

NO. _____

In The Supreme Court of the United States

MICHAEL DAVID CARRUTH, Petitioner

VS.

JOHN Q. HAMM, Commissioner, Alabama Department
of Corrections, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

When a state by statute or rule imposes a duty upon appellate counsel for the defendant-appellant in a criminal case to file a petition for a writ of certiorari with the state's highest appellate court after an adverse decision by a lower appellate court, does the defendant-appellant have a right to counsel through the point of the filing of a petition for a writ of certiorari in the appellate process?

Whether a state court procedure about which state trial courts were apparently unsure and which appears to have been addressed only once in a published appellate opinion in a non-capital case not involving a state mandate that appellant counsel file a petition for a writ of certiorari after an adverse decision of a lower appellate court in a death penalty case was not firmly established and regularly followed and whether the argument of the issue asserted to be barred was fairly presented in state court albeit not by utilizing a designated rule of procedure the designation of which was not firmly established and regularly followed but by otherwise presenting through and to the state's highest court?

LIST OF PARTIES

The Petitioner (and petitioner-appellant below) is Michael David Carruth . The Respondent (and respondent-appellee below) is the commissioner of the Alabama Department of Corrections, a position currently held by John Q. Hamm. Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF RELATED PROCEEDINGS

State Court

State v. Carruth, No. CC-2002-378, 379, 380, and 381 (Circuit Court for Russell County, Alabama) (capital trial and sentencing)

Carruth v. State, CR-03-0327 (Ala.Crim.App. Aug. 26, 2005) (affirming conviction and sentence)

State v. Carruth, No. CC-2002-378.70 (Circuit Court for Russell County, Alabama) (granting in part, later reversed; denying relief in post conviction)

Ex parte Carruth, No. 1070135 (Ala. Feb. 8, 2008) (denying Rule 2, Ala.R.App.P. motion to allow out of time petition for writ of certiorari)

State v. Carruth, CR-06-1967 (Ala.Crim.App. May 30, 2008) (reversing grant of Rule 32.1(f), Ala.R.Crim.P. out of time petition for writ of certiorari)

Ex parte Carruth, No. 1071618 (Ala. Aug. 24, 2009) (quashing previously issued writ of certiorari to review reversal of Rule 32.1(f), Ala.R.Crim.P. grant of out of time petitioner for a writ of certiorari)

Carruth v. State, CR-12-0505 (Ala.Crim.App. Mar. 14, 2014) (affirming denial of relief in post conviction)

Ex parte Carruth, No. 1130852 (Ala. Oct. 17, 2014) – denying writ, no opinion)

Federal Court

Carruth v. Alabama, No. 09-6133 (Supreme Court of the United States Nov. 30, 2009) (denial of petition for writ of certiorari regarding out of time petition for writ of certiorari)

Carruth v. Hamm, No. 2:14-CV-1107-WKW , (M.D.Ala. Sept. 20, 2022) (denying petition for writ of habeas corpus)

Carruth v. Comm'r Ala. Dept. of Corr. No. 22-13548 (11th Cir. Mar. 1, 2024)(affirming denial of petition for writ of habeas corpus)(Apr. 8, 2024 denied petition for panel rehearing)

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Appendix C: Memorandum Opinion and Order, *Carruth v. Hamm*, No. 2:14-CV-107-

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Appendix D: Opinion, *Carruth v. Alabama*, No. 09-6113, U.S.Sup.Ct. Nov. 30, 2009

Appendix E: Opinion, *Ex parte Carruth*, No. 1071618, Ala. Apr. 24, 2009

Appendix F: Opinion, *Carruth v. State*, No. CR-06-1967, Ala.Crim.App. May 30, 2008

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael David Carruth, an indigent prisoner sentenced to death in Alabama, requests that the Court grant certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's opinion is published and can be found at *Carruth v. Comm'r Ala. Dep't. of Corr.*, 93 F.4th 1338 (11th Cir. 2024) Pet. App. 1a. The United States District Court for the Middle District of Alabama's Final Judgment and contemporaneously issued memorandum opinion can be found at *Carruth v. Hamm*, 2022 U.S. Dist. LEXIS 169587, 2022 WL 4357471 (M.D.Ala. 2022). Pet. App. a22. The United States District Court for the Middle District of Alabama's decision granting in part and denying in part a certificate of appealability can be found at *Carruth v. Hamm*, 2022 U.S. Dist. LEXIS 203143, 2022 WL 17492261 (M.D.Ala. 2022). Pet. App. a19. The order of the United States Court of Appeals for the Eleventh Circuit denying Carruth's motion for panel rehearing is unreported and is attached as Appendix M. Pet. App. a160.

