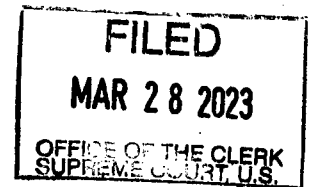


22-7221  
No. \_\_\_\_\_

ORIGINAL

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_



CARLOTTA SUSANN KUTSCHENREUTER - PETITIONER

vs.

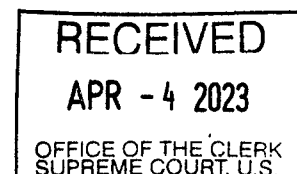
WARDEN LAGRETA McCLAIN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

CARLOTTA SUSANN KUTSCHENREUTER  
AIS 291809, DORM B, B-1-24A  
JULIA TUTWILER PRISON FOR WOMEN  
8966 US HWY 231  
WETUMPKA, AL 36092  
(NO PHONE NUMBER EXCEPT PRISON'S)



## QUESTIONS PRESENTED

1. Alabama Rule of Criminal Procedure (ARCrnP) 32.2(d) states "any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable." In light of Alabama's motion for new trial, and other rules such as ARCrnP 32.2(c) "certificate of judgment" date causing out-of-time issues because it is a week or more after the AEDPA §2254 habeas filing deadline are Alabama petitioners actively denied a review of their 6th Amendment right to *effective* assistance of defense counsel when ineffective assistance of direct appeal counsel and procedure default denies a review of meritorious ineffective assistance of counsel (IAC) of defense counsel claims until the State's Rule 32 petition process warrant equitable tolling for the §2254?
2. Per ARCrnP 32.5 a Rule 32 must be adjudicated in the trial court. A judge that did not preside over the trial did not specifically rule on any IAC claims, nor hold evidentiary hearings, but then the Alabama Court of Criminal Appeals (ACCA) sua sponte ruled. In light of the ACCA procedurally defaulting Petitioner's Rule 32, but also rendering a "merits" determination *sua sponte* on direct appeal counsel using *Strickland v. Washington*, 466 US 668 (1984) without an evidentiary hearing, was a "reasonable" ruling when the trial transcript proves the direct appeal counsel's legal filing was frivolous and erroneous?
3. When the State deceives, tricks, and otherwise impedes petitioners through State rules and laws plus lack of access to the courts from prison denying any review of their IAC claims until the Federal habeas process are petitioners allowed equitable tolling for redress of their 5th, 6th, and 14th Amendment claims?
4. Have the above cumulative constraints of the State's direct appeal and post-conviction process, and the rulings by the Alabama Courts, United States (US) District Court and Eleventh Circuit, abrogated Petitioner's rights under the 5th, 6th and 14th Amendments and thus mandate equitable tolling since no court has properly ruled on any of the Constitutionally guaranteed 6th Amendment IAC claims on either her two defense counsels or the direct appeal counsel?

## **LIST OF PARTIES**

[ X ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Etowah County Circuit Court; Judge Cody Robinson

Alabama State Attorney General

US District Court Northern District of Alabama, Middle Division

The Eleventh (11th) Circuit Court of Appeals

## **RELATED CASES**

*Gaines v Price*, No. 2:15-cv-1822-VEH-TMP, 2017 US Dist. LEXIS 80408, 2017 WL 2296962 (N.D. Ala. May 2, 2017)

*Greer, Terry v State* (CC-2013-002134; CC-2013-002135; Jefferson County, Alabama)

*Trevino v Thaler*, 569 US 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044, 2013 US LEXIS 3980

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION .....	7
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	8
STATEMENT OF THE CASE .....	10
REASONS FOR GRANTING THE WRIT .....	21
CONCLUSION .....	40

## INDEX TO APPENDICES

- APPENDIX 1 - Order of the Eleventh Circuit Denying Rehearing (not on LEXISNEXIS ADOC computer as of this date but original received from court on 1/9/2023 attached) No. 22-11893-J (Reh.Denied.) 12/29/2022.
- APPENDIX 2 - Order of the Eleventh Circuit Denying 59(e), Certificate of Appealability and In Forma Pauperis No. 22-11893-J (2022 US App LEXIS 31826) 11/17/2022.
- APPENDIX 3 - Decision of the US District Court MEMORANDUM Affirming REPORT AND RECOMMENDATION 4:21-cv-00115-AMM-JHE (2022 US Dist LEXIS 43418) 3/11/2022.
- APPENDIX 4 - Order of the US District Court REPORT AND RECOMMENDATION Denying §2254 Doc.1 4:21-cv-00115-AMM-JHE (2022 US Dist LEXIS 43432) 1/12/2022.
- APPENDIX 5 - Order of the State Supreme Court Affirming Court of Appeals 1190795 CR-18-0982 CC-10-1304.60 still not on ADOC LEXIS computer original from (State ANSWER Doc.10 Exhibit O) attached 10/16/2020.
- APPENDIX 6 - Order of the State Court of Appeals Denying Rehearing CR-18-0982 (CC-10-1304.60)(2020 Ala.Crim.App. LEXIS 499)(State ANSWER Doc.10 Exhibit M) 6/19/2020.
- APPENDIX 7 - Order of the State Court of Appeals MEMORANDUM Denying Rule 32 CR-18-0982 (CC-10-1304.60)(329 So.3d 689 2020 Ala.Crim.App. LEXIS 386) (State ANSWER Doc.10 Exhibit K) 5/22/2020.

- APPENDIX 8 - Order of the State Court of Appeals Writ of Mandamus Denied CR-18-0580 (CC-10-1304.60)(309 So.3d 1253 2019 Ala.Crim.App. LEXIS 809) 7/17/2019.
- APPENDIX 9 - Order of the State Trial Court Denying Rule 32 CC-10-1304.60 (Judge Robinson's Order Denying Rule 32 State ANSWER Doc.10 Exhibit G Vol.2 p357-360) 5/20/2019.
- APPENDIX 10 - Order of the State Court of Appeals Writ of Mandamus Denied CR-15-0727 (CC-10-1304.60)(231 So.3d 1180 2016 Ala.Crim.App. LEXIS 1171) 8/23/2016.
- APPENDIX 11 - Order of the State Court of Appeals Direct Appeal Rehearing Denied CR-13-0404 (CC-10-1304)(190 So.3d 582 2014 Ala.Crim.App. LEXIS 1264)(Direct Appeal Rehearing Denied State ANSWER Doc.10 Exhibit E) 7/3/2014.
- APPENDIX 12 - Order of the State Court of Appeals Affirming Denial of Direct Appeal CR-13-0404 (CC-10-1304)(184 So.3d 471 2014 Ala.Crim.App. LEXIS 907) (Denial of Direct Appeal State ANSWER Doc.10 Exhibit D) 6/6/2014.

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Arce v Garcia</i> , 400 F.3d 1340, 1349 (11th Cir. 2005).....	37
<i>Artuz v Bennett</i> , 121 S.Ct. 361, 148 L.Ed.2d 213, 531 US 4 (2000).....	38, 39
<i>Brooks v Jones</i> , 875 F.2d 30 (2nd Cir. 1989).....	32
<i>Brooks v Tennessee</i> , 406 US 605, 32 L.Ed.2d 358, 92 S.Ct. 1891 (1972).....	24, 29
<i>Bounds v Smith</i> , 430 US 817, 52 L.Ed.2d 72, 97 S.Ct. 1491 (1977) .....	20, 29, 31
<i>Carey v Saffold</i> , 536 U.S. 214, 219-20, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002).....	37
<i>Coleman</i> , 501 US., at 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 .....	36
<i>Commonwealth v. Fox</i> , 476 Pa. 475, 478, 383 A.2d 199, 200-01 (1978) .....	34
<i>Coral v State</i> , 628 So.2d 954, 1992 Ala.Crim.App. LEXIS 167.....	29
<i>Crosslin v State</i> , 446 So.2d 675 (Ala.Crim.App. 1983).....	25
<i>Deardorff v Bolling</i> , 2022 US Dist. LEXIS 178510 (9/30/2022) .....	38
<i>Evitts v Lucey</i> , 469 US 392, 83 L Ed 2d 821, 105 S Ct 830 (1985) .....	26, 27
<i>Ex parte Ingram</i> , 675 So.2d 863, 866 (Ala. 1996) .....	31
<i>Ex parte Kutschenreuter</i> , CR-15-0727; 231 So.3d 1180; 2016 Ala.Crim.App. LEXIS 1171 .....	3, 13
<i>Ex parte Kutschenreuter</i> , CR-18-0580; 309 So.3d 1253; 2019 Ala.Crim.App. LEXIS 809.....	5, 17
<i>Francis v Franklin</i> , 471 US 307, 105 S Ct 1965, 85 L Ed 2d 344 (1985).....	21
<i>Gaines v Price</i> , No. 2:15-cv-1822-VEH-TMP, 2017 US Dist. LEXIS 80408, 2017 WL 2296962, at *21 (N.D. Ala. May 2, 2017) .....	supra
<i>Greer v State</i> , CC-2013-002134; CC-2013-002135 Jefferson County, Alabama .....	23
<i>Hanna v State</i> , 992 So.2d 77, 2007 Ala.Crim.App. LEXIS 213.....	30

<i>Harville v State</i> , 772 So.2d 1199 (Ala.Crim.App. 1999) LEXIS 273.....	26
<i>Herring v Sec'y, Dep't of Corr.</i> , 397 F.3d 1338, 1355 (11th Cir. 2005) .....	27
<i>Holland v Florida</i> , 560 US 631, 130 S Ct 2549, 177 L Ed 2d 130, 2010 US LEXIS 4946 .....	27, 28
<i>Kelly v Sec't for the DOC Florida</i> , 377 F.3d 1317; 2004 U.S.App. LEXIS 15249 .....	34, 35
<i>Knowles v Mirzayance</i> (2009) 556 US 111, 129 S.Ct. 1411, 173 L.Ed.2d 251.....	23
<i>Kutschenreuter v McClain</i> , 2022 US Dist. LEXIS 43418 (N.D. Ala., 1/12/2022).....	supra
<i>Kutschenreuter v McClain</i> , 2022 US Dist. LEXIS 43432 (N.D. Ala., 1/12/2022).....	supra
<i>Kutschenreuter v State</i> , 184 So.3d 471, LEXIS 907 (Ala.Crim.App. 6/6/2014).....	3
<i>Kutschenreuter v Warden</i> , 2022 US App No 22-11893-J LEXIS 31826 .....	supra
<i>Lawrence v State of Fla</i> , 421 F.3d 1221; 2005 US App. LEXIS 18424.....	37
<i>Leonard v Deville</i> , US Court of Appeals for the Fifth Circuit, 960 F.3d 164; 2020 US App. LEXIS 15618 .....	37
<i>Lewis v Casey, Jr, et al.</i> , 518 US 343, 135 L.Ed.2d 606, 116 S.Ct. 2174 (6/24/1996) .....	20, 31
<i>Lister v State</i> , 437 So.2d 622 (Ala.Crim.App. 1983).....	25
<i>Lott v Mueller</i> , 304 F.3d 918, 924 (9th Cir.2002) .....	28
<i>Maple v Thomas</i> , 565 US 266, 132 S.Ct. 912, 181 L.Ed.2d 807, 2012 US LEXIS 905.....	36
<i>Martinez</i> applies. Pp. 421-429, 185 L.Ed.2d at 1051-1057 .....	32
<i>McCoy v Louisiana</i> , 138 S.Ct. 1500, 200 L.Ed.2d 821, 2018 US LEXIS 2802.....	29
<i>Murray v Carrier</i> , 477 US 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).....	36
<i>Murray v State</i> , 922 So.2d 961, 965 (Ala.Crim.App. 2005) .....	31
<i>O'Sullivan v Boerckel</i> , 526 U.S. 838, 845, 119 S.Ct. 1728, 1732, 144 L.Ed.2d 1 (1999).....	34
<i>Panetti v Quarterman</i> (2007, US) 127 S.Ct. 2842, 168 L.Ed.2d 662 .....	36

