No. 20-5802

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

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO TIMOTHY SAUNDERS' PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

INTRODUCTION

Contrary to the Respondent's Brief in Opposition ("BIO"), the Petition asks this Court to resolve a simple and straightforward question: must a federal habeas court afford 28 U.S.C. § 2254(d) deference to the decision of a state court on an exhausted but summarily dismissed claim where the state's post-conviction process prohibits the petitioner from fairly presenting his claim? Evading the answer to this direct question, the BIO instead addresses questions not asked and counters assertions not made.

The BIO appears to advance four primary arguments aimed at avoiding further scrutiny of a federal courts' application of AEDPA deference to an ineffective corrective post-conviction process in Alabama. First, the Respondent argues that Ala. R. Crim. P. 32 is not unduly burdensome. Second, the Respondent asserts that the Petitioner's underlying claim was insufficiently pled. Third, the Respondent contends that Rule 32.6 dismissals are merits determinations worthy of AEDPA deference because Rule 32 is the equivalent of Rule 2(c)[1]. Finally, the Respondent asserts the Petitioner's *Martinez* claim is without merit. The first and third are wrong as a matter of law. The second and fourth are simply red herrings designed to distract.

Before turning to Respondent's arguments, it is important to recognize what remains uncontested here; for it is what the BIO does not say which is telling. The Respondent does not challenge that capital defendants in Alabama, like Timothy

[1] Rule 2(c)(1),(2) of the Rules Governing Section 2254 Cases in the United States District Courts.

Saunders, are left to find their own volunteer counsel or must appear *pro se* in their state post-conviction proceedings.[2] The Respondent does not dispute that the summary dismissal of Rule 32 petitions in capital cases - without leave to amend - is routine in Alabama. The Respondent does not challenge that to apply the strictures of § 2254(d) to an exhausted claim decided on the merits, the statute is clear that a state must have an effective post-conviction process. Finally, the Respondent does not dispute that certain lower federal courts, outside the Eleventh Circuit, have concluded that failures in state court proceedings absolve the federal courts from applying deference to decisions arising from those proceedings.

A. The Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

The Eleventh Circuit has determined that when a claim is summarily dismissed in Rule 32 proceedings, it operates as a merits determination for § 2254(d) purposes.[3] While the Respondent asserts otherwise, a decision on this important and unsettled question of federal law has national application. The Respondent would have the Court believe that the question presented is limited solely to the merits and facts of the Petitioner's case.[4] Not so. The Petition presents the Court with an unsettled question of federal law that is far reaching beyond Timothy Saunders. The resolution of this

[2] In 2017, the law changed to provide post-conviction counsel for indigent capital defendants. Ala. Code 1975, § 13A-5-53.1 Prior to August 1, 2017, legal representation in state post-conviction proceedings was purely a matter of chance and good fortune.
[3] *Borden v. Allen*, 646 F.3d 785, 808 (11th Cir. 2011).
[4] Resp't. Br. 20.

question in theory could affect the liberty, or at least, the analysis of the federal habeas claims of a multitude of persons. There is uncertainty as to when a federal habeas court must apply AEDPA deference to the decision of a state court that either does not have a state corrective process or that process is ineffective. As the question seeks to clarify the application of federal law, the traditional criteria for certiorari have been satisfied here.[5]

The Respondent has no response for why this Court should not consider *this* important question of federal law. Instead, Respondent tries to convince the Court that the question presented is something other than what it is and then argues that the question *as framed by the Respondent* was not raised properly below. The Respondent asserts that the "the claims Saunders presents in his petition concerning the validity of Alabama's postconviction scheme were not properly raised below."[6] This is a distortion of the record. The Petition was clear that it was not a challenge to the state process: "Alabama is free to have the system it has, or no system at all."[7] Moreover, the Petitioner did raise the propriety of the courts below applying AEDPA deference to his claim at the Eleventh Circuit.[8] This question was resolved in the lower courts as evidenced by the clear language of the opinion below.[9]

