No. _____

In The
Supreme Court of the United States

TIMOTHY WADE SAUNDERS,
Petitioner,
v.

WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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September 21, 2020

CAPITAL CASE

QUESTION PRESENTED

What deference, if any, is due to a state court decision on an exhausted post-conviction claim when the decision arises from a system that does not give the petitioner a full and fair opportunity to litigate the claim and the federal courts do not give the petitioner a chance to cure default, but consider such a claim adjudicated on the merits?

LIST OF PARTIES

The Petitioner is Timothy Wade Saunders. The Respondent is the Warden of Holman Correctional Facility, where Mr. Saunders is incarcerated. That position is presently held by Terry Raybon. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF PROCEEDINGS

Federal

Saunders v. Warden, Holman Corr. Facility, 803 F. App'x 343 (11th Cir. 2020).

Saunders v. Warden, Holman Corr. Facility, No. 1:10-cv-00439-KD-C (S.D. Ala. Feb. 1, 2019).

Saunders v. Alabama, 556 U.S. 1258 (2009).

State

Saunders v. State, 249 So. 3d 1153, Ala. Crim. App., Dec. 16, 2016, rehearing denied (May 26, 2017), *certiorari* denied (Sep 22, 2017).

Saunders v. State, No. CC–04–1741.60 (Feb. 11, 2010).

Saunders v. State, 10 So.3d 53, Ala. Crim. App., Dec. 21, 2007, rehearing denied (Jan 25, 2008), *certiorari* denied (Nov. 26, 2008).

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PETITION FOR A WRIT OF CERTIORARI

Timothy Saunders respectfully requests that this Court grant a writ of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals' opinion in this case affirming the district court's denial of habeas relief is attached at Appendix A. Pet. App. 1a. The district court for the Southern District of Alabama's opinion denying Mr. Saunders' habeas corpus petition is attached at Appendix B. Pet. App. 13a.

JURISDICTION

The Eleventh Circuit Court of Appeals denied Mr. Saunders' rehearing petition on April 22, 2020. Pet. App. 113a. This Court previously ordered that the deadline to file any petition for a writ of certiorari due on or after March 19, 2020, would be extended to 150 days. Pursuant to that order, and Supreme Court Rule 30.1, the petition is due on September 21, 2020. This petition is timely filed pursuant to that order and rule, and the Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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."

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

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(b) provides that:

(1)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)
> (i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(d) provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

INTRODUCTION

For a federal court to review a habeas corpus claim on the merits, the claim must be exhausted and adjudicated on the merits in state court. If those events occur, the claim may be reviewed, but through the lens of deference to the state court decision.

If a state does not have a corrective process, or if the corrective process is ineffective, a petitioner is not required to exhaust that claim. But what if the claim is exhausted in a system that does not give the petitioner a fair opportunity to present the claim? Does that constitute an adjudication on the merits worthy of deference? That question is an open question, one which the Court should address. Mr. Saunders' case, as detailed below, presents that issue through the machinations of the Alabama capital post-conviction system.

STATEMENT OF THE CASE

A. The crime and Mr. Saunders' trial.

Before the incident that led to Mr. Saunders' conviction and death sentence, he was a 24 year old with no violent criminal history. His personal history was rife with the sorts of neglect, abuse and trauma that often lead to mental illness and substance abuse.

Timothy grew up in a chaotic environment, where his parents violently assaulted each other and just as often, hurt their six children. His mother cut

his father with a knife and chased him out of their trailer.[1] His father would sleep in the living room and tie his mother in the bedroom so she could not leave.[2] Timothy and his siblings were regularly beaten by both parents.[3]

Negligent parenting was a predictable byproduct of this fraught environment. Mr. Saunders' mother was an alcoholic who was drunk virtually every night for the 21 years she was married to his father.[4] Their mother's chronic drunkenness meant that Timothy's older sister, a child herself, was left to care for her younger siblings.

As an infant, Timothy's teeth rotted, because his mother put sugar in his baby formula, and she gave him and his other siblings Nyquil to make them sleep.[5] During her marriage and post-divorce from Timothy's father, his mother pursued romantic relationships with predatory and abusive partners, who also exposed her children to horrors and adult sexual behaviors no child should never experience. The family moved 19 times during Timothy's childhood because his parents were so frequently evicted for failing to pay rent. They lived in abject poverty, at times without adequate shelter or enough food. Timothy struggled academically and, at 14 years old, quit going to school altogether in the sixth grade.