<i>People v Keener</i> , 275 Ill. App. 3d 1, 4, 655 N.E.2d 294, 297, 211 Ill. Dec. 391 (1995).....	34
<i>Perkins v State</i> , 144 So.3d 457 2012 Ala.Crim.App. LEXIS 98.....	29
<i>Porter v. McCollum</i> (2009, US) 175 L.Ed.2d 398, 130 S.Ct. 447 .....	21, 22
<i>Pruett v Thompson</i> , 996 F.2d 1560, 1568 {221 So.3d 1150}(4th Cir. 1992) cert. denied, 510 US 984, 114 S.Ct. 487 126 L.Ed.2d 437 (1993).....	30
<i>Roberts v State of Alabama</i> , 141 So.3d 1139; 2013 Ala.Crim.App. LEXIS 83 .....	34
<i>Rompilla v Beard</i> , 545 US 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) .....	22
<i>Sandstrom v Montana</i> , 442 US 510, 99 s Ct 2450, 61 L Ed 2d 39.....	21
<i>Sandvik v US</i> , 177 F.3d 1269, 1271 (11th Cir. 1999).....	37
<i>Simmons v US</i> , 390 US 377, 394, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968).....	24
<i>Smith v Comm'r, Ala.Dep't of Corr.</i> , 703 F.3d 1266 (11th Cir. 2012) .....	28
<i>Spitsyn v Moore</i> , 345 F.3d 796, 798, 801 (9th Cir. 2003) .....	28
<i>State v Hurst</i> , 233 So.3d 941 2015 Ala.Crim.App. LEXIS 86.....	29
<i>Strickland v Washington</i> , 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	supra
<i>Thaler v Haynes</i> , 559 U.S. 43, 47, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010).....	39
<i>Thomas v State</i> , 766 So.2d 860, 876, Ala.Crim.App. 1998.....	30
<i>Trevino v Thaler</i> , 569 US ___, 133 S.Ct. 1911 185 L.Ed.2d 1044, 2013 US LEXIS 3980; Decided May 28, 2013 .....	supra
<i>US v Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	21
<i>US v Martin</i> , 408 F.3d 1089, 1096 (CA8 2005).....	28
<i>Victor v Nebraska</i> , 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583, 8 Fla.L.Weekly Fed. S 10, 94 Cal. Daily Op. Service 1982, 94 D.A.R. 3687 (1994), habeas corpus proceeding, remanded, 231 F.3d 1140 (9th Cir. 2000).....	35



<i>Weldon v Givens</i> , US Dist. Court for the Middle District of Alabama, Eastern Division, 2020 U.S. Dist. LEXIS 46941 CIVIL ACTION NO. 3:20-CV-61-WKW (March 17, 2020) .....	31, 32
<i>Wiggins</i> , 539 US., at 522-523, 123 S.Ct. 2527, 156 L.Ed.2d 471 .....	22
<i>Williams v Taylor</i> , 529 US 420, 431-32, 120 S.Ct. 1479, 1488, 146 L.Ed.2d 435 (2000) .....	supra
<i>Wood v Allen</i> , 558 US 290, 130 S.Ct. 841, 175 L.Ed.2d 738, 2010 US LEXIS 763 .....	22
<i>Woods v State</i> , 221 So.3d 1125 Ala.Crim.App. 2016.....	30

#### UNITED STATES SUPREME COURT STATUTES AND RULES

§2241(c)(3).....	39
§2244(d) .....	36, 38
§2244(d)(1)(B) .....	36
§2244(d)(2) .....	36, 38
§2254(d)(1) .....	31, 36
§2254(d)(2) .....	31, 36
§2254(e)(2)(B).....	33

#### ALABAMA CODE

§12-16-150(4) .....	25
§13A-3-1 .....	11
§13A-6-2 .....	11

#### ALABAMA RULE OF APPELLATE PROCEDURE (ARAppP)

ARAppP 28(a)(10).....	supra
ARAppP 39.....	12

ARAppP 41(a).....	30
ALABAMA RULE OF CRIMINAL PROCEDURE (ARCrImP)	
ARCrImP 19.4(b).....	25
ARCrImP 24.1(b) .....	supra
ARCrImP 32.2(c).....	supra
ARCrImP 32.2(d).....	supra
ARCrImP 32.5 .....	9, 32
ARCrImP 32.7(a).....	supra

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that the writ of certiorari issue to review the judgments below:

**OPINIONS BELOW**

[X] For cases from **federal courts**:

The opinion of the United States court of appeals 11th Circuit appears at Appendix 1 to the petition and is

[X] reported at Kutschenreuter v Warden No. 22-11893-J; (Reh. Denied.  
12/29/2022)

[X] is unpublished as of this date but original document from court is attached.

[X] For cases from **federal courts**:

The opinion of the United States court of appeals 11th Circuit appears at Appendix 2 to the petition and is

[X] reported at Kutschenreuter v Warden; 2022 US App LEXIS 31826; No. 22-11893-J (ORDER 11/17/2022)

[X] For cases from **federal courts**:

The opinion of the United States court of appeals District Court appears at Appendix 3 to the petition and is

[X] reported at Kutschenreuter v McClain; 2022 US Dist LEXIS 43418; No.4:21-cv-00115-AMM-JHE; (N.D. Ala., 3/11/2022)

[X] For cases from **federal courts**:

The opinion of the United States court of appeals District Court appears at Appendix 4 to the petition and is

[X] reported at Kutschenreuter v McClain; 2022 US Dist LEXIS 43432; 4:21-cv-00115-AMM-JHE (N.D. Ala. 1/12/2022)

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix 7 to the petition and is

[X] reported at Kutschenreuter v State; 329 So.3d 689; 2020 Ala.Crim.App.  
LEXIS 386; RULE 32 CR-18-0982 MEMORANDUM 5/22/2020  
[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the state circuit court to review the merits appears at Appendix 9 to the petition and is

[X] reported at Kutschenreuter v State; CC-10-001304.60 (ORDER Summarily  
Dismissed 5/20/2019)  
[X] is unpublished.

#### **LIST OF COURT FILINGS AND ACTIONS (BELOW)**

COURT IN QUESTION - DOCKET # - CASE CAPTION - DATE OF ENTRY

CIRCUIT COURT - CC-2010-1304 - Statutory Arraignment Plea NOT GUILTY and NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT - 1/26/2011.

CIRCUIT COURT - CC-2010-1304 - ORDER OUTPATIENT EVALUATION OF COMPETENCY TO STAND TRIAL AND MENTAL STATE AT THE TIME OF THE OFFENSE - 8/6/2012.

CIRCUIT COURT - CC-2010-1304 - ORDER FOR OUTPATIENT EVALUATION OF COMPETENCY TO STAND TRIAL AND MENTAL STATE AT THE TIME OF THE OFFENSE *granted* by judge who resided at trial, Judge William Rhea (Judge Rhea) - 8/29/2012.

CIRCUIT COURT- CC-2010-01304 - MOTION FOR NEW TRIAL - 10/25/2013.

CIRCUIT COURT- CC-2010-01304 - MOTION FOR A NEW TRIAL *denied* - 12/4/2013.

ACCA - CR-13-0404 - DIRECT APPEAL E-filed - 3/19/2014.

ACCA - CR-13-0404 - STATE'S BRIEF filed - 4/16/2014.

ACCA - CR-13-0404 - MEMORANDUM DIRECT APPEAL *denied* (Appendix 12  
Kutschenreuter v State, 184 So.3d 471, LEXIS 907 (Ala.Crim.App. 6/6/2014) - 6/6/2014.

ACCA - CR-13-0404 - DIRECT APPEAL APPLICATION FOR REHEARING FILED  
\*Petitioner never given a copy of\* - (?) date unknown not in State's Record on Appeal (ROA)

ACCA - CR-13-0404 - Application for Rehearing *overruled* (Appendix 11) - 7/3/2014.

ACCA - CR-13-0404 - CERTIFICATE OF JUDGMENT issued - 7/23/2014.

ACCA - CR-13-0404 - Appellate counsel's MOTION TO "EXCEED THE CAP" for indigent  
work on direct appeal filed and *granted* by Judge Rhea - 10/22/2014.

CIRCUIT COURT - CC-10-1304 - MOTION TO EXCEED BRIEF PAGE LIMITATIONS ON  
RULE 32 notarized on or about - 5/11/2015.

CIRCUIT COURT - CC-10-1304 - MOTION TO EXCEED BRIEF PAGE LIMITATIONS ON  
RULE 32 *granted* by Judge Rhea - 6/15/2015.

CIRCUIT COURT - CC-10-1304 - MOTION FOR THIRTY (30) DAY EXTENSION TO FILE  
A RULE 32 *granted* by Judge Rhea - 7/21/2015.

CIRCUIT COURT - CC-10-1304.60 - LETTER TO THE COURT EXPLAINING THE ADOC  
FAILED TO TIMELY MAIL RULE 32 SCANNED - 7/31/2015.

CIRCUIT COURT - CC-10-1304.60 - MOTION FOR A RESPONSE FROM PROSECUTOR  
TO RULE 32 PER STATE RULE 32.7(a) notarized - 2/4/2016

CIRCUIT COURT - CC-10-1304.60 - "MOTION FOR A RESPONSE FROM PROSECUTOR  
TO RULE 32 PER STATE RULE 32.7(a)" was "MOTIONED TO JUDGE AND PLACED  
COPY IN DA'S BOX" - 2/11/2016.

ACCA - CC-10-1304.60 - WRIT OF MANDAMUS TO COMPEL A RESPONSE FROM THE  
ETOWAH CO. DISTRICT ATTORNEY'S (DA) OFFICE ON HER RULE 32 PER  
ALABAMA RULE OF CRIMINAL PROCEDURES 32.7(a) notarized - 3/28/2016.

ACCA - CR-15-0727 - First WRIT OF MANDAMUS TO COMPEL A RESPONSE FROM  
THE ETOWAH CO. DA ON RULE 32 - *denied* (Appendix 10 Ex parte Carlotta S.  
Kutschenreuter, 231 So.3d 1180; 2016 Ala.Crim.App. LEXIS 1171 CR-15-0727) - 8/23/2016.

CIRCUIT COURT - CC-10-1304.60 - MOTION TO AMEND DEFENDANT'S RULE 32 PER  
RULE 32.7(b) AND NINETY (90) DAYS IN WHICH TO COMPLETE AND SUBMIT THE

AMENDED RULE 32 notarized 4/11/2018 *granted* by Judge Rhea - 4/18/2018.

CIRCUIT COURT - CC-10-1304.60 - MOTION TO MOVE AMENDED RULE 32 TO ANOTHER CIRCUIT COURT DUE TO A CONFLICT OF INTEREST CONCERNING THE ETOWAH COUNTY DA'S STAFF notarized and mailed - 1/28/2019.