JURISDICTION

On March 1, 2024, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court for the Middle District of Alabama's denial of Carruth's petition for a writ of habeas corpus. *Carruth v. Comm'r. Ala. Dep't. of Corr.*, 93 F.4th 1338 (11th Cir. 2024). Pet.App. 1a. Carruth timely filed a petition for panel rehearing which was denied on April 8, 2024. Appendix M. Pet. App. a160.

This petition is now timely filed and this Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY AND RULES PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to ... the Assistance of Counsel for his defense.”

The Fourteenth Amendment to the United States Constitution provides in relevant part: “No State shall . . . 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.”

18 U.S.C. § 2254, provides in relevant part:

(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.

Ala. Code §§ 13A-5-53, provides in relevant part:

(a) ...[A]ny case in which the death penalty is imposed [is] ... subject to review by the Alabama Supreme Court....

(b) In determining whether death was the proper sentence in the case the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court....

(c) After performing the review specified in this section, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court....

Ala. Code § 15-12-22(b) provides in relevant part:

If it appears that the indigent defendant desires to appeal and is unable financially or otherwise to obtain the assistance of counsel on appeal and the indigent defendant expresses the desire for assistance of counsel, the trial court shall appoint counsel to represent and assist the indigent defendant on appeal, through the indigent defense system for such cases.

Rule 2(b), Ala.R.App.P provides in relevant part:

...[F]or good cause shown, an appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. ... [T]he supreme court may extend the time for filing a petition for certiorari in a criminal case in which the death penalty was imposed as punishment.

Rule 39(a)(2), Ala.R.App.P. provides in relevant part:

When the Court of Criminal Appeals has affirmed a sentence imposing the death penalty, counsel who represented the appellant on the appeal to the Court of Criminal Appeals or successor counsel ***shall*** prepare and file in the Supreme Court a petition for a writ of certiorari for review of the decision of the Court of Criminal Appeals.

Rule 32.1(f), Ala.R.Crim.P. in effect at relevant times provided:

Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute relief on the ground that:

....

(f) The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

STATEMENT OF THE CASE

State Court Trial

In April of 2002, a Russell County, Alabama grand jury indicted Michael David Carruth on four counts of capital murder in the death of W.B.B., one count of attempted murder of Forest Bowyer, one count of robbery in the first degree, and one count of burglary in the first degree. (Doc.¹ 21-1 at 94-96, Doc. 21-5 at 42-43, Doc. 21-10 at 1364-65, Doc. 21-10 at 184-185, Doc. 21-8 at 13-14). On October 9, 2003, a jury found Carruth guilty of all charges. (Doc. 21-25 at 143-144). “The murder was made capital (1) because it was committed during the course of a kidnapping in the first degree, see § 13A-5-40(a)(1), Ala.Code 1975; (2) because it was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala.Code 1975; (3) because it was committed during the course of a burglary in the first degree, see § 13A-5-40(a)(4), Ala. Code 1975; and (4) because [W.B.B.] was less than 14 years of age, see § 13A-5-40(a)(15), Ala. Code 1975.” *Carruth v. State*, 927 So. 2d 866, 868-869 (Ala.Crim.App. 2005). A penalty phase trial began the next day. Neither the State of Alabama nor Carruth called any witnesses. (Doc. 21-25 at 143-144). The State of Alabama and Carruth stipulated that Carruth had no significant history of prior criminal activity. (Doc. 21-25 at 174). The jury returned a verdict in favor of a death sentence on that same day. (Doc. 21-26 at 4.) On December 3, 2003, the state trial judge sentenced Carruth to death on each of the capital murder charges and

¹ “Doc” citations are to the ECF document number as filed in the district court below.

consecutive terms of life imprisonment for each of the attempted murder, robbery, and burglary charges. (Doc. 21-26 at 13-30).

State Court Direct Appeal

On August 26, 2005, the Alabama Court of Criminal Appeals affirmed Carruth's capital conviction and sentence of death and vacated Carruth's convictions and sentences for robbery and burglary as violative of double jeopardy. Carruth's rehearing application was denied on October 14, 2005. *Carruth v. State*, 927 So. 2d 866 (Ala.Crim.App. 2005). Pet.App. a111. Although required to do so, Carruth's lawyer failed to file a petition for a writ of certiorari with the Alabama Supreme Court.

