Idaho</i> , 139 S. Ct. 738 (2019)	4
<i>Maples v. Thomas</i> , 565 U.S. 266 (2012).....	5
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	2, 3
<i>McCoy v. Louisiana</i> , 138 S. Ct. 1500 (2018)	5
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989).....	2, 3, 4
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987).....	4

Other Authorities

Brief for the National Association of Criminal Defense Lawyers <i>et al.</i> as <i>Amici Curiae</i> Supporting Petitioner, <i>Maples v. Thomas</i> , 565 U.S. 266 (2012)	6
--	---

ARGUMENT

No one presently on death row in Alabama had counsel appointed on collateral review of their death sentences until after their post-conviction petition was filed. Alabama was, until 2017, the only state that did not provide and fund qualified counsel for collateral attacks on death sentences. The State describes this system as “not broken” and providing “more than the Constitution requires.”¹ The State’s brief is filled with hyperbole, disparaging remarks, and a list of law firms and non-profit organizations who have had to fill the void created by Alabama’s failure to provide meaningful collateral review of death sentences. The State uses this hyperbole because it is unable to explain why this Court should not take Mr. Riley’s case to resolve the tension between *Martinez v. Ryan*² and *Murray v. Giarattano*.³ It cannot explain how Mr. Riley had competent counsel, when that counsel did not know the first thing about how to prove Mr. Riley’s case. This Court should grant certiorari in Mr. Riley’s case to decide whether a capitally sentenced defendant has the right to competent counsel to prepare and litigate collateral review of that conviction and sentence.

I. This case is an appropriate vehicle to raise and resolve this issue.

Mr. Riley’s last point was the State’s first – whether this case is a good

¹ Resp’t’s Br. in Opp’n (BIO), p. i.

² 566 U.S. 1 (2012).

³ 492 U.S. 1 (1989).

vehicle to resolve the issue. None of the State’s proffered reasons are an impediment to this Court’s exercise of judicial discretion to accept this case for review.

The State begins by correctly noting that Mr. Riley did not argue that there was a circuit split on the issue or that the lower court’s decision conflicted with this Court’s precedents.⁴ However, those are not the only grounds upon which this Court may grant *certiorari*. The conflict between *Martinez* and *Giarratano* has been noted from the day *Martinez* was decided.⁵ Only this Court can resolve that tension; therefore, certiorari is not only proper, but also necessary. Mr. Riley asks this Court to address a conflict only it can resolve and to hold that indigent death-sentenced prisoners are entitled to competent counsel to prepare and argue their petitions.

The State next argues that there is a significant “reliance interest” on *Giarrantano* that should not be disturbed.⁶ The only State that has a reliance interest in maintaining the status quo is Alabama, because all other states provide death-sentenced inmates with counsel to prepare and litigate their petitions from the outset. The State also claims that this Court “reaffirmed”⁷ *Pennsylvania v.*

⁴ BIO, pp. 4-5.

⁵ *Martinez*, 566 U.S. at 27 (Scalia, J. dissenting) (“The argument is quite clearly foreclosed by our precedent.”).

⁶ BIO, p. 8.

⁷ BIO, p. 5.

*Finley*⁸ just this year in *Garza v. Idaho*.⁹ But *Finley*, which was the non-capital precursor to *Giarratano*, was never at issue in *Garza*. *Garza* was a non-capital case concerning whether prejudice can be presumed from counsel's failure to file a notice of appeal when the defendant signed an appeal waiver. The Court's statement concerning the lack of post-conviction counsel in non-capital cases was an observation that it would be unfair to burden *pro se* litigants with identifying meritorious appellate issues.¹⁰

The State also argues, citing to a sentence fragment, that the Alabama Court of Criminal Appeals held that the issue was waived under state law.¹¹ The State is incorrect. The waived issue was whether it was proper for the circuit court to refuse to allow new counsel to investigate and amend Mr. Riley's post-conviction petition after judgment.¹² In fact, the issue that forms the basis of this petition was raised to the Court of Criminal Appeals, and was the focus of extensive discussion by the court.¹³ The issue was raised to the Alabama Supreme Court on discretionary review, and discretionary review was denied.

Finally, the State maintains that this case does not deserve review because

⁸ 481 U.S. 551 (1987).

⁹ 139 S. Ct. 738, 749 (2019).

¹⁰ *Garza*, 139 S. Ct. at 749.

¹¹ BIO, p. 6.