CIRCUIT COURT - CC-10-1304.60 - MOTION TO MOVE AMENDED RULE 32 TO ANOTHER CIRCUIT COURT DUE TO A CONFLICT OF INTEREST CONCERNING THE ETOWAH COUNTY DA'S STAFF *denied* by a new judge; Judge Robinson - 3/13/2019.

ACCA - CR-18-0580 (CC10-1304.60) - Two (2) Pro se motions (1) MOTION TO MOVE PETITIONER'S RULE 32 TO ANOTHER CIRCUIT COURT and (2) MOTION TO VACATE, SET ASIDE OR AMEND FLAWED DIRECT APPEAL with cover letter mailed - 3/13/2019.

ACCA - CR-18-0580 (CC10-1304.60) - ORDER from the ACCA to treat the two motions as WRIT OF MANDAMUS CR-18-0580 - 3/19/2019.

ACCA - CR-18-0580 (CC10-1304.60) - *ORDERED* STATE GIVEN 21 DAYS TO RESPOND TO THE TWO WRITS OF MANDAMUS - 4/16/2019.

CIRCUIT COURT - CC-10-1304.60 - DA's MOTION TO DISMISS RULE 32 - 4/29/2019.

ACCA - CR-18-0580 (CC10-1304.60) - RESPONSE FROM THE STATE OF ALABAMA to ACCA as to why no response to Rule 32 for years - 4/29/2019.

CIRCUIT COURT - CC-10-1304.60 - DA's MOTION TO DISMISS *granted* by Judge Robinson - 5/13/2019.

CIRCUIT COURT - CC-10-1304.60 - DA'S *granted* 5/13/2019 was "*SET ASIDE*" - 5/15/2019.

CIRCUIT COURT - CC-10-1304.60 -Judge Robinson's ORDER *denied* RULE 32 (Appendix 9) - 5/20/2019

CIRCUIT COURT - CC-10-1304.60 - REPLY BRIEF in RESPONSE to the DA'S MOTION TO DISMISS" concerning the "STATE'S RESPONSE TO THE STATE OF ALABAMA" 5/20/2019 scanned - 5/29/2019.

CIRCUIT COURT - CR-18-0580; (CC-10-1304.60) - REPLY BRIEF in RESPONSE to the

"RESPONSE TO THE STATE OF ALABAMA" 5/20/2019 - 5/29/2019.

ACCA - CR-19-0982 (CC-10-1304.60) - NOTICE OF APPEAL from Circuit Court denial of RULE 32 - 7/9/2019.

ACCA - CR-18-0580 - Second WRITS OF MANDAMUS PETITION *denied* (Appendix 8 Ex parte Carlotta Kutschenreuter, 309 So.3d 1253; 2019 Ala.Crim.App. LEXIS 809; CR-18-0580) - 7/17/2019.

ACCA - CR-19-0982 (CC-10-1304.60) - RULE 32 BRIEF 8/14/2019 *docketed* - 8/20/2019.

ACCA - CR-19-0982 - BRIEF OF APPELLEE filed - 9/30/2019

ACCA - CR-19-0982 (CC-10-1304.60) - RULE 32 REPLY BRIEF - 11/7/2019.

ACCA - CR-18-0982 (CC-10-1304.60) - MEMORANDUM APPEAL *denied* (Appendix 7) - 5/22/2020.

ACCA - CR-18-0982 (CC-10-1304.60) - APPLICATION FOR REHEARING - 6/12/2020.

ACCA - CR-18-0982 (CC-10-1304.60) - APPLICATION FOR REHEARING *overruled* (Appendix 6) - 6/19/2020.

ALABAMA SUPREME COURT - 1190795 (CR-18-0982; CC-10-1304.60) - WRIT OF CERTIORARI petition notarized and stamped filed- 7/2/2020.

ALABAMA SUPREME COURT - 1190795 (CR-18-0982; CC-10-1304.60) - CERTIFICATE OF JUDGMENT WRIT *DENIED NO OPINION* (Appendix 5) - 10/16/2020.

US DIST - 4:21-cv-00115-AMM-JHE - §2254 PETITION (Doc.1) - 1/15/2021.

US DIST - 4:21-cv-00115-AMM-JHE - STATE ANSWER (Exhibits A-O Doc.10) - 3/24/2021.

US DIST - Petitioner received ANSWER FROM STATE (Exhibits A-O Doc.10) - 4/2/2021.

US DIST - 4:21-cv-00115-AMM-JHE - REPORT AND RECOMMENDATION (Doc.18) *denied* (Appendix 4)(Kutschenreuter v McClain, 2022 US Dist. LEXIS 43432; WL 1284307 (N.D. Ala., Jan. 12, 2022) - 1/12/2022.

US DIST - 4:21-cv-00115-AMM-JHE - MEMORANDUM (Doc. 25) *overruled and FINAL JUDGEMENT* (Doc.26)(Appendix 3 Kutschenreuter v. McClain, 2022 US Dist LEXIS 43418

(N.D.Ala., 1/12/2022)) - 3/11/2022

US DIST CT - 4:21-cv-00115-AMM-JHE - 59(e) MOTION filed - 4/7/2022.

US DIST - 4:21-cv-00115-AMM-JHE - ORDER DISMISSING 59(e) - 5/19/2022.

US DIST - 4:21-cv-00115-AMM-JHE - NOTICE OF APPEAL 11th Circuit - 5/31/2022.

US DIST - 4:21-cv-00115-AMM-JHE - DIST CT ORDER Doc.33 - 6/8/2022

US DIST - 4:21-cv-00115-AMM-JHE - ORDER *denies* IFP (Doc.36) - 6/27/2022.

11th CIRCUIT - 22-11893-J - MOTION FOR EXTENSION OF TIME TO FILE  
APPLICATION FOR A COA - 7/1/2022

11th CIRCUIT - 22-11893-J - APPLICATION FOR A COA notarized 7/26/2022.

11th CIRCUIT - 22-11893-J - APPLICATION FOR A COA and IFP *denied* (Appendix 2  
Kutschenreuter v. Warden; 2022 US App LEXIS 31826 No 22-11893-J (ORDER 11/17/2022 -  
11/17/2022.

11th CIRCUIT - 22-11893-J - MOTION FOR RECONSIDERATION - 12/8/2022.

11th CIRCUIT - 22-11893-J - Pro se MOTION FOR RECONSIDERATION (Received at  
LEGAL MAIL CALL Sunday, 1/9/2023, because only ADOC officer that passes out LEGAL  
MAIL out due to surgery) *denied* (Appendix 1) - 12/29/2022.



## **JURISDICTION**

[X] For cases from federal courts:

The date on which the US 11th Circuit Court of Appeals decided case was 11/17/2022.

[X] A timely petition for rehearing was denied by the US 11th Circuit Court of Appeals on the following date 12/29/2022.

A copy of the order denying rehearing appears at Appendix 1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[X] For cases from state courts:

The date on which the Alabama Court of Criminal Appeals decided case per MEMORANDUM CR-18-0982 (CC-10-1304.60) (Appendix 7) was 5/22/2020.

A copy of that decision appears at Appendix 6.

[X] A timely petition for rehearing was thereafter denied on the following date: 6/19/2020, and a copy of the order denying rehearing appears Appendix 6.

[X] For cases from state courts:

The date on which the Alabama Supreme Court decided my case per WRIT DENIED. NO OPINION, 1190795 (In re: Carlotta S. Kutschenreuter v State of Alabama)(CC-10-1304.60; Criminal Appeals: CR-18- 0982) was 10/16/2020.

A copy of that decision appears at Appendix 5.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### CONSTITUTIONAL AMENDMENTS:

Constitutional Amendment 5 "No person shall be held to answer for a capital, or otherwise infamous crime, ... ; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ... ."

Constitutional Amendment 6 "In all criminal prosecutions, ... ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitutional Amendment 14 Sec. 1 [Citizens of the United States.] "All persons born ... in the United States ... . 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."

### ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA)

§2241(c)(3) "he is in custody in violation of the Constitution or laws or treaties of the United States."

§2244(d)(1)(2)(B) states that the one-year limitation period shall begin to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the US is removed, if the applicant was prevented from filing by such State action."

§2254(d) 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; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

### ALABAMA CODE (Ala. Code):

Ala. Code 1975 §12-16-150(4), catalogs ten (10) grounds upon which a juror may be challenged. ... (4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of civil law, wither with the defendant or with the prosecution, or the person alleged to be injured ...."

§13A-3-1 Not Guilty and Not Guilty by Reason of Mental Disease and Defect (NGRI)

§13A-6-2 Intentional murder.

ALABAMA RULE OF APPELLATE PROCEDURE (ARAppP)

ARAppP 28(a)(10) Argument of petitioner/appellant brief.+

ARAppP 39 Petition for writ of certiorari to the Alabama Supreme Court.

ARAppP 41(a) Date of issuance of a certificate of judgment shall be 18 days after entry of judgment.

ALABAMA RULES OF CRIMINAL PROCEDURE (ARCrImP):

ARCrImP 19.4(b) In all noncapital cases, the court reporter shall take full stenographer notes of the voir dire of the jury and of the arguments of counsel if directed to do so by the judge.

ARCrImP 24.1(b) A motion for a new trial must be filed no later than thirty (30) days after sentence is pronounced.

ARCrImP 32.2(c) Limitations period. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala.R.App.P., ... .

ARCrImP 32.2(d) Claims of ineffective assistance of counsel. Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable. In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition.

ARCrImP 32.5 Venue. Petitions filed under this rule shall be filed in and decided by the court in which the petitioner was convicted.

ARCrImP 32.7(a) Prosecutor's response. Within thirty (30) days after the service of the petition, or within the time otherwise specified by the court, the district attorney ... shall file with the court and send to the petitioner or counsel for the petitioner, if any, a response, which may be supported by affidavits and a certified record or such portions thereof as are appropriate or material to the issues raised in the petition.

## STATEMENT OF THE CASE

Petitioner, Carlotta Susann Kutschenreuter, was charged with a non-capital offense of intentional murder per Alabama Code §13A-6-2 of her husband of 28 years in 2010.

Not reflected on Etowah County Case Action Summary (CAS) CC-2010-1304 Petitioner is indigent and received court-appointed defense counsel; Jonathan Martin Welch (Welch).

Petitioner was not guilty of murder and told Welch of her thirty years of mental illness recorded in two States and her suicide attempt as a teenager and at arraignment plead statutory plea §13A-3-1 Not Guilty and Not Guilty by Reason of Mental Disease and Defect (NGRI) (State ANSWER Exhibit A Vol.1 C.15).

After Petitioner's not guilty and NGRI plea Welch waited two years 8/6/2012 to file an ORDER FOR OUTPATIENT EVALUATION OF COMPETENCY TO STAND TRIAL AND MENTAL STATE AT THE TIME OF THE OFFENSE. The original trial court judge, William Rhea III, (Judge Rhea) *granted* the ORDER. Dr. McKeown never asked any questions about the alleged offense charged. Because of the Forensic Evaluation Report filed by Dr. McKeown Petitioner went to UAB Neuropsychological on her own for evaluation (R678).

The trial began 8/26/2013 and a defense co-counsel assigned same day, Philip Miles (Miles) (State ANSWER Exhibit A Vol.1 p53 CC-2010-1304; 4:21-cv-00115-AMM-JHE Doc.10). However, the adversarial process against the State completely failed due to two defense counsel's IAC and her 5th, 6th, and 14th Amendment rights were violated.