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[5] Sup. Ct. R. 10.
[6] Resp't. Br. 21.
[7] Resp't Br. 13.
[8] *Saunders v. Warden*, 19-10817 (11th Cir. Feb. 1, 2020), Mot. Reh'g 8-11.
[9] The Eleventh Circuit issued a twelve-page unpublished *per curiam* opinion *Id.* After finding that the claim was denied "on the merits" in state court, the court referenced its obligation to apply AEDPA

B. Alabama Rule of Criminal Procedure 32 does not protect the rights of the applicant.

Failing to challenge the argument that summarily dismissed claims should not be given AEDPA deference, Respondent instead asserts that Alabama's Rule 32 pleading requirements are not unduly burdensome.[10] This is a clear misstatement of the § 2254(b)(1)(B)(ii) standard which is not whether the process is unduly burdensome but whether the state corrective process is "ineffective to protect the rights of the applicant." Such is the case in Alabama.

Here, Respondent concedes:

> it would be insufficient in a Rule 32 proceeding to plead only that counsel were ineffective for failing to retain an expert. Rather, a petitioner would need to plead the name of the expert who should have been retained, the expert's availability at the time of trial, and the substance of the expert's testimony—facts that show the expert could have been retained and would have made a difference to the outcome of the case.[11]

While this pleading standard is ostensibly reasonable, if you are housed on death row at Holman Correctional Facility in Atmore, Alabama, it is impossible. Death-sentenced inmates in Alabama are entitled to *no legal assistance* to prepare and present a petition for post-conviction relief which would satisfy the strict pleading standard

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deference six times when denying relief. *Id.* The substantive analysis of Petitioner's actual ineffective assistance of counsel claim was less than five pages. *Id.*

[10] Resp't. Br. 22.

[11] *Id.* at 24. In fact, the State of Alabama used this argument in its brief on appeal of the denial of Rule 32 relief at the Alabama Court of Criminal Appeals. ("Saunders did not identify any expert in his Rule 32 petition who could have testified to this information.") *Saunders v. State,* CR-13-1064, (Ala. Crim. App., Nov. 7, 2014), Appellee Br. 29.

enforced by the State. Worse, the State specifically *excludes* the appointment of post-conviction counsel when there is a summary dismissal.[12] At that point, what may appear at first glance to be a reasonable pleading requirement becomes an entirely unattainable standard to meet. Indeed, from inside the walls of Holman, the condemned prisoner would be required to research and locate an appropriate expert. Without funds, the same condemned person must retain that expert. Without the guidance and assistance of counsel, a condemned person, perhaps with limited intelligence or mental capacity, is supposed to know that he would need an expert to prove his claim. Somehow, the Respondent would have this Court believe that this "is not an insurmountable obstacle, nor is it particularly different from the pleading required in federal habeas."[13]

The Respondent's position on this issue has changed. In the Brief of the Appellee in the Petitioner's Rule 32 proceedings before the Alabama Court of Criminal Appeals, the Respondent urged the court to affirm the summary dismissal because the Petitioner did not meet the heightened pleading standard and "[t]he burden of pleading under Rule 32.3 and Rule 32.6(b) is a *heavy one*."[14] Yet, previously, the Respondent unambiguously requested this Court deny a petition for writ of certiorari because "[i]n fact, an inmate wishing to file a Rule 32 petition need only complete a simple,

[12] Ala. R. Crim. P 32.7(c) ("If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.").
[13] Resp. Br. 22.
[14] Appellee Br. 10. (emphasis added).

boilerplate, fill-in-the-blank form apprising the court of *the most basic information* pertinent to his case" and "[t]he form [] contains a straightforward list of grounds on which an inmate might potentially base a Rule 32 petition; an inmate is asked *simply to check from the list any ground* that he feels applies to his case and to summarize the basic facts pertinent to each claim."[15] This is a far cry from having to name an expert, affirm his prior availability for trial, and give the substance of his proffered testimony.