State Court Post Conviction

On October 26, 2006, Carruth filed a Rule 32, Ala.R.Crim.P. petition in the Circuit Court of Russell County. (Doc. 21-27 at 8-91). Counsel was later appointed for Carruth. (Doc. 21-27 at 95). On July 2, 2007, Carruth filed an amendment to the Rule 32 petition. (Doc. 21-27 at 154-165).

Carruth requested, among other things, leave to file an out-of-time petition for a writ of certiorari in the Alabama Supreme Court. On August 2, 2007, the circuit court, stating that "[t]o the extent it ha[d] jurisdiction," "granted [Carruth] permission to file an Out of Time Petition for Writ of Certiorari to the Alabama Supreme Court" and reserved judgment on the remaining issues in the Rule 32 petition." Pet. App. a119. The State of Alabama appealed that order. (Doc. 21-28 at

2). The circuit court stayed the proceedings pending resolution of that appeal. (Doc. 21-31 at 63).

In October of 2007, while the State of Alabama's appeal was pending, Carruth filed a motion with the Alabama Supreme Court seeking an extension of time for filing a petition for a writ of certiorari. (Doc. 21-28 at 63-69). The motion, referencing Rules 2 and 39, Ala.R.App.P., stated that it would be "in the best interest of justice to require compliance by appellate counsel with the mandatory provisions of the Alabama Rules of Appellate Procedure designed to afford due process rights to individuals sentenced to death." (Doc. 21-28 at 67). That motion was denied on February 28, 2008. Pet. App. a121.

In briefing the out of time certiorari petition Rule 32.1(f), Ala.R.Crim.P. issue in the Alabama Court of Criminal Appeals, Carruth, citing *Strickland v. Washington*, 466 U.S. 668 (1984) and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), argued that the grant of relief was proper. (Doc. 21-28 at 46-59). The Alabama Court of Criminal Appeals reversed the trial court's order granting Carruth permission to file an out of time petition for writ of certiorari on May 30, 2008 and denied rehearing on August 15, 2008. *State v. Carruth*, 21 So.3d 764 (Ala.Crim.App. 2008). Pet. App. a111. Carruth petitioned the Alabama Supreme Court for review. (Doc. 21-28 at 136-185). The petition stated in its introduction: "Counsel failed to provide notice to any court or Mr. Carruth of his default of Mr. Carruth's appeal,...." (Doc. 21-28 at 144). In his brief in the Alabama Supreme Court, Carruth argued that allowing him to file an out-of-time appeal would remedy a violation of his right to counsel under the Sixth,

Eighth and Fourteenth Amendments to the United States Constitution. (Doc. 21-29 at 4). He stated:

Appointed counsel abandoned his representation of Mr. Carruth without prior notice to any court. More importantly, appointed counsel abandoned Mr. Carruth without notice to Mr. Carruth and without filing a petition for writ of certiorari. Such conduct clearly constitutes deficient performance which prejudiced Mr. Carruth. Such actions violated Mr. Carruth's right to effective assistance of counsel before [the Alabama Supreme Court] on direct appeal.

(Doc. 21-29 at 26).

Appointed counsel provided ineffective assistance before the Court of Criminal Appeals by failing to complete his duties regarding Carruth's first appeal as of right. Appointed counsel's representation before the Court of Criminal Appeals did not end when he filed the brief. Rather, counsel had a duty to inform Mr. Carruth when his appeal to the Court of Criminal Appeals had been denied and to consult with him about any further appeals. The failure to do so constituted ineffective assistance of counsel in his representation of Mr. Carruth before the Court of Criminal Appeals.

(Doc. 21-29 at 29)

In addition to the duty of appellate counsel to consult with Mr. Carruth regarding a petition for certiorari, counsel at the Court of Criminal Appeals had a duty to inform Mr. Carruth that the Court of Criminal Appeals had denied rehearing.

(Doc. 21-29 at 28). Carruth cited *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), as authority. (Doc. 21-29 at 27-15). The Alabama Supreme Court later quashed a previously issued writ, thus, denying Carruth relief. *Ex parte Carruth*, 21 So.3d 770 (Ala. 2009). Pet. App. a107.