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[1] Pet. App. 54a.

[2] *Id.*

[3] Pet. App. 53a.

[4] Pet. App. 54a.

[5] Pet. App. 51a.

Timothy did not survive his traumatic childhood unscathed. By his early teens, he was abusing alcohol and drugs. By this late teens, he had developed depression, repeatedly attempted suicide, suffered command auditory hallucinations from reactive psychosis, and received inpatient psychiatric treatment.[6]

So it was that Mr. Saunders was in the throes of three-week cocaine binge when he went to the home of his elderly neighbors, Melvin and Agnes Clemmons. He asked Mr. Clemmons to borrow a crow bar. When Mr. Saunders didn't return the crow bar, Mr. Clemmons came out in the yard, encountered Mr. Saunders smoking crack on his property, and threatened to call the police. Mr. Saunders attacked and killed Mr. Clemmons.[7] Mr. Saunders returned to the home, where Mrs. Clemmons let him come inside to use the restroom. Once inside, Mr. Saunders attacked Mrs. Clemmons while continuing his crack-smoking binge.[8] Mrs. Clemmons eventually chased Mr. Saunders from the house with a shotgun and called the police.[9]

Shortly after his arrest, Mr. Saunders confessed to the homicide and the assault. Of relevance to this case, he was indicted and tried for two

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[6] Pet. App. 49a.

[7] Pet. App. 14a.

[8] *Id.*

[9] *Id.*

counts of capital murder, one count of attempted murder, and one count of first degree burglary.

As an indigent defendant, Alabama provided Mr. Saunders counsel for his capital murder trial. As this Court has recognized, "Alabama sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial."[10] So too here.

Mr. Saunders' counsel pursued an insanity defense prior to trial, pleading not guilty by reason of mental disease or defect, but withdrew that plea less than two weeks before trial.[11] Counsel instead argued that Mr. Saunders could not form the intent to commit capital murder because of his crack cocaine use.[12] Counsel did not call any experts to explain this defense, instead calling one witness: Mr. Saunders.[13] Mr. Saunders was convicted of capital murder and the jury unanimously recommended a death sentence.[14] After that sentence was imposed, trial counsel immediately withdrew.[15]

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[10] *Maples v. Thomas*, 565 U.S. 266, 271 (2012).

[11] Pet. App. 15a.

[12] Pet. App. 2a.

[13] The Eleventh Circuit summarized some of Mr. Saunders' testimony this way: "For example, his trial counsel asked questions such as: "What did [Melvin] do to deserve [being hit with a crowbar]?" Saunders answered: "Nothing in this world." Counsel asked: "Then why did you hit [Melvin]?" Saunders answered: "I was scared, and when you're on crack, you're not thinking right." Counsel asked: "Do you realize how hard you hit [Melvin]?" Saunders replied: "Yes sir, I do now."" Pet. App. 2a, n.1.

[14] Pet. App. 3a.

[15] Pet. App. 16a.

B. Direct appeal proceedings.

Mr. Saunders had three appellate attorneys before an initial brief was filed. The first attorney appointed to represent Mr. Saunders moved to withdraw because the state did not pay adequate fees in capital appeals. This attorney was allowed to withdraw. The second attorney moved to withdraw and filed a brief pursuant to *Anders v. California*,[16] telling Mr. Saunders that there might be meritorious issues that someone "with better judgment that me" could find. The second attorney was allowed to withdraw and a third attorney was appointed. This attorney did file a direct appeal brief, which consisted of 17 issues – in 23 pages.

That attorney argued that Mr. Saunders' trial counsel abandoned him when he put him on to testify with no preparation. Neither the initial appellate brief nor the reply brief refer to *Strickland*. Despite the clear portrayal of this as an abandonment claim, the Alabama Court of Criminal Appeals converted the claim into ineffective assistance of counsel claim, and resolved it as such.

Noting that "claims of ineffective assistance of counsel are not often presented for review on direct appeal because of the inherent difficulties associated with reviewing such claims on direct appeal,"[17] the state court concluded "Saunders has not established that defense counsel was

[16] 386 U.S. 738 (1967).