Respondent's assertion that Rule 32 requirements are "not particularly difficult" because they "echo"[16] Rule 2(c), Fed. R. Civ. P. ignores (or purposefully omits) the crucial fact that in federal habeas proceedings you have a statutory right to counsel.[17] Pursuant to 18 U.S.C. § 3599(c), the statute requires that capital defendants have counsel with the following qualifications: "at least one attorney [] appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years [sic] experience in the handling of appeals in that court in felony cases." At a minimum, pursuant to 18 U.S.C. § 3599(d), capital defendants should have appointed counsel whose "background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." Moreover, upon proper showing, federal habeas

[15] *Barbour v. Haley*, 2006 WL 4541663 (2017), Appellee Br. 55-56.
[16] Resp't. Br. 23.
[17] 18 U.S.C. § 3599.

counsel is authorized to retain the services of an investigator, expert witnesses, or any other services reasonably necessary for the representation of the defendant.[18]

To the extent that Rule 2(c) has a heightened pleading requirement similar to Rule 32 of Ala. R. Crim. P., there is a concomitant heightened standard for the appointment of qualified counsel to assist habeas petitioners in meeting that pleading standard; not so in Alabama. To navigate this heightened standard with the assistance of qualified counsel is vastly different from attempting to do so as a fledgling *pro se* litigant.

However, even qualified federal habeas counsel are without recourse when the underlying claim is summarily dismissed in a flawed and impossible-to-navigate state post-conviction system but is considered a merits determination worthy of AEDPA deference when it arrives at federal court. As Judge Wilson recognized when considering the practical application of Rule 32 in Alabama's state court system, "[w]ithout the aid of legal process and a developed record to rely upon, it would be virtually impossible for any petitioner to carry his or her ultimate burden of proof, let alone to demonstrate that he or she is entitled to habeas relief in federal court under AEDPA's 'doubly deferential' standard of review."[19] This cycle of contradiction invalidates the premise upon which § 2254 was based; that federal habeas relief will be

[18] *See* 18 U.S.C. § 3599(f).
[19] *Borden v. Allen,* 646 F.3d 785, 831(11th Cir. 2011) (J. Wilson, dissenting).

limited because the condemned petitioner participated in a state process that is effective and his claims have already been fairly presented and sufficiently considered.[20]

C. A Rule 32 summary dismissal is not the equivalent of a Rule 2(c) merits determination.

Federal law requires that federal courts apply AEDPA deference only to state court determinations where the post-conviction system is effective to protect the rights of the applicant.[21] Again, the Respondent attempts to distract and turn the question before the Court into a fact-bound inquiry. The Respondent suggests that the Petition presents a case-specific limited question. But given the question presented, the same question could be asked in any AEDPA case where deference was wrongly applied to the decision of an ineffective state post-conviction process.

The Respondent's merits based argument here follows a consistent and familiar pattern by the State of Alabama. The State fails to provide counsel in post-conviction proceedings, then argues the claims raised are insufficiently pled and should be summarily dismissed, further argues that summary dismissal is actually a merits determination due AEDPA deference and, without a qualified attorney conducting an investigation or evaluation, the State concludes that there were no set of facts that the petitioner could have plead to warrant relief because the Petitioner failed to show what he "could have" raised.[22] While the State is able to suppose or speculate about what the

[20] *See Harrington v. Richter,* 562 U.S. 86, 99 (2011).
[21] 28 U.S.C. § 2254(b)(1)(B).
[22] Resp't. Br. 26.

Petitioner should have argued or could have raised, the Petitioner is held to the strict Rule 32.6(b) standard of only asserting claims with the specific and full factual basis needed to satisfy the "heavy" burden imposed by Rule 32.[23] When the corrective process does not allow the petitioner to meet that standard, the State then asserts, as it did here, that "the fact remains that he presented the state courts with a meritless, insufficiently pleaded claim, that claim was properly dismissed, and the federal courts correctly denied relief."[24] How can a federal habeas court correctly consider the merits of the claim without certain requisite information rightly developed in state court? Simply, it cannot.