On August 24, 2009, Carruth filed a petition for a writ of certiorari in this Court. (Doc. 21-30 at 2-76). This Court denied the petition on November 30, 2009. *Carruth v. Alabama*, 558 U.S. 1052 (2009). Pet. App. 105.

On February 21, 2012, the state circuit court dismissed several of Carruth's Rule 32 claims and ordered an evidentiary hearing on the remaining issues. Pet. App. a151. After the evidentiary hearing, on December 26, 2012, the state circuit court denied relief on the remaining claims in Carruth's Rule 32 petition. Pet. App. a148.

The Alabama Court of Criminal Appeals affirmed the denial of Carruth's Rule 32 petition and overruled an application for rehearing. *Carruth v. State*, 165 So.3d 627 (Ala.Crim.App. 2014) Pet. App. a125.

On October 17, 2014, the Alabama Supreme Court denied Carruth's petition for writ of certiorari. Pet. App, 123.

Federal Post Conviction

On October 23, 2014, Carruth petitioned the United States District Court for the Middle District of Alabama for a writ of habeas corpus under 28 U.S.C, § 2254. (Doc. 1). On May 15, 2015, Carruth amended his petition. (Doc. 34). On September 20, 2022, the district court denied Carruth's amended petition, *Carruth v. Hamm*, 2022 U.S. Dist. LEXIS 169587, 2022 WL 4357471 (M.D. Ala. 2013). Pet. App. a22, and granted a limited certificate of appealability. *Carruth v. Hamm*, 2022 U.S. Dist. LEXIS 203143, 2022 WL 17492261 (M.D. Ala. 2022). Pet. App. a19. Carruth timely appealed. (Docs. 52, 53).

Carruth argued on appeal, *inter alia*, that his appellate counsel had been ineffective in not filing a petition for a writ of certiorari in the Alabama Supreme Court and failing to notify him that the Alabama Court of Criminal Appeals had overruled an application for rehearing and to advise him of further available

appellate options and that that issue was not procedurally barred. The Eleventh Circuit affirmed on March 1, 2024. *Carruth v. Comm’r Ala. Dept. of Corr.* 93 F.4th 1338 (11th Cir. 2024). Pet. App. 1. The Eleventh Circuit’s opinion did not specifically address whether an asserted procedural bar of Carruth’s claim that his counsel was ineffective in failing to file a petition for a writ of certiorari on direct appeal with the Alabama Supreme Court and failing to advise him of further appellate options was firmly established and regularly followed. Carruth timely filed an application for panel rehearing asserting that it was not and that the merits of the issue were fairly presented in state court for exhaustion purposes. On April 8, 2024, the United States Court of Appeals for the Eleventh Circuit denied the petition for rehearing. *Carruth v. Comm’r. Ala. Dep’t. of Corr.*, 94 F.4th 1338 (11th Cir. 2024). Pet. App. a1, a160.

REASONS FOR GRANTING THE WRIT

The writ should be granted because, contrary the Alabama state courts’ decisions, this Court’s opinions addressing when there is a right to counsel on appeal and Alabama’s statutes and rules imposing upon appellate counsel a duty to file a petition for a writ of certiorari after an adverse lower appellate court decision in a death penalty cases warrant the conclusion that the Constitution requires counsel in Alabama death penalty cases through the filing of a petition for a writ of certiorari with the Alabama Supreme Court.

The district court below stated that “Carruth's appellate counsel acted unprofessionally and counter to the best interests of his client by failing to update his address with the court; failing to inform, consult, or counsel Carruth when the application for rehearing was unsuccessful; and failing to either file a petition for writ of certiorari or ask the Alabama Supreme Court for more time to file the petition.”

Carruth v. Hamm, 2022 U.S. Dist. LEXIS 169587, 2022 WL 4357471 (M.D. Ala. 2013). Pet. App. a47.

The Eleventh Circuit concluded that counsel for Carruth “at the discretionary appeal level was not constitutionally required.” *Carruth v. Comm’r Ala. Dep’t. of Corr.*, 93 F.4th 1338, 1357 (11th Cir. 2024). Pet. App. a15. But, an examination of this Court’s opinions addressing when there is a right to counsel on appeal and Alabama’s statutes and rules imposing upon appellate counsel a duty to file a petition for a writ of certiorari after an adverse lower appellate court decision in a death penalty cases warrants a conclusion that Carruth’s constitutional right to counsel was denied.