## MOTION FOR NEW TRIAL ISSUE

On 10/25/2013 Welch filed a Motion For New Trial (State ANSWER Exhibit A Vol.1 p56-58; 4:21-cv-00115-AMM-JHE Doc.10) per Alabama Rule of Criminal Procedure

(ARCrImP) 24.1(b) within the thirty (30) days allowed where he could not include an IAC claim on himself, or Miles, per case precedence. Judge Rhea *denied* (State ANSWER Exhibit A Vol.1 p59; 4:21-cv-00115-AMM-JHE Doc.10) that motion forty (40) days later on 12/4/2013 per State rules denying any review of IAC claims on two defense counsels.

Judge Rhea assigned appellate counsel, Jacob Millican (Millican) 12/17/2013 (State ANSWER Exhibit A Vol.1 p61; 4:21-cv-00115-AMM-JHE Doc.10).

Also on 12/17/2013 Millican filed his Motion For New Trial (State ANSWER Exhibit A Vol.1 p62-64; 4:21-cv-00115-AMM-JHE Doc.10). Judge Rhea *denied* that motion the next day 12/18/2013 (State ANSWER Exhibit A Vol.1 p66; 4:21-cv-00115-AMM-JHE Doc.10).

The direct appeal (DIRECT APPEAL CR-13-0404 CC-2010-1304 State ANSWER Exhibit B; 4:21-cv-00115-AMM-JHE Doc.10) was filed 3/19/2014 but was frivolous and did not reflect facts in or from the trial transcript; especially the factual IAC claims against Welch and Miles. Millican could not put into the direct appeal his own IAC due to case precedence.

The ACCA MEMORANDUM CR-13-0404 CC-2010-1304 denied the direct appeal 6/6/2014 (Appendix 12 State ANSWER Exhibit D; 4:21-cv-00115-AMM-JHE Doc.10).

Millican filed an Application For Rehearing CR-13-0404 the ACCA *overruled* on 7/3/2014 (Appendix 11 State ANSWER Exhibit E; 4:21-cv-00115-AMM-JHE Doc.10).

Millican did not file a Writ of Certiorari petition to the Alabama Supreme Court due to the "discretionary rule" Alabama Rule of Appellate Procedure (ARAppP) 39(a). Per ARCrImP 32.2(c) the ACCA issued a "Certificate of Judgment" CR-13-0404 CC-2010-1304 dated 7/23/2014 (State ANSWER Exhibit F; 4:21-cv-00115-AMM-JHE Doc.10). While Millican did not file a petition for a Writ of Certiorari he did file to "exceed the cap" on indigent legal

services on 10/22/2014 that was *granted* same day instead of sending Petitioner the only copy of the indigent trial transcript so she could begin work on the State habeas (Rule 32).

### DENIED INDIGENT TRANSCRIPT AND RULE 32 ISSUES

NOT IN STATE ROA (NOT ST ROA): Petitioner wrote to Millican as well as letters to Judge Rhea, his clerk Glory Inman, and Welch begging for the transcript to be forwarded to prisoner and received a number of letters from Millican that are recorded in her TRAVERSE as Exhibits (TRAVERSE Exhibit K-A 6/3/2014, Exhibit K-B 7/21/2014, Exhibit K-C 7/28/2014, Exhibit K-D 1/9/2015; 4:21-cv-00115-AMM-JHE Doc.15) and her §2254 Petition (§2254 Petition Exhibit 207.A 1/5/2015; 4:21-cv-00115-AMM-JHE Doc.1) where he told her he had filed an Application For Rehearing and that he was setting up an appointment "to talk about her appeal" with that meeting taking place on or about 8/5/2014. Millican finally mailed transcript on 1/30/2015 (§2254 Exhibit 207.B USPS tracking #9114 9999 4423 8830 4560 57; 4:21-cv-00115-AMM-JHE Doc.1) after holding it seven (7) months;

NOT ST ROA: Petitioner filed NOTICE OF APPEAL with MOTION TO EXCEED BRIEF PAGE LIMITATIONS ON RULE 32 (CC-2010-1304) because she had to hand write the Rule 32 that Judge Rhea *granted* (CC-10-1304) (TRAVERSE Exhibit K-F Doc.15) on 6/15/2015 thus tolling the filing deadline 33 days before the AEDPA deadline of 7/17/2015.

NOT ST ROA: Because of the conditions in prison Petitioner feared running out of time to file the Rule 32 by the "Certificate of Judgment" date of 7/23/2015 so she filed a MOTION FOR THIRTY (30) DAY EXTENSION TO FILE A RULE 32 (CC-10-1304) because of Alabama Rule of Civil Procedure (ARCivP) 77(d) on or before 7/14/2015 and Judge Rhea *granted* her MOTION (CC-10-1304) on 7/21/2015. On 8/26/2015 Judge Rhea granted her AFFIDAVIT OF SUBSTANTIAL HARDSHIP and when CC-2010-1304.60 assigned.

### BATTLE FOR YEARS TO GET THE DA'S "RESPONSE" TO RULE 32

The DA failed to file a "response" in "thirty (30) days" per ARCrP 32.7(a) (CC-2010-1304.60) but most of that legal record is not in the State's ROA. Therefore, to show her diligence Petitioner lists thirty-two (32) court actions; including two writs of mandamus to the ACCA and other legal filings that are recorded in her §2254 (4:21-cv-00115-AMM-JHE Doc.1) and TRAVERSE (Doc.15) to the District Court;

(01) NOT ST ROA: 11/20/2015 letter to Court to get DA's response CC-2010-1304.60 .

(02) NOT ST ROA: 1/4/2016 letter to Court to get DA's response CC-2010-1304.60.

(03) Notarized 2/4/2016 MOTION FOR A RESPONSE FROM PROSECUTOR TO PETITIONER'S RULE 32 PER STATE RULE 32.7(a) recorded as filed 2/11/2016 (State ANSWER Exhibit G Vol.1 p112 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.10) (TRAVERSE Exhibit K-2 Doc.15) was only "MOTIONED TO JUDGE AND PLACED COPY IN DA'S BOX" per CAS (TRAVERSE Exhibit K-2 CAS CC-2010-001304.60).

(04) NOT ST ROA: 3/28/2016 PETITION FOR A WRIT OF MANDAMUS to ACCA to compel DA's response. Assigned CR-15-0727. (TRAVERSE Exhibit K-G & K-H; Doc.15)

(05) NOT ST ROA: 8/23/2016 ACCA *denied* the writ of mandamus in favor of the State (Appendix 10) Ex parte Carlotta S. Kutschenreuter, 231 So.3d 1180; 2016 Ala.Crim.App. LEXIS 1171 CR-15-0727)(TRAVERSE Exhibit K-I (relating to Exhibits K-G & K-H) Doc.15).

(06) NOT ST ROA: 6/12/2017 letter Circuit Court for DA's response (TRAVERSE Exhibit CSA.2 CC-2010-001304.60 dated 10/26/2020 Doc.15).

(07) NOT ST ROA: 11/30/2017 wrote that "it has been 27 *months* since the Court received and accepted the Rule 32" with no response from DA (TRAVERSE Exhibit K-J Doc.15).

(08) NOT ST ROA: 12/6/2017 per CAS CC-2010-001304.60 letter asks for DA response.

(09) 3/21/2018 After 30 *months* with no response from DA, filed a MOTION TO AMEND

RULE 32 PER RULE 32.7(b) AND NINETY (90) DAYS IN WHICH TO COMPLETE AND SUBMIT THE AMENDED RULE 32 (State ANSWER Exhibit G Vol.1 p113 CC-2010-001304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE Exhibit K-3 Doc.15).

(10) 4/18/2018 Judge Rhea *granted* motion to Amend (State ANSWER Exhibit G Vol.1 p115 CC-2010-001304.60; 4:21-cv-00115-AMM-JHE Doc.10) (TRAVERSE Exhibit K-4 Doc.15).

(11) AMENDED RULE 32 (State ANSWER Exhibit G Vol.1 p117-200 & Vol.2 p 201-388; 4:21-cv-00115-AMM-JHE Doc.10) submitted with IAC of appellate counsel added and letter to Judge Rhea why not mailed from prison until 7/25/2018 due to ADOC staff not knowing how to process out-going Legal Mail and a prison wide lockdown due to the death of an inmate 7/31/2018 (State ANSWER Exhibit G Vol.2 p348-49; 4:21-cv-00115-AMM-JHE Doc.10).

(12) NOT ST ROA: 9/9/2018 request for DA's response CAS CC-2010-1304.60.

(13) 1/28/2019 MOTION TO MOVE AMENDED RULE 32 TO ANOTHER CIRCUIT COURT DUE TO A CONFLICT OF INTEREST CONCERNING THE ETOWAH COUNTY DA'S STAFF filed after learning that Welch's wife had been working in DA's Office and concerned that a conflict-of-interest was why no "response". (State ANSWER Exhibit G Vol.2 p350 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE Exhibit K-6 Doc.15)

(14) NOT ST ROA: 3/13/2019 motion to ACCA with two issues (1) MOTION TO VACATE, SET ASIDE OR AMEND FLAWED DIRECT APPEAL and (2) MOTION TO MOVE PETITIONER'S RULE 32 TO ANOTHER CIRCUIT COURT Etowah Circuit Court CC-10-1304.60 for DA's response 3/13/2019. (TRAVERSE Exhibit K-P Doc.15)

(15) 3/18/2019 learned new judge, Judge Robinson, assigned when he *denied* MOTION TO MOVE AMENDED RULE 32 TO ANOTHER CIRCUIT COURT DUE TO A CONFLICT OF



INTEREST CONCERNING DA'S STAFF (State ANSWER Exhibit G Vol.2 p351 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE Exhibit K-7 Doc.15)

(16) NOT ST ROA: 3/19/2019 ACCA NOTICE TO THE PARTIES 3/13/2019 2 motions to be treated as writs of mandamus CR-18-0580. (TRAVERSE Exhibit K-Q CR-18-0580 Doc.15)

(17) NOT ST ROA: 4/2/2019 letter to ACCA that two (2) writs of mandamus filed and was second number needed to avoid confusion.(TRAVERSE Exhibit K-R Doc.15)

(18) NOT ST ROA: 4/2/2019 Pro se response to ACCA's *ORDER* (1) to vacate, set aside or amend flawed direct appeal. (TRAVERSE Exhibit K-T CR-18-0580 p1-22 Doc.15)

(19) NOT ST ROA: 4/2/2019 Pro se response to ACCA's *ORDER* (2) motion to move her Rule 32 to another circuit court. (TRAVERSE Exhibit K-U CR-18-0580 p1-10 Doc.15)

(20) NOT ST ROA: 4/16/2019 the ACCA gave DA 21 days to respond "to the allegations contained in this petition for writ of mandamus regarding the length of time the petition for postconviction relief has been pending before the trial court without the issuance of a dispositive order." (TRAVERSE Exhibit K-V CR-18-0580 Doc.15)

(21) NOT ST ROA: 4/29/2019 DA's letter to ACCA a "Supernumerary DA" was cause of why it had taken years to respond to Rule 32. (TRAVERSE Exhibit K-W CR-18-0580 Doc.15)

(22) Also 4/29/2019 DA filed MOTION TO DISMISS Rule 32. DA noted both the defense counsel's IAC claims (1)(b)[i][e] and appellate counsel's IAC claims (1)(b)[ii][a][e] but claimed all of Rule 32 claims were procedural barred and filed out-of-time. (State ANSWER Exhibit G Vol. 2 p352-354 CC-10-001304.60; 4:21-cv-00115-AMM-JHE Doc.10)

(23) NOT ST ROA: 5/7/2019 State Attorney General wrote ACCA stating DA filed response so it "was dispositive to the question of the length of time the petition for postconviction relief

has been pending in the trial court." (TRAVERSE Exhibit K-X CR-18-0580 Doc.15)

(24) 5/13/2019 Judge Robinson "*granted*" DA's MOTION (State ANSWER Exhibit G Vol.2 p355 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.) (Traverse Exhibit K-8 Doc.15).