Moreover, the Respondent's argument that a summary dismissal under Rule 32.6(b) is a merits determination ignores that the Eleventh Circuit's decision in *Borden* was based on the premise that "[u]nlike a plaintiff pleading a case under Rule 8(a), the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterwards."[25] *Borden* wrongly assumed that because Rule 32 and Rule 2 are similar in word that they are similar in deed; however, that is not the case. Rule 2 operates in the way it does based on an assumption that a petitioner has been able to obtain, possess, or access during

[23] *Id.* at 24.
[24] *Id.* at 28.
[25] *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011).

his state court proceedings the information needed to properly assert a federal habeas claim. In the post-AEDPA era, federal courts have relied on the factual findings and legal analysis of state courts to ease the burden of *de novo* review; however, this system only works when the petitioner receives a fair review in the state courts.[26] Whereas here, when the state system fails to function as it should, federal habeas courts should not be confined to summary dismissals as the source of a merits determination.

D. The *Martinez*[27] distraction

In an effort to deflect from the question presented, the Respondent wrongly asserts that the Petition "touches on a claim raised in his first of two Rule 60(b) motions in the district court."[28] It does not. The Petition references *Martinez* to illustrate how the Eleventh Circuit's holding that summarily dismissed claims are merits determinations operates to preclude any meaningful *Martinez* review.

Martinez established the ability to assert ineffective assistance of post-conviction counsel to equitably overcome a procedural default. When a summary dismissal in state court is viewed as a merits determination, the petitioner is unable to make such an equitable argument during his federal habeas. This flawed analytical construct thwarts the salutary purposes of *Martinez*: to vindicate the "foundation[al" right to effective trial

[26] *Burt v. Titlow*, 571 U.S. 12, 15-16 (2013)("Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)(AEDPA "demonstrates Congress' intent to channel prisoners' claims first to the state courts.").
[27] *Martinez v Ryan*, 566 U.S. 1 (2012).
[28] Resp't. Br. 28.

counsel and to promote the full and fair resolution of substantial ineffective assistance of counsel claims in federal habeas, where ineffective or absent post-conviction counsel disrupts that process in state court.[29] "To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default."[30] In other words, state post-conviction counsel could be considered ineffective for insufficiently pleading ineffective assistance of trial counsel claims in state court. If those insufficiently pled claims were procedurally defaulted, the petitioner could argue the ineffectiveness of post-conviction counsel to overcome the default and have the underlying claim considered on the merits *de novo*. But when, as is the case here, the claim is viewed as a merits denial, the Petitioner has no recourse.

In Alabama, when the time arrives for a petitioner to raise ineffective assistance of trial counsel claims, he has no right to legal assistance, is unable to meet the stringent pleading standard, receives a summary dismissal which is viewed as a merits determination, and is unable to raise *Martinez* because there was no procedural default. To be clear, the Petition references *Martinez* for consideration of all the claims he was unable to raise a *Martinez* exception because the claim was not deemed procedurally defaulted. As the Petition made abundantly clear, as is equally true for scores of

[29] *Martinez*, 566 U.S. at 12.
[30] *Id.* at 10.

Alabama death row prisoners, Mr. Saunders didn't have effective trial counsel and was gravely disadvantaged by unqualified and demonstrably ineffective post-conviction counsel.[31] But the lack of procedural default takes the claim out of the realm of *Martinez*. Contrary to the Respondent's assertion, this preclusion is actually the crux of the Petitioner's "supposed *Martinez* grievance."[32]

The result reached in this capital case is arbitrary. But the question presented is by no means limited to this case. The decision below has great consequences for federal habeas petitioners in the Eleventh Circuit and elsewhere. The question settles an area of law that necessitates clarification by this Court. Further review is warranted.

CONCLUSION

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

Respectfully submitted,

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[31] Pet. 19.
[32] Resp't. Br. 29.