[17] *Saunders v. State*, 10 So.3d 53, 91 (Ala. Crim. App. 2007).

ineffective."[18] It went on to find, despite not being asked, that there was "no prejudice as a result of counsel's actions in this regard."[19] Mr. Saunders' conviction and death sentence were affirmed.[20]

C. Post-conviction "process"

In 2009, Alabama did not provide counsel to prepare and file state post-conviction petitions for death sentenced inmates.[21] Indeed, the rule provided that counsel could only be appointed, even in capital cases, "[i]f the court does not summarily dismiss the petition."[22] Instead, Alabama has touted its system, which relied on "volunteer" counsel, often obtained by non-profit organizations to represent clients on death row in post-conviction proceedings.[23] In doing so, Alabama imposed no standards or qualifications for post-conviction counsel.

Attorneys from Balch & Bingham, a large civil practice firm based in Birmingham, Alabama, agreed to represent Mr. Saunders and filed a post-conviction petition on his behalf in November 2009. The initial petition contained two claims of guilt phase ineffective assistance, two claims of penalty phase ineffectiveness and five generic claims relating to Alabama's

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[18] *Id.* at 92.

[19] *Id.* at 94.

[20] *Id.* at 116.

[21] *Maples v. Thomas*, 565 U.S. 266, 273 (2012).

[22] Rule 32.7(c).

[23] *See* pp. 16-17 *infra*.

capital punishment system and method of execution. Among other things, counsel argued that trial counsel had failed to develop and present a coherent, fact-based, intoxication defense. What happened next was a series of events that was described by the State as "Gordian."[24]

Three months after the petition was filed, at the state's urging, the trial court summarily dismissed Mr. Saunders' claims without an evidentiary hearing or discovery. The trial court also did not give Mr. Saunders the opportunity to amend his petition to cure any deficiency.[25]

Mr. Saunders' counsel missed his appeal deadline, apparently due to the trial court's failure to notify the parties of its order dismissing the petition. Mr. Saunders requested an out of time appeal. The Alabama Court of Criminal Appeals dismissed the appeal because Mr. Saunders' counsel failed to either pay a filing fee or file a motion to proceed *in forma pauperis.*[26] Counsel then filed a second and a *third* post-conviction petition. The Alabama Court of Criminal Appeals consolidated all three petitions, and eventually affirmed the summary dismissal of Mr. Saunders' petition.[27] The Alabama Supreme Court denied *certiorari* in 2017.

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[24] Pet. App. 16a.

[25] Rule 32.7 does not require dismissal for insufficient pleading, the court has discretion to allow the pleading to be amended to cure the deficiency. Ala. R. Crim. P. 32.7(d).

[26] Pet. App. 16a.

[27] *Id.*

D. Federal habeas proceedings magnify the failures in state court proceedings.

While litigating the various post-conviction petitions, counsel filed a placeholder habeas corpus petition in August 2010, and the case was stayed by agreement pursuant to *Rhines v. Weber*,[28] pending the resolution of the state court proceedings.[29]

When the case returned to the district court for amendment and review after the *Rhines* stay was lifted, Mr. Saunders was represented by the same law firm attorneys who represented him in state post-conviction proceedings.[30] Neither the district court nor habeas counsel questioned the propriety of this, despite the fact that these attorneys failed to properly plead any claim in state court -- a failure that could be laid at their feet. Habeas counsel presented all of the previously summarily dismissed ineffective assistance of counsel claims for habeas review in federal court, as well as certain other claims.[31] One claim they did not present in federal court was the initial claim preserved on direct appeal: whether Mr. Saunders was abandoned by his trial attorneys.

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[28] 544 U.S. 269 (2005).

[29] Pet. App. 17a.

[30] Defense counsel were also conflicted because while they were filing an amended habeas corpus petition for Mr. Saunders, as they were representing the Alabama Department of Corrections against a class of inmates that included Mr. Saunders. *See Saunders v. Dunn et al.*, No. 20-CV-00456-WKW, Doc. 1.

[31] *Saunders v. Warden*, No. 1:10-cv-00439-KD-C, Doc 41-1.