(25) Then Judge Robinson ordered 5/13/2019 ruling "*set aside*"; was it because someone told him he had to spell out why he denied a Rule 32 per case precedence (State ANSWER Exhibit G Vol.2 p356 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.10).(?)

(26) On 5/20/2019 Judge Robinson filed second *ORDER* and summarily dismissed Rule 32 as (1) procedurally defaulted and (2) out-of-time without conducting an evidentiary hearing on the multiple IAC claims even though he did not preside over the trial himself in 2013 and no judge witnesses an appellate counsel's work on a direct appeal. (Appendix 9 State ANSWER Exhibit G Vol. 2 p357-360 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.10).

(27) REPLY BRIEF TO DA "MOTION TO DISMISS" concerning "STATE'S RESPONSE TO THE STATE OF ALABAMA" 5/20/2019. (State ANSWER Exhibit G Vol. 2 p361-73 CR-18-0580 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE K-9 Doc.15)

(28) REPLY BRIEF to STATE OF ALABAMA RESPONSE 5/20/2019 (State ANSWER Exhibit G Vol. 2 p374-84 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE K-10 Doc.15).

(29) 5/30/2019 Letter to Judge Robinson about 5/20/2019 ORDER and her REPLY BRIEFs especially since she was NOT OUT-OF-TIME to file the RULE 32 and he failed to rule on two defense counsels and appellate counsel IAC claims (State ANSWER Exhibit G Vol. 2 p386-88 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE K-13 Doc.15).

(30) 6/5/2019 Docketing Statement to Circuit Court she intends to APPEAL THE DENIAL OF RULE 32 filed by Clerk 7/1/2019 (State ANSWER Exhibit G Vol. 2 p389-399 CC-10-1304.60 CR-18-0580; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE K-6 Doc.15)

(31) NOT ST ROA: 7/9/2019 filed to ACCA a NOTICE OF APPEAL on Circuit Court DENIAL OF RULE 32 (CR-19-0982 CC-10-1304.60)(TRAVERSE K-V Doc.15).

(32) NOT ST ROA: 7/17/2019 ACCA *denied* second writs of mandamus (1) to vacate, set aside or amend flawed direct appeal and (2) to move her Rule 32 to another Circuit Court (Appendix 8 Ex parte Kutschenreuter, 309 So.3d 1253; 2019 Ala.Crim.App. LEXIS 809 CR-18-0580 CC-2010-1304.60)(TRAVERSE K-e Doc.15).

8/14/2019 BRIEF on Rule 32 (CR-18-0982 (Appeal from Etowah Circuit Court CC-10-1304.60) *docketed* 8/20/2019 (State ANSWER Exhibit H; 4:21-cv-00115-AMM-JHE Doc.10).

9/30/2019 BRIEF OF APPELLEE (CR-18-0982 State ANSWER Exhibit I; 4:21-cv-00115-AMM-JHE Doc.10).

11/7/2019 REPLY BRIEF (State ANSWER Exhibit J CR-18-0982 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10).

5/22/2020 ACCA *denied* her Rule 32 but where recorded the State conceded that Petitioner was not out-of-time to file her Rule 32 per State's rules (Appendix 7 p4 5/22/2022 CR-18-0982 CC-10-1304.60 State ANSWER Exhibit K; 4:21-cv-00115-AMM-JHE Doc.10).

APPLICATION FOR REHEARING 6/12/2020 (State ANSWER Exhibit L CR-18-0982 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10) and *overruled* 6/19/2020 (Appendix 6 State ANSWER Exhibit M CR-18-0982 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10).

Although Petitioner's dorm was on a Covid quarantine she filed a PETITION FOR WRIT OF CERTIORARI with Alabama Supreme Court (CR-18-0982; CC-10-1304.60) notarized and filed 7/2/2020. (State ANSWER Exhibit N; 4:21-cv-00115-AMM-JHE Doc.10) and ruled *WRIT DENIED. NO OPINION* 10/16/2020 that is still not on the LEXIS computer. (Appendix 5 (Petitioner's original document) Alabama Supreme Court 1190795 CR-18-0982 CC-2010-1304.60 State ANSWER Exhibit O; 4:21-cv-00115-AMM-JHE Doc.10).

1/15/2021 §2254 PETITION (Doc.1) notarized and mailed to the US District Court (US Dist)(4:21-cv-00115-AMM-JHE Doc.1). State ANSWER with Exhibits (State ANSWER with Exhibits A - O under Alabama CC-2010-1304 CR-13-0404 CC-2010-1304.60 CR-18-0982; 4:21-cv-00115-AMM-JHE Doc.10) filed 3/24/2021 but Petitioner did not receive those documents until 4/2/2021 because her dorm was on Covid quarantine.

Submitted TRAVERSE (4:21-cv-00115-AMM-JHE Doc.15; corrected pages Doc.16 (Doc.15)) but 1/12/2022 REPORT AND RECOMMENDATION *denied* §2254 Petition stating she was out-of-time to file the Federal habeas (Appendix 4 Kutschenreuter v McClain, 2022 US Dist. LEXIS 43432 (N.D. Ala., Jan. 12, 2022) (4:21-cv-00115-AMM-JHE Doc.18).

OBJECTIONS Brief (4:21-cv-00115-AMM-JHE Doc.24) filed. Per MEMORANDUM (Appendix 3 4:21-cv-00115-AMM-JHE (Docs.25 and 26) OBJECTION *overruled* 3/11/2022 (Kutschenreuter v. McClain, 2022 US Dist LEXIS 43418 (N.D. Ala., 1/12/2022))).

59(e) Motion filed 4/17/2022 (Appendix 2 4:21-cv-00115-AMM-JHE Doc.27). US Dist issued an *ORDER DISMISSING with prejudice* (4:21-cv-00115-AMM-JHE Doc.29) 59(e), COA, IFP and §2254 Petition on 5/19/2022.

Petitioner had to write 11th Circuit Court of Appeals 4/12/2022 because no forms in

prison Law Library to file and only website [www.ca11.us.courts.gov](http://www.ca11.us.courts.gov) on LEXIS computer.

Petitioner submitted several IFP request but all were denied.

Pro se NOTICE OF APPEAL (4:21-cv-00115-AMM-JHE Doc.29) mailed 5/31/2022.

US Dist ORDER treated as notice of appeal (4:21-cv-00115-AMM-JHE Doc.33) denied COA and IFP and directed Petitioner to file in the 11th Circuit dated 6/8/2022.

On 6/27/2022 Petitioner had an appointment with the ADOC Business Office to get a PMOD printout for the 11th Circuit. On video Petitioner handed over her IFP to go with the PMOD printout (Ms. Edwards refused to sign) in a sealed Legal Mail Envelope but that Legal Mail Envelope never reached the 11th Circuit.

Petitioner filed a Motion For A 14 Day Extension Of Time an Official Application For A Certificate of Appealability (COA) (11th Circuit No. 22-11893-J) 7/1/2022, revised 7/25/2022, after calling Case Manager Ms. Burney-Smith on 6/30/2022 to verbally request the 14 day extension of time because her Legal Mail untimely and dorm under COVID quarantine again.

7/19/2022 letter to 11th Circuit concerning an ADOC Business Office employee never mailing out her Legal Mail that was handed over 6/27/2022 at the Business Office window containing a CIP, a PMOD printout and IFP request and the ADOC violating *THE PRISON LITIGATION REFORM ACT, PUB. L. NO. 104-134, §804*. Capt. Coleman did search for the 6/27/202 Legal Mail that the ADOC camera showed Petitioner gave to Ms. Edwards but that legal mail was never found. Warder McClain supplied another PMOD printout and IFP forms to resubmit to the 11th Circuit because no forms accessed in Law Library and only by website.

7/26/2022 the 11th Circuit Application For a COA (22-11893-J) was *denied* on 11/17/2022 but received 11/29/2022 (Appendix 2).

Motion For Reconsideration to the 11th Circuit (22-11893-J) was *denied* USPS post mark 12/29/2022 (Appendix 1 as not on LEXIS computer yet) but not received until 1/9/2023 because ADOC officer that passes out Legal Mail was out of work due to surgery.

NOTE: There are only cases cited from the 5th and 11th Circuit Court of Appeals, Alabama and US Supreme Court on the Alabama Department of Corrections (ADOC) LEXIS computer in the prison Law Library which has broken hyperlinks and Petitioner has to search three places just for Appendix 2 is under filename 0511hot.NFO "US Court of Appeals - 5th and 11th Circuit - Case Update"; but Appendix 4 is under filename 1ykcases.NFO "US Dist Court - 11th Circuit (2018-Present)"; and still Appendix 3 is under filename ykhot1.NFO "US District Court - 11th Circuit Case Update."

Also, there is no outside aid to assist inmates with legal filings nor are there adequate materials such as correct forms needed nor editions of either the *The Bluebook: A Uniform System of Citation* or *ALWD [Association of Legal Writing Directors] Citation Manual; A Professional System of Citation* in violations of *Bounds v Smith*, 430 US 817, 52 L.Ed.2d 72, 97 S.Ct. 1491 (1977) and *Lewis v Casey, Jr, et al.*, 518 US 343, 135 L.Ed.2d 606, 116 S.Ct. 2174 (6/24/1996)

## REASONS FOR GRANTING THE PETITION

### STATE COURT RULINGS THAT PREJUDICED PETITIONER CAN ALLOW EQUITABLE TOLLING FOR §2254 AND WRIT PETITIONS

The States have been cloaked in difference for so long that the States have crafted rules and laws that clearly interfere with not only a petitioner's right to a "fair trial" but also with the direct and habeas appeal process. Therefore, Petitioner seeks a Writ of Certiorari from the US Supreme Court in order to brief the questions of whether or not the State actively interfered with her 5th, 6th and 14th Amendment Constitution rights to a fair trial and appeal rights.

Case precedence requires that during the "capital-sentencing phase" for a capital offense if defendants received IAC because of a lack of "mitigating defense" a "reverse and remand" is required to correct the error. When a person on trial for a non-capital murder has no mitigating defense during trial because their two defense counsels lacked basic criminal law skills and used a trial strategy that changed a Not Guilty and NGRI to a "guilty but for" defense thereby allowing a *Sandstrom/Franklin Error* at trial is Petitioner not allowed redress? (*Sandstrom v Montana*, 442 US 510, 99 s Ct 2450, 61 L Ed 2d 39)(*Francis v Franklin*, 471 US 307, 105 S Ct 1965, 85 L Ed 2d 344 (1985) Per *Strickland v Washington*, 466 US., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, and *US v Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) this Court ruled yes it does warrant intervention to correct the 5th, 6th and 14th Amendment violations during trial (*Williams v Taylor* (2000) 529 US 362, 146 L.Ed.2d 389, 210 S.Ct. 1495).