This Court has held that it is constitutionally permissible not to require counsel for a discretionary certiorari petition. *Ross v. Moffitt*, 417 U.S. 600, 617-618 (1974). But, it stated in *Ross v. Moffit* that it did “not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review.” *Id.* at 618. And, it has said that “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause,” kicking in the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Here, Alabama opted to act to the point of requiring counsel to file a petition for a writ of certiorari with the Alabama Supreme Court in death penalty cases.

Ala. Code §§ 13A-5-53(a), (b) and (d), provide that death penalty cases are "subject to review by the Alabama Supreme Court." *See also* Ala.R.App.P. 39(a)(2). Ala. Code § 15-12-22 directs that for indigent defendants, "the trial court shall appoint counsel to represent and assist the defendant on appeal." Under Alabama law, Carruth, an indigent, was granted appointed counsel for his direct appeal. Rule 39(a)(2), Ala.R.App.P. provides that in every death penalty case counsel must, if the sentence is affirmed on appeal, file a petition for writ of certiorari in Alabama Supreme Court:

When the Court of Criminal Appeals has affirmed a sentence imposing the death penalty, counsel who represented the appellant on the appeal to the Court of Criminal Appeals or successor counsel ***shall*** prepare and file in the Supreme Court a petition for a writ of certiorari for review of the decision of the Court of Criminal Appeals.

This language is mandatory and unequivocal. While the Alabama Supreme Court may have discretion to deny the petition, appellate counsel does not have any discretion not to file it.

As to Carruth's case, the district court stated:

On October 14, 2005, the Court of Criminal Appeals denied the application for rehearing. (Doc. # 21-26 at 269.) Under Rule 39(c)(2) of the Alabama Rules of Appellate Procedure, Carruth then had fourteen days to file a petition for writ of certiorari in the Alabama Supreme Court. No petition was filed. (Doc. # 21-28 at 148.) The certificate of judgment was issued on November 2, 2005. (Doc. # 42 at 20.) Ala. R. App. P. 41(a)(1).

Carruth alleges that no petition was filed because his appellate counsel had changed his address a second time and did not inform either the Court of Criminal Appeals or Carruth. (Doc. # 34 at 7-8, ¶ 27.) While the state generally does not dispute that Carruth's appellate counsel was at fault for the failure to file a petition for writ of certiorari, the exact details are once again somewhat muddled. (Doc. # 42 at 20 n.27.)

On January 26, 2006, Carruth's appellate counsel filed a letter in the Court of Criminal Appeals, saying:

Please resend me a copy of the Order denying my Application for Rehearing in this case. I have not received this Order and I just heard from an Attorney who has spoken to my client and has noted that he has not received any word either. Please resend this Order Denying the Application so that I may petition the Supreme Court for a Writ Of Cert. Please note my address has changed and that is perhaps the reason I did not receive any kind on Please resend me a copy of the Order denying my Application for Rehearing on this case. My new address is: [address on Richard Arrington, Jr., Boulevard South in Birmingham, Alabama]. (Doc. # 47-1 at 89.)

Then, on June 6, 2006, Carruth's appellate counsel filed a motion in the Alabama Supreme Court styled as a "Motion for Ruling on Petition for Writ of Certiorari." (Doc. # 47-1 at 90.) The motion alleged that a petition for writ of certiorari had been filed "on February 16, 2006," and requested a prompt ruling on the petition. But Carruth's appellate counsel once again had either misunderstood, misremembered, or misrepresented the true state of the case file. The clerk of the Alabama Supreme Court responded to Carruth's appellate counsel, informing him that there was no record of any such petition having been filed. (Doc. # 42 at 20.)

Carruth's appellate counsel did not file a motion for extension of time or make any other effort to obtain review of Carruth's claims in the Alabama Supreme Court. Nor, apparently, did he inform his client that any of this had taken place. Carruth alleges that he finally learned of the demise of his appeal when he received a letter from counsel for the state dated October 3, 2006, informing him that he had until November 2, 2006, to file a Rule 32 petition. (Doc. # 34 at 8, P 27; Doc. # 42 at 20.) Counsel for the state also sent a copy of the letter to a nonprofit group that frequently provides advocacy for death row inmates. The nonprofit helped get Carruth's Rule 32 process started. (Doc. # 42 at 20-21.)

Carruth v. Hamm, 2022 U.S. Dist. LEXIS 169587, 2022 WL 4357471 (M.D. Ala. 2013). Pet. App. a48.