The district court reviewed all of the ineffective assistance of counsel claims on the merits, despite the fact that the claims were summarily dismissed in state court as insufficiently pled. The district court did so because of Eleventh Circuit precedent holding that "[s]ummary dismissals under Rules 32.6(b) and 32.7(d) are adjudications on the merits and subject to AEDPA review."[32]

The district court, without the benefit of an evidentiary hearing, or anything beyond the facts presented in the insufficiently pled post-conviction petition, rejected *on the merits* Mr. Saunders' claim that his counsel were ineffective in having him testify.[33] The court found that "Saunders failed to demonstrate that the CCA's holding was contrary to or involved an unreasonable application of clearly established federal law."[34] The district court granted a narrow certificate of appealability on that claim.[35]

The Eleventh Circuit affirmed the district court's denial of habeas relief on this ineffectiveness claim. With respect to deficient performance, the court held that "we cannot say that the state court's denial of Saunders' claim was contrary to clearly established federal law or based on an unreasonable

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[32] *Daniel v. Comm'r, Alabama Dep't of Corr.*, 822 F.3d 1248, 1260 (11th Cir. 2016); Pet. App. 26a.

[33] Pet. App. 40.

[34] *Id.*

[35] Pet. App. 112a.

determination of the facts."[36] The court then turned to the question of prejudice, concluding that "we cannot say that every fairminded jurist would disagree with the state court's decision that Saunders did not suffer prejudice."[37] In affirming, the court did not cite to a state court ruling on prejudice in the post-conviction ineffective assistance of counsel claim, because there was none.

Instead, the Eleventh Circuit cited to the direct appeal opinion from the state court where it decided an issue that was not before it.[38] The Eleventh Circuit deferred to a finding made on direct appeal on an issue that was not raised in order to affirm a non-existent state court decision on an ineffective assistance of counsel claim that was summarily dismissed in state court post-conviction proceedings.

REASONS FOR GRANTING THE WRIT

I. The writ should be granted so the Court can resolve the question of what process a state must provide in order for a decision on an exhausted claim to be accorded deference in § 2254 proceedings.

As this Court has said, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system."[39] And, as the primary mechanism for protecting that right, "the collateral proceeding is in many

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[36] Pet. App. 11a.

[37] Pet. App. 12a.

[38] Pet. App. 8a.

[39] *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim,"[40] But Alabama's post-conviction system does relatively little to support litigation of those claims. Rather, in many ways, Alabama's process actively thwarts a petitioner's "'one and only appeal' as to [his] ineffective assistance claim."[41] And its brokenness yields especially harsh results for death-sentenced inmates.

Alabama is free to have the system it has, or no system at all. However, the nature of the state post-conviction system determines whether federal courts must defer to decisions coming from that system. Mr. Saunders' case illuminates various points of failure, from untrained Rule 32 counsel to the byzantine pleading requirements. Alabama's system is exacerbated by federal court review, which instead of questioning summary denials of entire capital post-conviction petitions, rewards such decisions with deference. The Court should grant this writ to clarify whether a failed state post-conviction system like Alabama's can produce decisions worthy of deference from a federal court.

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[40] *Martinez,* 566 U.S. at 11.

[41] *Martinez*, 566 U.S. at 8.

A. The statutory structure of federal habeas review of state court convictions relies on the petitioner to exhaust claims and the state court to provide the petitioner a fair opportunity to present those claims.

Title 28 U.S.C. § 2254 provides that a federal court may not grant habeas corpus relief in any case unless the claim is exhausted in state court[42] and the state court decision on that claim is contrary to, or an unreasonable application of, Supreme Court precedent.[43]

Section 2254(b) provides an exception to the exhaustion requirement. If a state has no corrective process,[44] or if that process is ineffective to protect the petitioner's rights,[45] then a habeas petitioner is not required to exhaust those claims and may present them directly to a federal court.

When a claim is exhausted and adjudicated on the merits, then the federal court must defer to the state court decision unless it is contrary to this Court's precedent, an unreasonable application of this Court's precedent, or an unreasonable determination of the facts based on the evidence introduced in state court proceedings.[46]

When § 2254(d) was amended in 1996, it was understood that there were two components to the statute, one putting burdens on the petitioner,

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[42] 28 U.S.C. § 2254(b).

[43] 28 U.S.C. § 2254(d).

[44] 28 U.S.C. § 2254(b)(1)(B)(i).

[45] 28 U.S.C. § 2254(b)(1)(B)(ii).