Per this Court "appellate court's deference to counsel's strategic decision not to present every conceivable mitigating defense possible, despite the fact that counsel had based this alleged choice on an unreasonable investigation, was objectively unreasonable." And "the lack

of mitigating evidence at sentencing was prejudicial to the accused." *Porter v McCollum* (2009, US) 175 L.Ed.2d 398, 130 S.Ct. 447. While *Porter*, supra, is a capital case Petitioner was especially harmed during trial when "the lawyers' duty to conduct a thorough investigation of possible mitigating evidence is well established by our cases *Porter v McCollum*, ante, at 39-40, 130 S.Ct. 447, 175 L.Ed.2d 398 (per curiam); *Rompilla v Beard*, 545 US 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins*, 539 US., at 522-523, 123 S.Ct. 2527, 156 L.Ed.2d 471; *Williams v Taylor*, 529 US 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Strickland*, 466 US., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. These cases also make clear that counsel's unconsidered decision to fail to discharge that duty cannot be strategic." *Wood v Allen*, 558 US 290, 130 S.Ct. 841, 175 L.Ed.2d 738, 2010 US LEXIS 763.

Because the State's agent, Dr. McKeown, *did not* comply with the court-order for Petitioner's "Mental State At The Time Of The Offense" she went to UAB Neuropsychological. The UAB psychiatrist gave her a 4-page UAB Neuropsychological Assessment Report (UAB Report) dated 11/8/2012 with mental illness diagnoses and his business card (R678). The UAB psychiatrist told her to have Welch subpoenaed him for defense or he could not help her at trial.

Petitioner gave the UAB Report and business card to Welch and told him to subpoena the UAB psychiatrist for her trial and she took a copy to her psychiatrist, Dr. Huma Khusro. The first morning of trial Welch told her he did not subpoena the UAB psychiatrist because he wanted Dr. Carr instead and that he had received "a negative report on Dr. Carr's mental health treatment" from Dr. Khusro therefore he would not subpoena Dr. Khusro even though the State mentions her during trial (R672-73). Petitioner did not know that at that time she could have gone straight to the Court and told them she needed new defense counsel immediately.



During the three years before trial Welch did not talk to Petitioner about "trial strategy" except to mention at different short meetings with her;

(i) "being drunk was no defense in the State of Alabama" but State case precedence proves Welch wrong on his conclusion of law *if the level of intoxication reached insanity*. The State offered Jury Charge #8 which was a NGRI defense and Petitioner's blood alcohol level at the Emergency Room proved her NGRI defense that she learned about in prison on 2/5/2015 (State Exhibit 135 Gadsden Regional Medical Center Emergency Room State ANSWER Exhibit A Vol.2 C.232-253 CC-10-1304; 4:21-cv-00115-AMM-JHE Doc.10);

(ii) there was sufficient proof that Petitioner was mentally ill upon arrest when she was taken to the ER and upon arrest she was on suicide watch for eleven (11) days in Jail. Welch did not "counsel" Petitioner to abandon her not guilty and NGRI defense because "it had little chance to succeed" as was done in *Knowles v Mirzayance* (2009) 556 US 111, 129 S.Ct. 1411, 173 L.Ed.2d 251. Welch once said he was afraid Petitioner would spend more time in a mental hospital. But did Welch not investigation her mental health history because of Dr. Carr who stated at trial he did not believe "mental health testing" (R678 lines 14-15). Did Welch even order Petitioner's mental health records from Texas and Alabama that covered three decades? Did Welch contact the UAB psychiatrist? Did Welch just rely on the advice of Dr. Carr to not use the NGRI defense? Petitioner recently learned on 1/18/2023 about Terry Greer, a pastor who killed his wife in 2013 (CC-2013-002134; CC-2013-002135; Jefferson County, Alabama), and did use NGRI, and found not guilty due to a new medication he was taking and he was assigned to a mental hospital for five years until he was released to a half-way house in 2018 which proves Welch's trial strategy ill informed; and

(iii) the third trial "strategy" Welch mentioned was to throw Petitioner's son "under the bus" and she adamantly refused because her son was at work and was a victim of the religious, verbal, emotional and physical domestic violence by his father's hand too.

The adversarial process against the State failed her at trial because;

(a) one or both defense counsels changed her original plea to a "guilty but for" Battered Spouse defense that is not even recognized in the State of Alabama instead of NGRI;

(b) one or both defense counsels refused to subpoena the UAB psychiatrist and instead caused a conflict-of-interest when lead DA said Dr. Carr was Welch's "Wednesday weekly golfing buddy" during closing argument. The lead DA used the UAB Report to thrash Dr. Carr on the stand where Dr. Carr claimed Petitioner was not mentally ill (R659, 677-78) and stated the trial was not a defense of NGRI (R681-82);

(c) Miles announced in court that Petitioner would testify when she did not want to (R129-30) and Judge Rhea made her get on the stand to swear she would testify and ruled that she would testify first or no defense witnesses could (R367-73) in violation of *Brooks v Tennessee*, 406 US 605, 32 L.Ed.2d 358, 92 S.Ct. 1891 (1972), and lead DA said it was clear Petitioner was conflicted about testifying at all (R371 lines 8-10). Therefore, Petitioner was forced to give up her 5th Amendment right not to testify so that she could obtain her 6th Amendment right for any defense witnesses to testify which was a violation of her Constitution right to a fair trial because this Court has ruled that "[15,16] Forcing a criminal defendant to surrender one constitutional right "in order to assert another" is "intolerable." *Simmons v US*, 390 US 377, 394, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968) that Millican did not record in direct appeal;

(d) Neither Welch or Miles knew basic criminal law rules of evidence and Miles said that one

of the rules was "ridiculous" (R387) that the four DAs for the State tried to explain to them they were allowed to use in order to actually help their client during the trial.

(e) Welch and Miles failed to introduce or use any mitigating evidence to defend Petitioner.

Her 1.09 blood alcohol level the State introduced with zero testimony upon it (noted above under (i) State Exhibit 135) as they rested (R352-53). Because of the strength of State Exhibit 135 for Petitioner's defense the State offered Jury Charge #8 an "insanity level intoxication defense" that Judge Rhea refused because Welch and Miles denied her NGRI defense. Did Welch or Miles even subpoena the ER Report themselves? If so when?

8. I charge you ladies and gentlemen of the jury, in a murder case, voluntary intoxication is no defense, unless the degree of intoxication amounts to insanity and renders the accused incapable of forming an intent to injure. *Lister v State*, 437 So.2d 622 (Ala.Crim.App. 1983); *Crosslin v State*, 446 So.2d 675 (Ala.Crim.App. 1983)(State Jury Charge #8 C.40 State ANSWER Exhibit A Vol.1 CC-10-1304; 4:21-cv-00115-AMM-JHE Doc.10)(Emphasis added.);

(f) Welch and Miles allowed a juror who declared four times he had an aunt that worked in the DA's Office (R28, 85, 90, 100) and became jury foreman. Did the two defense counsels not know about §12-16-150(4) to even challenge that juror during the trial's voir dire?;

(g) Welch and Miles failed to ask for the "opening and closing statements" per ARCrP 19.4(b). Another example of Alabama's court rules that deny petitioners due process of law under the 14th Amendment when a trial judge can refuse to have the opening and closing statements recorded and transcribed to deny those crucial records to be included in the ROA. When those records were not specifically requested by Welch and Miles they rendered IAC, not only in her appeal rights, but in basic reasonable legal practices during a murder trial. Petitioner "reconstructed" from the "objections" during opening and closing for the Rule 32 and §2254

petitions (State ANSWER Exhibit A Vol.1-7; C.79, R134-136 opening objections; R378 DA said what all the ex-wife was going to testify to but never put her on the stand; R380-381 DA claimed Petitioner was a "witch" during opening; R798 DA stated the so-called mental health expert (Dr. Carr) "Their expert. The one they picked to bring to court.," during closing). (AMENDED RULE 32 State ANSWER Exhibit G Vol.2 p324-331; 4:21-cv-00115-AMM-JHE Doc.10)(§2254 Petition GROUND 9; 4:21-cv-00115-AMM-JHE Doc.1)

While Millican did include the opening and closing issue in his direct appeal he did not argue it as an IAC claim against the two defense counsels therefore he rendered IAC:

"V. That the Defendant was prejudiced by the incomplete record served to her appellate counsel. The record served to the appellate counsel did not include the opening and closing statements by the state and Defendant's trial counsel. The lack of such a large portion of the record warrants this Court to reverse the Trial Court's judgment and Order that a new trial be held.," (DIRECT APPEAL CC-2010-0404 3/19/2014 State ANSWER Exhibit B; 4:12-cv-00115-AMM-JHE Doc.1)

These are just some of Petitioner's Rule 32 claims but those IAC claims above prove that the adversarial process against the State failed for Petitioner during a murder trial and the direct appeal process to correct the IAC of defense counsels failed too. Specifically notable here is the State ignored their own case precedence because a claim of IAC on appellate counsel would have had to be addressed by the original trial court judge in 2013 or the newly appointed judge in 2019 because no judge witnesses the work done by an appellate counsel. See *Harville v State*, 772 So.2d 1199 (Ala.Crim.App. 1999) LEXIS 273 ("Summary denial of defendant's petition for post-conviction relief was improper since defendant's argument that his appellate counsel was ineffective could not have been raised at trial or on direct appeal.")

When a direct appeal, the first-appeal-of-right with guaranteed effective assistance of

counsel per *Evitts v Lucey*, 469 US 392, 83 L.Ed.2d 821, 105 S.Ct 830 (1985) as the ACCA states in their MEMORANDUM (Appendix 7 p5-8), does not reflect facts from the transcript that direct appeal effort was ineffective to protect the Constitutional rights of the indigent Petitioner and her due process rights to *effective* assistance of counsel on direct appeal were violated. While "This court does not sit as an appellate court for the Alabama state trial courts. See e.g., *Herring v Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1355 (11th Cir. 2005) ... this court may consider only whether constitutional error occurred." See *Trevino*, 569 U.S. at 421. *Trevino v Thaler*, 569 US 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044, 2013 US LEXIS 3980

Also, the only IAC issue Millican put in his direct appeal was erroneous because defense counsels used a different trial "strategy" therefore, how could they "request a jury charge relating to" Petitioner's statutory plea Not Guilty and NGRI? Welch turned Petitioner's defense into a "guilty but for" as the State kept reminding the trial court and jurors (R131, 355, 365-66, 659, 677-78, 681-82)(State ANSWER Exhibit A Vols.1-7; 4:21-cv-00115-AMM-JHE Doc.10):

IV. That the Defendant's trial counsel was deficient in their representation of the Defendant by not requesting a jury charge relating to the Defendant's previously raised affirmative defense of not guilty and not guilty by reason of mental disease or defect. (Direct Appeal CC-2010-0404 (Appeal from CC-2010-01304 Circuit Court) 3/19/2014 State ANSWER Exhibit B 4:21-cv-00115-AMM-JHE Doc.10)(Emphasis added.)

Petitioner's claim that the direct appeal itself proves that Millican at no time was serving as her agent "in any meaningful sense of that word." *Holland v Florida*, 560 US, at -- 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (opinion of Alito, J.), is proved by the State's ROA, especially comparing the direct appeal to the actual transcript itself.