In *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), this Court reiterated that it had

long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See *Rodriguez v. United States*, 395 U.S. 327 (1969); cf. *Peguero v. United States*, 526 U.S. 23, 28 (1999) ("When counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit"). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

It went on to recognize a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to trial counsel that he was interested in appealing. *Id.* at 480.

Any rational defendant facing a death penalty would want to go as far as possible on direct appeal. There is no indication that Carruth indicated otherwise to his appellate counsel. And while there is no indication that Carruth specifically instructed his counsel to file a petition for a writ of certiorari with the Alabama Supreme Court, Alabama law and rules required his counsel to do so. No defendant facing the death penalty should have to request such. Further, even absent that requirement of counsel, under *Roe v. Flores-Ortega*, Carruth's counsel, at a minimum, had a duty to consult with Carruth about his further options for review.

Counsel's failure to even notify Carruth that the Alabama Court of Criminal Appeals had denied rehearing or let him know about further direct appeal options prevented Carruth from pursuing his appeal in the Alabama Supreme Court. This was presumptively prejudicial, or alternatively, actually prejudicial to Carruth. *Roe v. Flores-Ortega*, 528 U.S. at 483 (" [W]e cannot accord any 'presumption of reliability' . . . to judicial proceedings that never took place.").

While this Court has not previously addressed whether the Alabama laws and rules create a right to counsel beyond the Alabama Court of Criminal Appeals, it flows from the obligations of counsel set out in *Roe v. Flores-Ortega* that there are obligations beyond that in Alabama death penalty cases and that it was unreasonable for the Alabama courts not to hold so. *See, Williams v. Taylor*, 529 U.S. 361, 407-408 (2000) ("unreasonable application" when state court unreasonably refuses to extend principle to a new context). This case presents an occasion for an explicit statement on the extent of counsel appellate duties in death penalty cases coming out of Alabama.

The asserted procedural bar of Carruth's claim that his counsel was ineffective in failing to file a petition for a writ of certiorari on direct appeal with the Alabama Supreme Court and failing to advise him of further appellate options was not firmly established and regularly followed and the claim was fairly presented in state court for exhaustion purposes.

Procedure not firmly established and regularly followed

[O]nly a "firmly established and regularly followed state practice" may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim. [*James v. Kentucky*, 466 U.S. 341,] 348-351 [(1984)]; see also *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)

(state procedural rules "not strictly or regularly followed" may not bar our review); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (procedural rule no bar to our review when state court had never applied it with the "pointless severity shown here").

Ford v. Georgia, 498 U.S. 411, 423-424 (1991).

The Eleventh Circuit's opinion in this case did not address whether an asserted procedural bar of Carruth's claim that his counsel was ineffective in failing to file a petition for a writ of certiorari on direct appeal with the Alabama Supreme Court and failing to advise him of further appellate options was firmly established and regularly followed. A state procedural rule is adequate to bar federal review if the rule is firmly established and regularly followed. *Walker v. Martin*, 562 U.S. 307, 316 (2011); *Ford v. Georgia*, 498 U.S. at 423-25. But, a state procedural rule is not "firmly established" if the rule is novel or newly announced. *Ford v. Georgia*, 498 U.S. at 423-24.

Here, a required use of Rule 2, Ala.R.App.P. rather than Rule 32.1(f), Ala.R.Crim.P. to get permission to pursue a petition for a writ of certiorari in the Alabama Supreme Court was not firmly established or regularly followed. Carruth's state circuit court court's statement "[t]o the extent it ha[d] jurisdiction," in its order granting the appeal on that issue in the Rule 32 proceeding indicates the state trial court's own uncertainty about it. And, apparently Carruth's state circuit court was not the only state court viewing Rule 32.1(f), Ala.R.Crim.P. as a vehicle for out of time certiorari petition filings in death penalty cases. *See, State v. Martin*, 56 So.2d 709 (Ala.Crim.App. 2009), *aff'd*, *Ex parte Martin*, 56 So. 3d 726 (Ala. 2010)(trial court grant of Rule 32.1(f), Ala.R.Crim.P. petition seeking an out of time application for rehearing and certiorari petition in capital case reversed). Here, the Alabama Court

of Criminal Appeals, in holding that Rule 32.1(f), Ala.R.Crim.P. did not apply to requests for out of time applications for rehearings, cited only *Elliott v. State*, 768 So.2d 422 (Ala.Crim.App.1999), a non-capital case not carrying the same mandated post adverse appellate decision duties of appellate counsel as in capital cases. *State v. Carruth*, 21 So.3d 764 (Ala.Crim.App. 2008). Pet.App. 116. The Alabama Supreme Court did not cite any cases at all for precedent. *Ex parte, Carruth*, 21 So.3d 770 (Ala. 2009). Pet. App. 107. With this, at best, scant history, the conclusion should be that this choice of rules issue was not firmly established or regularly followed.