[46] 28 U.S.C. § 2254(d)(1)-(2).

and the other putting burdens on the state. In his signing statement, President Clinton noted that the provision limiting evidentiary hearings in federal court would only apply if the applicant failed to meet their burden, and not "when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court."[47]

The idea that there are burdens on both the state and the petitioner has also arisen in the context of when to apply deference to a state court decisions. Lower courts have concluded that failures in state court proceedings absolve the federal courts from applying deference to decisions arising from those proceedings. In *Gordon v. Braxton*,[48] the Court of Appeals for the Fourth Circuit held that:

> "[a]claim is not 'adjudicated on the merits' when the state court makes its decision 'on a materially incomplete record.' A record may be materially incomplete 'when a state court unreasonably refuses to permit 'further development of the facts' of a claim.' In this circumstance, we do not offend the principles of "comity, finality, and federalism" that animate AEDPA deference because the state court has 'passed on the opportunity to adjudicate [the] claim on a complete record.'"[49]

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[47] President's Statement on Signing Anti-Terrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996).

[48] 780 F.3d 196 (4th Cir. 2015).

[49] *Id.* at 202.

The Fourth Circuit concluded that Mr. Gordon's claim was not adjudicated on the merits, and not entitled to deference, because the state court prevented factual development on a claim and did not rule on the claim itself.[50]

Mr. Saunders' case provides a ready example of how a state can prevent a petitioner from developing the facts necessary to present a claim.

B. Alabama inhibits factual development on claims in various ways, leading to summary dismissals like the one in this case.

Alabama's post-conviction system contains numerous fault lines where the statute and precedent inhibit a petitioner from developing the facts necessary to present and prove an ineffective assistance claim. This leads to numerous summary dismissals of capital post-conviction petitions, including Mr. Saunders' petition.

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[50] *Id.*; *See also Plymail v. Mirandy*, No. CV 3:14-6201, 2019 WL 1258847, at *6 (S.D.W. Va. Mar. 19, 2019) (a claim is never "adjudicated on the merits" for purposes of § 2254(d) "when the state court makes its decision 'on a materially incomplete record.'" One situation where a record may be materially incomplete is "when a state court unreasonably refuses to permit 'further development of the facts' of a claim."); Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 Ariz. L. Rev. 291, 315–16 (2019); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. Rev. 953, 980 (2012). There are also other occasions when the deferential analysis in § 2254(d) is not applied, for example, in certain occasions when harmless error is at issue. *See Davis v. Ayala*, 576 U.S. 257, 270 (2015) ("[i]n sum, a prisoner who seeks federal habeas relief must satisfy Brecht, and if the state court adjudicated his claim on the merits, the Brecht test subsumes the limitations imposed by AEDPA.") *See also Davenport v. MacLaren*, 964 F.3d 448 (6th Cir. 2020) (satisfying the *Brecht* standard absolves need for applying AEDPA standard).

1. Alabama did not provide counsel to prepare state post-conviction petitions at the time Mr. Saunders filed his petition.

When Mr. Saunders' state post-conviction petition was filed, Alabama did not provide him an attorney to prepare and file it. In *Maples*, this Court noted that instead of providing counsel, Alabama elected to rely on "well-funded" volunteers from outside of Alabama.[51]

Maples was a sequel to *Barbour v. Haley*, where the State argued that death row inmates in Alabama were represented by "an honor roll of the American legal community."[52] Not wanting to leave out Alabama-based lawyers, the state noted that "[a]mong others, lawyers at in-state megafirms Bradley, Arant, Rose & White and Maynard, Cooper & Gale have stepped up to represent Alabama death-row inmates in post-conviction proceedings."[53] Alabama did this while reminding the court that it was under no constitutional obligation to provide counsel to "prepar[e], present[], and litigat[e] post-conviction challenges to their convictions and sentences."[54]

Alabama is correct on that point, and Mr. Saunders does not argue that the state is required to provide counsel in state post-conviction

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[51] *Maples v. Thomas*, 566 U.S. 266, 273 (2012).

[52] Brief of Appellees, Christopher Barbour, *et al.*, Plaintiffs-Appellants, v. Michael Haley, *et al.*, Defendants-Appellees., 2006 WL 4541663 (11th Cir. May 24, 2006).

[53] *Id.* Mr. Saunders was represented by one of these "Alabama megafirms."

[54] *Id.*

proceedings, even in capital cases. That is a question for another case and another day. Rather, the question here is what effect this failure should have on review of state post-conviction proceedings in federal court.

It had an obvious catastrophic effect on Mr. Saunders. Someone prepared a petition that ill-qualified, civil practitioner attorneys signed and filed for Mr. Saunders. The State moved to dismiss this petition on various grounds[55] and the court dismissed the petition without an evidentiary hearing three months after it was filed. Because of Alabama's pleading requirements, summary dismissal of a capital case is not unusual.