¹² Pet'r's App. 13-14.

¹³ Pet'r's App. 20-25.

“Riley was clearly guilty of the murder”¹⁴ and his post-conviction allegations of ineffectiveness are “borderline frivolous.”¹⁵ These contentions are irrelevant to resolution of the constitutional issue. If Mr. Riley has been denied a constitutional right to counsel, an issue which he is asking this Court to determine, such an error is structural, and not subject to harmless error review.¹⁶

Mr. Riley was not appointed counsel to prepare his collateral attack on his conviction and death sentence. When he was given counsel, that counsel was not competent to litigate his case, and did not understand the basic points of post-conviction litigation. New counsel stepped in, but were prohibited from providing him competent representation. These issues were raised and determined against him in the Alabama state courts. This is an appropriate vehicle to resolve this open question.

II. Alabama’s post-conviction system is broken, despite the State’s assertions.

As noted in his initial petition, this Court has been aware of the problems with Alabama’s capital post-conviction system for almost eight years. In *Maples v. Thomas*,¹⁷ counsel arguing for Mr. Maples informed the Court that part of the problem with the case was:

¹⁴ BIO at 7.

¹⁵ *Id.*

¹⁶ *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018).

¹⁷ *Maples v. Thomas*, 565 U.S. 266 (2012).

Figure 1¹⁸

2 MR. GARRE: I think that's -- that's right,
3 Mr. Chief Justice. I would couple that, though, with
4 the fact that the State initially set up a system for
5 the representation of indigent capital defendants that
6 relies extremely heavily on the good graces of
7 out-of-State counsel to represent indigent capital
8 defendants in Alabama.

Alabama, as seen in its Brief in Opposition in this case, still uses this fact to claim that Alabama's system is not broken compared to systems that appoint qualified counsel from the state to represent death-sentenced inmates.¹⁹ *Amici* in *Maples* disagreed, pointing out that Alabama and Georgia were the only states that did not guarantee counsel to prepare post-conviction petitions for capital defendants, and Alabama the only one that did not provide funding for a resource center.²⁰ "Alabama's post-conviction process is governed by exceptionally complex procedural rules, including unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate this maze. Failure to meet all of the [state law] requirements seals the fate of a condemned

¹⁸ Tr. of Oral Arg. at 4, *Maples v. Thomas*, 10-63.

¹⁹ BIO, pp. 18-19.

²⁰ Brief for the National Association of Criminal Defense Lawyers *et al.* as *Amici Curiae* Supporting Petitioner, *Maples v. Thomas*, 565 U.S. 266 (2012) (No. 10-63), 2011 WL 2132707, p. 19.

inmate.”²¹ This leads to a system where post-conviction relief is rarely granted.²²

The State’s recitation of the number of out of state law firms and non-profit groups that have done capital post-conviction cases in Alabama²³ illustrates the dysfunction of the system, not that the system is working well. Alabama wants to run a capital punishment system and put the burden on others to ensure that constitutional rights are protected.²⁴ Yet case after case shows that inmates in Alabama get executed, without due process, because of the failures of Alabama’s system.²⁵ That is the definition of a broken system.

CONCLUSION

Mr. Riley raises an important issue that this Court has not resolved in the seven years since *Martinez* was decided. Are indigent capital defendants entitled to counsel to prepare collateral attacks on their convictions and sentences? Alabama only provides counsel *after* the inmates file a petition and the trial court concludes that the petition should not be dismissed. Even when it does provide counsel, it appoints counsel like in this case -- counsel who had no experience in post-conviction cases, let alone cases where someone’s life was at stake. Mr. Riley

²¹ *Id.* at 21 (citations omitted).

²² *Id.*

²³ BIO, pp. 18-19.

²⁴ The State also tries to fault Mr. Riley for wanting pro bono counsel that was from out of state. It should be noted that one of the counsel who tried to rescue Mr. Riley’s case was from Alabama. The key point is that the counsel appointed by the court was unqualified to represent anyone in capital post-conviction.

²⁵ Pet. at 6-7.

requests this Court to grant *certiorari* in this case, remand the case to the Alabama courts, and order that Mr. Riley receive new state post-conviction proceedings with competent counsel.

Respectfully submitted,

Christine A. Freeman, Executive Director
John A. Palombi*
Natalie C. R. Olmstead
Assistant Federal Defenders
Federal Defenders for the Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: (334) 834-2099

*Counsel of Record