Millican's actions both in crafting the direct appeal and withholding the transcript for seven (7) months matters concerning the out-of-time ruling by the Federal Courts because if an

appellate counsel can not file a direct appeal without said transcript how can a pro se petitioner confined in a prison file any habeas without the same transcript? See *Lott v Mueller*, 304 F.3d 918, 924 (9th Cir.2002) ("We have previously held that equitable tolling may be appropriate when a prisoner had been denied access to his legal files."); *Holland v Florida*, 560 US 631, 130 S Ct 2549, 177 L Ed 2d 130, 2010 US LEXIS 4946, (*Spitsyn v Moore*, 345 F.3d 796, 798, 801 (9th Cir. 2003), at 800-802 (finding that extraordinary circumstances may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to his client's communications)); *US v Martin*, 408 F.3d 1089, 1096 (CA8 2005)(client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct)."

"Additionally, a court "must take into account the conditions of confinement and the reality of the prison system" when assessing diligence, the Court noted." *Smith v Comm'r, Ala. Dept. of Corr.*, 703 F.3d 1266 (11th Cir. 2012). Petitioner could not find Rule 32 instructions in the prison "Law Library" and she wrote Millican for a copy of the Rule 32 rules and he forwarded them which is recorded in Petitioner's letter of 1/9/2015 where she thanked Millican for forwarding the Rule 32 instructions but she also asked him again why he had not sent the transcript yet (TRAVERSE Exhibit K-D Doc.15).

Petitioner was forced to beg for her indigent transcript and then to beg for the State to respond for years because the DA failed to file a RESPONSE per ARCrP 32.7(a) in thirty (30) days to Petitioner's Rule 32. The history of Petitioner's diligent efforts towards getting the DA's RESPONSE are recorded under STATEMENT OF THE CASE and she cited thirty-two (32) legal filings of the struggle and Petitioner prays that this Supreme Court will review those

facts but she expounds upon a few here;

Petitioner was shocked and dismayed that the ACCA stated a year was not too long to wait on the DA's response and she was at a loss as to how to get the "response" but she did write the Circuit Court again asking the DA to respond on or about 6/12/2017.

Also, on 5/20/2019 Petitioner filed two reply briefs because the new judge ruled denied;

(I) REPLY BRIEF IN RESPONSE TO THE DA'S "MOTION TO DISMISS" CONCERNING THE "STATE'S RESPONSE TO THE STATE OF ALABAMA" (REPLY BRIEF CR-18-0580 CC-2010-1304.60 State ANSWER Exhibit G Vol.2 p 363-373 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE Exhibit K-9 Doc.15) where she notes that the ACCA had not ruled on both 2019 writ of mandamus yet, she mentions Judge Rhea's granting her Motion to Exceed Brief Page Limitations on 6/15/2015 therefore she was not out-of-time to file the original Rule 32, the problem of access to the courts because of few resources in the prison Law Library per *Bounds*, supra, the problems with getting incoming "legal mail" timely in prison, the Circuit Court not honoring the date the notarized date from prison as the filed date, the list of letters from Millican and the battle for the transcript, the length of time she had to wait for the DA's "response" allowing her to file an Amended Rule 32 which Judge Rhea granted among other issues with many cases cited including *State v Hurst*, 233 So.3d 941, 2015 Ala.Crim.App. LEXIS 86; *Perkins v State*, 144 So.3d 457, 2012 Ala.Crim.App. LEXIS 98; *McCoy v Louisiana*, 138 S.Ct. 1500, 200 L.Ed.2d 821, 2018 US LEXIS 2802; *Brooks v Tennessee*, 406 US 32 L.Ed.2d 358, 92 S.Ct. 1891 (1972); and *Coral v State*, 628 So.2d 954, 1992 Ala.Crim.App. LEXIS 167, to back up her reply to the DA's MOTION TO DISMISS and;

(II) a REPLY BRIEF IN RESPONSE TO THE "RESPONSE TO THE STATE OF

ALABAMA" (State ANSWER Exhibit G Vol.2 p 374-84 CR-18-0580 CC-2010-1304.60; 4:21-cv-00115-AMM-JHE Doc.10)(TRAVERSE Exhibit K-10 Doc.15) that was marked received by the Circuit Court 5/29/2019 because she knew she was not out-of-time to file her original Rule 32 petition among other complaints to refute the DA's claims in their MOTION TO DISMISS with cases cited including *Thomas v State*, 766 So.2d 860, 876, Ala.Crim.App. 1998; *Woods v State*, 221 So.3d 1125 Ala.Crim.App. 2016; *Pruett v Thompson*, 996 F.2d 1560, 1568 {221 So.3d 1150}(4th Cir. 1992) cert. denied, 510 US 984, 114 S.Ct. 487 126 L.Ed.2d 437 (1993); and *Hanna v State*, 992 So.2d 77, 2007 Ala.Crim.App. LEXIS 213.

The issue of the Rule 32 deadline being from the certificate of judgment date, while the AEDPA deadline from ARAppP 41 effects pro se inmates of timely filing the Federal habeas. Due to the scheme in Alabama per ARCrP 32.2(c) the deadline for filing a Rule 32 is 1-year from the Certificate of Judgment date. Many pro se petitioners are deceived when the Certificate of Judgment date is calculated from ARAppP 41(a) which states the certificate of judgment of the court shall issue 18 days after the entry of judgment. Even the State claims in their ANSWER page 9, under item 18., (State ANSWER Doc.10) that her deadline for the Rule 32 was 1- year from the "certificate of judgment" date of July 23, 2014. ARAppP 41(a) does not mention information about the fourteen (14) day deadline date the Magistrate Judge used. Petitioner learned of the 1-year AEDPA deadline being 7/18/2014, 14 days after Millican's Application For Rehearing was denied, instead of the State's Certificate of Judgment date of 7/23/2014 from the REPORT AND RECOMMENDATION (Appendix 4 p2 Doc.18).

The ability to research and formulate effective arguments are restricted due to the fact that the ADOC only allows the 5th and 11th Circuit Courts, the State's and US Supreme Court's



cases. Does an inmate's "right of access to courts" by withholding the Federal Court "Sister Circuits" rulings deny them full access to all of "the tools to attack their sentences, directly or collaterally, ..." that are available to other State's inmates who have resources to hire attorneys? Petitioner can not review a "Sister Circuit case" when she reads it cited in another legal filings therefore she can not discern whether or not that case would in fact aid her in formulating her argument on appeal.

It was an unreasonable application of Federal law so as to warrant habeas relief under 28 USCS §2254(d)(1) when both the ACCA and the 11th Circuit ignored the fact that Petitioner has been denied her right to habeas corpus appeal due to the lack of access to the courts for Alabama petitioners on State and Federal habeas review. The ACCA and the 11th Circuit also violated §2254(d)(2) because they unreasonably applied Federal law concerning *Bounds* and *Lewis*, supra.

The Alabama Supreme Court and 11th Circuit have ruled that if there is a claim of IAC, "and that claim cannot reasonably be presented in a new trial motion filed within the 30 days allowed by ARCrP 24.1(b), the proper method for presenting that claim for appellate review is to file a ARCrP 32 petition for post-conviction relief.," using 32.2(d);

"... In Alabama, a petitioner may allege claims of ineffective assistance of trial or appellate counsel in a Rule 32 petition filed within one year of the conclusion of direct appeal proceedings. See, e.g., ARCrP 32.2(c), *Ex parte Ingram*, 675 So.2d 863, 866 (Ala. 1996)(the proper method for presenting a claim for ineffective assistance of trial counsel that cannot reasonably be presented in a motion for a new trial is by filing a Rule 32 petition); *Murray v State*, 922 So.2d 961, 965 (Ala.Crim.App. 2005) (holding same.)" *Weldon v Givens*, US Dist. Court Middle District of Alabama, Eastern Division, 2020 US Dist. LEXIS 46941 NO. 3:20-CV-61-WKW (3/17/2020). (Emphasis added)

Therefore, Petitioner had no choice but to use ARCrP 32.2(d) for both her IAC claims

on two defense counsels and appellate counsel, as the 11th Circuit stated in *Weldon*, supra.

Petitioner asked the ACCA for a case-of-first impression concerning *Trevino*, supra, and ARCrP 24.1(b) causing the procedural default to not have had IAC claims on two defense counsels filed in a timely Motion For New Trial, and "therefore not before the courts" as the State claimed, in the first brief she ever crafted (RULE 32 BRIEF CR-18-0982 CC-2010-1304 CC-2010-1304.60 8/14/2019 State ANSWER Exhibit H; 4:21-cv-00115-AMM-JHE Doc.10) where she cited twenty-four (24) different cases including pages 37-38, 40 and 48 concerning *Trevino*, supra, ("Held: Where, as here, a State's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, the exception recognized in *Martinez* applies. Pp. 421-429, 185 L.Ed.2d at 1051-1057 ... Second, ineffective assistance of counsel on direct appellate review could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Ibid ...") and page 50 *Brooks v Jones*, 875 F.2d 30 (2nd Cir. 1989)(the US Supreme Court ruled that a lengthy delay by the State to a speedy hearing of an appeal was prejudice.) and the transcript proves that the ROA was incomplete in an attempt to get the ACCA to send the Rule 32 back to the Circuit Court under ARCrP 32.5 for an evidentiary hearing because the new judge over the Rule 32, Judge Robinson, summarily dismissed (Appendix 9) the Rule 32 even though he did not preside over the trial in 2013, Judge Rhea did.

The ACCA also ruled (Appendix 7) her Rule 32 did not comply with ARAppP 28(a)(10), that IAC claims were "not jurisdictional" and ARCrP 32 rules to procedural default her Rule 32 "brief" like they claimed in *Gaines v Price*, No. 2:15-cv-1822-VEH-TMP, 2017 US Dist.

LEXIS 80408, 2017 WL 2296962, at \*21 (N.D. Ala. May 2, 2017); that Mr. Gaines' writ of habeas was granted upon by the Federal District Court. Petitioner's Rule 32 brief (State ANSWER Exhibit H; 4:21-cv-00115-AMM-JHE Doc.10) was ruled procedurally defaulted because of the ACCA's reliance on ARAppP 28(a)(10). However, per cases such as *Gaines*, supra, a Federal court "declining to apply state-barred procedural default on habeas review because "the brief ... sufficiently supplied facts and authority that would have allowed the [state] appellate court to address the issue on the merits," *report and recommendation adopted*, 2017 US Dist. LEXIS 80036, 2017 WL 2289105 (N.D. Ala. May 25, 2017))" allows exception to protect petitioners 5th, 6th and 14th Amendment rights.

Petitioner submitted a REPLY BRIEF where she cited forty (40) different cases to argue against the State's Brief her claim that the direct appeal was erroneous thus it failed to record meritorious IAC claims on two defense counsels and there was no evidentiary hearing ordered by Judge Robinson (State ANSWER Exhibit J CR-18-0982 CC-10-1304.60; 4:21-cv-00115-AMM-JHE Doc.10). §2254(e) applies where a petitioner has failed to develop the factual basis of a claim in State court however, Petitioner developed her claims by recording and quoting from the transcript, the direct appeal, and the State's legal filings in her Rule 32 brief. It was the State that refused to conduct an evidentiary hearing on Constitutionally guaranteed IAC claims on three attorneys assigned as "agent" for the Petitioner and "... a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." *Williams v Taylor*, 529 US 420, 431-32, 120 S.Ct. 1479, 1488, 146 L.Ed.2d 435 (2000).