2. Alabama's pleading requirements in state post-conviction are harsh and contain numerous traps for counsel who are not experienced with that practice.

Summary dismissal of a capital post-conviction petition is not prohibited by the rules in Alabama. In fact, the Alabama Court of Criminal Appeals has specifically noted: "this Court has, on numerous occasions, upheld summary dismissals of Rule 32 petitions in capital cases in which the death penalty has been imposed."[56] That opinion then listed 11 cases where summary dismissals of capital post-conviction petitions were upheld.[57] That list did not include Mr. Saunders' case.[58]

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[55] The vagaries of Alabama's pleading rules in post-conviction will be discussed *supra.*

[56] *Mashburn v. State*, 148 So. 3d 1094, 1109 (Ala. Crim. App. 2013).

[57] *Id.*

[58] *See* Pet. App. 114a for a non-exhaustive list of capital cases in Alabama where post-conviction petitions were summarily dismissed.

While Mr. Saunders' volunteer counsel were experienced attorneys, they were civil practitioners not versed in the ways of state post-conviction practice. In particular, they were not versed in pleading practice in state post-conviction cases. Presumably, they were unaware that "[i]neffective-assistance claims often depend on evidence outside the trial record[,]"[59] because they didn't look for any such evidence. Or, if they did, that evidence did not find its way into any of the petitions they filed.

Regular federal civil complaints require "a short and plain statement of the claim showing that the pleader is entitled to relief."[60] Even though the pleading requirements were made slightly more stringent in *Bell Atlantic v. Twombly*[61]and *Ashcroft v. Iqbal*,[62] they are still not as stringent as what Mr. Saunders was facing.

Alabama state post-conviction proceedings require each claim to "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds."[63] Or, as the Alabama courts have held:

> **The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one.** Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full

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[59] *Martinez*, 566 U.S. at 13.

[60] Fed. R. Civ. P. 8(a)(2).

[61] 550 U.S. 544 (2007).

[62] 556 U.S. 662 (2009).

[63] Ala. R. Crim. P. 32.6(b).

> factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b).[64]

An example of the typical pleading standard for a post-conviction petition in Alabama is the one involving claims of ineffective assistance of counsel for not hiring an expert witness. In order to plead such a claim, before getting to the question of whether counsel was ineffective, the petitioner must plead: 1) the name of the expert defense counsel should have hired; 2) what that expert would say and 3) whether that specific expert would have been available to testify on the days when the trial took place.[65] This is far different from the notice pleading required in federal civil cases, where specific facts are unnecessary.[66] It is also different from the standard in Alabama civil cases.[67]

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[64] *Hyde v. State,* 950 So.2d 344, 356 (Ala. Crim. App. 2006) (Emphasis added.).

[65] *See Daniel v. State*, 86 So. 3d 405, 425-26 (Ala. Crim. App.2011) (Daniel failed to identify, by name, any forensic or DNA expert who could have testified at Daniel's trial or the content of the expert's expected testimony. Accordingly, Daniel failed to comply with the full-fact pleading requirements of Rule 32.6); *See also McNabb v. State*, 991 So. 2d 313 (Ala. Crim. App. 2007) (claim that counsel was ineffective for failing to retain an expert not sufficiently pleaded because expert was not identified).

[66] *Bell Atlantic*, 550 U.S. at 555.

[67] "The notice pleading requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for post-conviction petitions are more stringent...." *Washington v. State*, 95 So. 3d 26, 59 (Ala. Crim. App. 2012).

3. The rules regarding amendment of petitions, while seemingly liberal, are under constant attack from lower courts trying to limit them.

Seemingly, the drafters of the rule knew that the burden of pleading was a strict one. They provided that amendments may be made at any time prior to judgment,[68] and allowed that "[l]eave to amend [the pleadings prior to entry of judgment] shall be freely granted."[69] In addition, the rules permit a court to allow amendment rather than dismiss a case.[70] The trial court in Mr. Saunders' case chose not to do that. While this rule seems clear, its mandate has been interpreted inconsistently and given rise to attempts at limiting its application.

One attempt to limit the rule was the creation of a 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 showing of diligence.[71] This judge-made rule existed from 1989 until 2004. The Alabama Supreme Court accepted review[72] in a case where the petitioner

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Mr. Saunders' attorneys were well versed in civil practice, but not in post-conviction proceedings.

[68] Ala. R. Crim. P. 32.7(b).

[69] Ala. R. Crim. P. 32.7(d).

[70] *Id.*

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

[72] All appeals to the Alabama Supreme Court are discretionary. Ala. R. App. P. 39.

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.[73] He was not allowed to amend, and the Alabama Court of Criminal Appeals affirmed that decision. The Alabama Supreme Court reversed, 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."[74]

In 2002, despite no language in the rules supporting its conclusion, the Alabama Court of Criminal Appeals ruled that amendments to a post-conviction petition filed after the statute of limitations expired must relate back to the initial petition.[75] 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, holding: "[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."[76]

These examples show the hostility that the Alabama courts have to their own rules. The fact that a clearly stated rule such as the amendment rule can be misinterpreted, and those misinterpretations can remain law for over a decade shows why a federal court must look carefully at a state post-

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

[74] *Id.* at 459.

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

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

conviction process before automatically deferring to decisions arising from that process.

4. *Martinez v. Ryan* did not remedy the problem in this case because Mr. Saunders was not aware it would apply, his attorneys could not raise their own ineffectiveness, and the federal courts have created a way to avoid its use.

Compounding Alabama's refusal to provide trained counsel to capital post-conviction petitioners to prepare and file their petitions and byzantine pleading rules that lead to summary dismissals, is how Eleventh Circuit precedent works to negate the effect of *Martinez v. Ryan*,[77] which would otherwise be available to remedy certain failures of the system. Inconsistent requirements for habeas counsel and the effect of a pre-*Martinez* precedent allow federal courts to enshrine the failures of Alabama state law into federal law.

Some district courts in Alabama take judicial notice of post-conviction counsel's continuing to represent a client in federal habeas and mandate that they explain *Martinez* to their client and obtain their client's consent to continued representation.[78] However, while that practice is prevalent in the Northern District of Alabama, it does not exist in the Middle District or the Southern District, where Mr. Saunders' habeas originated.

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[77] 566 U.S. 1 (2012).

[78] *See e.g.*, *Spencer v. Dunn, Comm'r, Ala. Dep't of Corrs.*, No. 2:16-cv-01877-KOB, Doc.8 (N.D. Ala. Jan. 20, 2017).

An attorney appointed under 18 U.S.C. § 3599 to represent a death-sentenced inmate in habeas proceedings is limited in their ability to remedy problems that occur in state post-conviction. *Cullen v. Pinholster*[79] requires that review under § 2254(d)(1) must be done on the record that was before the state court at the time the state court decision in question was made.[80] A deficient state court record on a substantive ineffective assistance of counsel claim can be cured if: 1) that claim is defaulted and 2) state post-conviction counsel was ineffective. But that can't happen if habeas counsel and state post-conviction counsel are the same person, since counsel would be raising their own ineffectiveness.

Mr. Saunders was not advised that his attorneys could have been the cause for all of the claims in his post-conviction petition being defaulted. He was not advised that there was a remedy for this that would allow him, if successful, to present new facts to the federal district court hearing his habeas petition. However, despite the procedural default in state court, and the lack of factual development or a hearing, the district court decided Mr. Saunders' ineffective assistance of counsel claims on the merits. Why? Because the Eleventh Circuit allows this.

As the district court held:

> *"Summary dismissals under Rules 32.6(b) and 32.7(d) are adjudications on the merits and subject to AEDPA review."* *Daniel v. Comm'r, Alabama Dep't of Corr.*, 822 F.3d 1248, 1260

[79] 563 U.S. 170 (2011).

[80] *Id.* at 181-82.

> (11th Cir. 2016). Thus, AEDPA requires the Court evaluate whether the CCA's determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1); *Borden v. Allen*, 646 F.3d 785, 817-18 (11th Cir. 2011), or if the CCA's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[81]

Daniel and *Borden*, both cited in the preceding paragraph, stand for the conclusion that a ruling by an Alabama court that an ineffective assistance of counsel claim is dismissed for insufficient pleading is actually a merits decision to be given deference by a federal court. Judge Wilson, in his concurring opinion in *Borden*, discussed the problems with how Alabama courts applied the rule concerning pleading requirements and the problems with the rule the Eleventh Circuit had created and came to the following conclusion:

> In light of this application and many others like it, *I am at a loss to explain the operation of Rule 32.6(b)*. Under these circumstances, I simply cannot join the majority's determination that Rule 32.6(b) dismissals categorically constitute rulings on the merits. Specificity rulings may often subsume a substantive evaluation of a claim's merit in exactly the way the majority perceives. And I agree that where the record supports such a reading, we should treat those rulings as adjudications on the merits under AEDPA. However, if it instead appears that a rule is being applied procedurally, simply to object to a defect in form that does not preclude the possibility that the petitioner has in fact asserted the substance of a colorable federal claim, it simply cannot be credited as a ruling on the merits.[82]

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[81] Pet. App. 26a. (Emphasis added).