The State's claim that the IAC claims against the two defense counsels were not

recorded in the first Motion for New Trial (10/25/2013) and therefore procedural defaulted was erroneous because Judge Rhea ruled forty (40) days (12/4/2013) after the thirty (30) day deadline for ARCrP 24.1(b) covering "thirty (30) days after sentence is pronounced" which made any mention of any IAC on the two defense counsels out-of-time by the time appellate counsel was assigned. Per State and Federal case precedence no defense counsel can claim an IAC upon themselves and no direct appeal counsel can file an IAC upon themselves. See *Roberts v State of Alabama*, 141 So.3d 1139; 2013 Ala.Crim.App. LEXIS 83 (reversed and remanded)("Alabama caselaw questions the propriety of an attorney asserting his or her own ineffectiveness."); *People v Keener*, 275 Ill. App. 3d 1, 4, 655 N.E.2d 294, 297, 211 Ill. Dec. 391 (1995)("A *per se* conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness."); *Commonwealth v Fox*, 476 Pa. 475, 478, 383 A.2d 199, 200-01 (1978)("recognizing that "it is unrealistic to expect trial counsel to argue his own ineffectiveness."). Therefore, Petitioner had to put Welch's, Miles' and Millican's IAC claims in her Rule 32 (State ANSWER Exhibit G Vol.1 p117-200 & Vol.2 p 201-388; 4:21-cv-00115-AMM-JHE Doc.10) per ARCrP 32.2(d).

Because Millican's claims, especially the IAC of defense counsels, in the direct appeal were frivolous whether he did, or did not, take his direct appeal to the Alabama Supreme Court is moot. Petitioner did take her Rule 32 all the way to the Alabama Supreme Court (Appendix 5) and has exhausted all of her claims in the State courts.

"To ensure exhaustion, petitioners must present their claims in this manner of clarity throughout "one complete round of the State's established appellate review process." *O'Sullivan v Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 1732, 144 L.Ed.2d 1 (1999). As long as state supreme court review of a prisoner's claims is part of a state's ordinary appellate review procedure, prisoners of that state must present their claims to

the state supreme court to preserve those claims for federal review, even if review by that court is discretionary. See id. at 848-49, 119 S.Ct. at 1734." *Kelly v Sec't for the DOC Florida*, 377 F.3d 1317; 2004 U.S.App. LEXIS 15249; 17 Fla. L. Weekly Fed. C 804 (Emphasis added.)

The ACCA did a sua sponte "merits" ruling on the appellate counsel IAC claims using *Strickland*, supra, after ruling that she was procedurally barred to file anything (Appendix 7). Therefore, Petitioner asks for a review of her IAC claims against all three court appointed counsels from that merit ruling because her 6th and 14th Amendment rights to *effective* assistance was violated. And because this Court has ruled that a;

"State prisoner's claim - unsuccessfully raised before state's highest court on postconviction review of prisoner's murder conviction and death sentence, and raised before Supreme Court on certiorari to review requirements of due process clause of Fourteenth Amendment, is properly presented for review by Supreme Court, despite prisoner's failure to object to instruction at trial or to raise issue on direct appeal, because last state court in which review could be had considered prisoner's claim on merits." *Victor v Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583, 8 Fla.L.Weekly Fed. S 10, 94 Cal. Daily Op. Service 1982, 94 D.A.R. 3687 (1994), habeas corpus proceeding, remanded, 231 F.3d 1140 (9th Cir. 2000)(Emphasis added.)

Petitioner then asked was her IAC claims covered per *Trevino* in her §2254 petition (§2254 PETITION GROUND FIVE p21-22 1/15/2021 Doc.1-5) and in her 59(e) Motion to the District Court (59(e) Motion p19-20 4/7/2022; 4:21-cv-00115-AMM-JHE Doc.27) but the District Court ruled that because she was out-of-time to file the §2254 petition they did not have to review her claims of IAC on two defense counsels and the appellate counsel. As a pro se layperson Petitioner asked the wrong question of the District and 11th Circuit Courts as to whether *Trevino* covered her Rule 32 because it does per *Gaines*, supra, that she just found the week of 3/6 - 3/10/23 on the ADOC LEXIS computer.

However, when the ACCA refused to address the IAC claims because they were "not

jurisdictional," as well as using ARAppP 28, ARCrP 32, and *Strickland*, supra, it was an unreasonable application of Federal law in violations of the 5th, 6th and 14th Amendments and warrants habeas relief under §2254(d)(1) and a Federal court must then resolve those claims without deference AEDPA otherwise requires. *Panetti v Quarterman* (2007, US) 127 S.Ct. 2842, 168 L.Ed.2d 662.

The ACCA also violated §2254(d)(2) regarding procedural default for defendants on IAC review on appellate counsel claim because they unreasonably applied Federal law using *Strickland*, supra, without an evidentiary hearing being conducted denying review on any of her IAC claims on three different court-appointed counsels to be investigated.

Per *Maple v Thomas*, 565 US 266, 132 S.Ct. 912, 181 L.Ed.2d 807, 2012 US LEXIS 905. ("[7]Cause for a procedural default exists where "something external to the petitioner, something that cannot fairly be attributed to him[,] ... 'impeded [his] efforts to comply with the State's procedural rule.'" *Coleman*, 501 US., at 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (quoting *Murray v Carrier*, 477 US 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); emphasis in original) if Petitioner was out-of-time to file the §2254 then the violations of her 5th, 6th, and 14th Amendment rights at trial, and on the Constitutionally guaranteed direct appeal, warrant §2244(d) granting of equitable tolling to review her IAC claims on the three court appointed counsels because the State itself impeded her habeas appeal rights due to their agents and rules.

§2244(d)(1)(B) states that the 1-year limitation period shall begin to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the US is removed, if the applicant was prevented from filing by such State action." §2244(d)(2) allows the deadline for Federal filings to be tolled when a prisoner

legitimately pursues state remedies in good faith.

"Equitable tolling...""is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v US*, 177 F.3d 1269, 1271 (11th Cir. 1999). ... (stating that the Court has allowed equitable tolling in situations where complainant has been induced or tricked by his adversary's misconduct into allowing the filing date to pass); *Arce v Garcia*, 400 F.3d 1340, 1349 (11th Cir. 2005)(noting that in order to invoke equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment.)" *Lawrence v State of Fla*, 421 F.3d 1221; 2005 US App. LEXIS 18424. (Emphasis added.)

Petitioner requests this Court to rule on whether or not the deception built into the State's prosecution and appellate system grants equitable tolling when defendant's Constitutional rights were violated during trial and on appeal by the State. When petitioner was granted extra time to file their Rule 32 before the AEDPA 1-year deadline does that toll the §2254 petition filing?

"We hold that the answer is yes, a conclusion dictated by our own precedents and by the Supreme Court's teaching that a state post-conviction application remains "pending" for statutory tolling purposes "as long as the ordinary state collateral review process is 'in continuance.'" *Carey v Saffold*, 536 U.S. 214, 219-20, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002). Concluding that Leonard was entitled to statutory tolling and that his petition was therefore not time-barred, we vacate the district court's dismissal and remand for further proceedings." *Leonard v Deville*, US Court of Appeals for the Fifth Circuit, 960 F.3d 164; 2020 US App. LEXIS 15618. (Ephasis added.)

Even though the ACCA procedurally defaulted Petitioner's Rule 32 it is also where the State conceded she was **not out-of-time** to file her original Rule 32 per State rules (Appendix 7 p4). However, the State claimed in District Court that the §2254 "was filed over five years too late and should be dismissed as time-barred..." and Petitioner "waited five and one-half years too late to file the §2254" (State ANSWER Doc.10) was to continue to impede her access to the courts in appealing her unlawful conviction. Although most of the thirty-two (32) legal filings listed under STATEMENT OF THE CASE are not in the State's ROA Petitioner proves her

diligence in begging for years for the DA's response to her Rule 32. Because it took the DA years to file a response Judge Rhea was no longer on the bench and a new judge appointed, Judge Robinson, who did not even mention in his ORDER (Appendix 9) summarily denying the Rule 32 any of the IAC claims on two defense counsels counsels. Judge Robinson also failed to rule on the specific issue of the IAC claims against the direct appeal counsel in his ORDER. Since Judge Robinson did not hold any evidentiary hearings on her Rule 32 IAC claims on three different court appointed counsels, and her other claims such as prosecutorial misconduct, that he personally did not witness during trial Judge Robinson failed to honor the agreement between the State and the Federal government concerning defending the 5th, 6th and 14th Amendment Constitutional rights of this Petitioner.

"The doctrine barring procedural defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Trevino v Thaler*, 569 ... Such impediments ..." of IAC at a stage where the petitioner had a right to counsel." *Id.* " *Deardorff v Bolling*, 2022 US Dist. LEXIS 178510 (9/30/2022)(Emphasis added.)

Petitioner should have been granted equitable tolling and redress in the District Court or the 11th Circuit because Judge Rhea *granted* Petitioner's MOTION TO EXCEED BRIEF PAGE LIMITATIONS ON RULE 32 (TRAVERSE Exhibit K-F Doc.15) on 6/15/2015. After that motion was *granted* on 6/15/2015 it tolled 33 days before AEDPA deadline. When Judge Rhea granted that motion he accepted her Rule 32 and granted within the meaning of §2244(d)(2). Thus, the factual AEDPA tolling date was 6/15/2015 which was 33 days before 7/18/2015 the AEDPA deadline because "Finally (and this is the sole point on which we granted certiorari), the panel held that respondent's 1995 motion was "properly filed" within the meaning of §2244(d)(2) because it complied with those rules "governing" whether "an



application for state postconviction relief [is] recognized as such” under state law. *Id.*, at 123. *Artuz v Bennett*, 121 S.Ct. 361, 148 L.Ed.2d 213, 531 US 4 (2000). Judge Rhea also *granted* her MOTION FOR THIRTY (30) DAY EXTENSION TO FILE A RULE 32 on 7/21/2015 (TRAVERSE Exhibit K-E Doc.15).

Petitioner would not have been found guilty of intentional murder if she has received any type of defense against the adversarial process of against the State. Petitioner has proved her IAC against two defense counsels and an appellate counsel for not including those IAC claims in the only Constitutionally guaranteed first-appeal-of-right. Petitioner has taken her claims to the Alabama Supreme Court. A State court decision is "contrary to" federal law when a state court arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the state court facts are materially indistinguishable from a Supreme Court case, yet the state court decides the case differently. *Thaler v Haynes*, 559 U.S. 43, 47, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010).

Also, the US Supreme Court construes pleadings so as to do justice and per §2241(c)(3) this Court can rule directly themselves or reverse and remand to the lower courts for redress of IAC on two defense counsels and an appellate counsel. Petitioner humbly prays the US Supreme Court will grant review of her complaint that her 5th, 6th, and 14th Amendment rights were violated due to IAC by defense counsels and then on direct appeal by appellate counsel. She also prays if writ granted she be assigned court-appointed counsel to protect her appeal rights and rights.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,




CARLOTTA KUTSCHENREUTER

AIS 291809

TPW, DORM B, B-1-25A

8966 US HWY 231

WETUMPKA, AL 36092



SWORN TO AND SUBSCRIBED BEFORE ME THIS  
24 DAY OF March, 2023  
Jacqueline Ruiz  
NOTARY PUBLIC OF ALABAMA  
MY COMMISSION EXPIRES 06-28-25