[82] *Borden v. Allen*, 646 F.3d 785, 828 (11th Cir. 2011) (Wilson, J. concurring) (emphasis added) (footnotes omitted).

Judge Wilson stated the problem succinctly. Rather than examining the record on each claim and deciding it individually, the court's rule allows for rote application of deference to the state's rulings.

5. The effect in the Eleventh Circuit of these failures.

The district court granted a certificate of appealability on the question of whether counsel were ineffective "because even if trial counsel's decision to call Mr. Saunders to testify during the guilt phase was made for strategic reasons, trial counsel's execution of that decision was ineffective at best, and, at worst, tended to establish the inference that Mr. Saunders was guilty of capital murder."[83] The state court did not make any finding on the prejudice prong of the *Strickland* analysis in state post-conviction proceedings because the state court found that Mr. Saunders' petition was insufficiently pleaded. However, the Eleventh Circuit found a state court ruling of prejudice – from the direct appeal. This finding of no prejudice is what the Eleventh Circuit relied on to affirm the denial of habeas relief, reasoning:

> Because the state court in this case also determined that Saunders was not prejudiced by his counsel's performance, AEDPA applies to the prejudice analysis as well. And that means we will not disturb the state court's decision on prejudice unless that decision was contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts.[84]

This completes the circle denying Mr. Saunders an opportunity to develop the facts of his claim. Mr. Saunders was not entitled to appointed

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[83] *Saunders v Warden*, No. 1:10-cv00439-KD, Doc. 51 at 100.

[84] *Saunders*, 803 F. App'x at 347 (citations omitted).

counsel to investigate and prepare his state post-conviction petition. The Alabama courts summarily dismiss capital petitions by enforcing pleading requirements that are, as they readily admit, stricter than the pleading requirements in civil cases. The Alabama courts have the discretion to allow petitioners to amend an insufficiently pled petition, but they do not use that discretion.

As the case moves to federal court, Mr. Saunders was not allowed to use the mechanism this Court created to cure procedurally defaulted issues, by contriving to deem them "adjudicated on the merits." At no point in this case was Mr. Saunders' claim of ineffective assistance of counsel heard on the actual merits of the claim. Yet, the federal court treated it that way and rejected his summarily dismissed insufficiently pled claim as if it was decided on the merits after an evidentiary hearing and full consideration.

C. This case is a proper vehicle for the Court to resolve this issue.

Mr. Saunders' case provides a proper vehicle for the Court to resolve this issue because it illustrates all the reasons why decisions of the Alabama courts should not be considered adjudications on the merits of the claim. The underlying claim in this case has never been decided on the merits, but the federal courts treated it as such. It was raised originally as an attorney abandonment claim, but that claim was never decided on the merits because the Alabama Court of Criminal Appeals turned the claim into an ineffective assistance of counsel claim.

Mr. Saunders' inexperienced post-conviction lawyers then pleaded it as an actual ineffective assistance of counsel claim, but compounded the problem when they failed to plead specific facts showing prejudice, and the claim was dismissed.

The same attorneys who did not properly plead the claim then filed a placeholder habeas corpus petition because they missed the deadline for filing an appeal in state court. Once the appeals continued, the errors continued.

Despite all of the claims being defaulted as improperly pled in state court, the same attorneys continued to represent Mr. Saunders and did not raise any excuse for the procedural default pursuant to *Martinez v. Ryan*. Indeed, Mr. Saunders could not have done that, because the district court found that the claim was "adjudicated on the merits" and rejected the claim. In affirming that decision, the Eleventh Circuit affirmed the district court by citing to a state court ruling – the Court of Criminal Appeals ruling on the issue it created.

No other vehicle can sum up the failures of Alabama's capital post-conviction system better than this one. It is an appropriate case for the Court to determine when state court process is sufficient to render an opinion worthy of deference.

CONCLUSION

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

Respectfully submitted,

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