The issue was fairly presented in state court

The Eleventh Circuit's opinion states as a ground of preclusion that "[Carruth] did not raise an independent issue of ineffective assistance of appellate counsel in the second Rule 32 appeal." *Carruth v. Comm'r. Ala. Dep't. of Corr.*, 93 F.4th at 1356. Pet. App. a14. Carruth raised that issue on his first trip up on post conviction review. Having been rejected on a procedural ground not firmly established and regularly followed, it would justifiably be thought to be considered the law of case which obviated the need for Carruth to make the same argument again. *See, Honea v. Raymond James Fin. Servs., Inc.*, 279 So. 3d 568, 570-71 (Ala. 2018) ("An appellate court's decision is final as to the matters before it, becomes the law of the case, and must be executed according to the mandate. *Ex parte Edwards*, 727 So.2d 792, 794 (Ala. 1998). Generally, a lower court 'exceeds its authority' by addressing issues already decided by an appellate court's decision in that case. *Lynch v. State*, 587 So.2d 306, 308 (Ala. 1991).")

To exhaust a claim for federal review, the claim must have been presented to the state courts to give them an "opportunity to apply controlling legal principles to the facts bearing upon (his) constitutional claim." *Picard v. Connor*, 404 U.S. 270, 277 (1971). Although the route here was circuitous, Carruth did so.

He argued among other things in his Rule 32 petition that he was denied the effective assistance of counsel under the United States Constitution because:

Counsel's failure to notify Mr. Carruth or the court . . . about his change of address, his failure to notify Mr. Carruth of the denial of his application for rehearing, his failure to consult with Mr. Carruth about the appeal, and his failure to either file a petition or notify petitioner that he would not file a petition with the Alabama Supreme Court and that Mr. Carruth needed to file a Petition on his own.

(Doc. 21-27 at 20-21)

On the first trip up in state post conviction, Carruth argued in his brief in the Alabama Court of Criminal Appeals, that his appellate counsel's failure to file a petition for a writ of certiorari in Carruth's direct appeal amounted to ineffective assistance of counsel. (Doc. 21-28 at 52, 55) and cited *Roe v. Flores-Ortega* as authority for the argument. (Doc. 21-28 at 55-57). In connection with an application for rehearing in the Alabama Court of Criminal Appeals, Carruth argued he had ineffective assistance of appellate counsel because his appointed counsel "failed to notify [him] that his direct appeal had been defaulted or attempt to withdraw from representation", (Doc. 21-28 at 101), "abandoned [him] without timely notice to [him]", (Doc. 21-28 at 121-122), "never notified [him] that he had failed to file a petition for certiorari in the Alabama Supreme Court", (Doc. 21-28 at 123), and "never notified him or any court that he had abandoned [his] appeals....", (Doc. 21-28 at 126-

127) In connection with a petition for a writ of certiorari in the Alabama Supreme Court, Carruth urged as a ground for granting the writ that the default by Carruth's appellate counsel violated Carruth's rights under the Sixth, Eighth, and Fourteenth Amendments, (Doc. 21-28 at 137), and went on to state:

Appointed counsel provided ineffective assistance before the Court of Criminal Appeals by failing to complete his duties regarding Mr. Carruth's first appeal as of right. Appointed counsel's representation before the Court of Criminal Appeals did not end when he filed the brief. Rather, he had a duty to inform Mr. Carruth when the appeal to the Court of Criminal Appeals had been denied and to consult with him about any further appeals. The failure to do so constituted ineffective assistance of counsel in the representation of Mr. Carruth before the Court of Criminal Appeals.

(Doc. 21-28 at 161), and cited *Roe v. Flores-Ortega*. (Doc. 21-28 at 162). In his brief in the Alabama Supreme Court, Carruth argued that allowing him an out of time petition for a writ of certiorari would remedy a violation of his right to counsel under the Sixth, Eighth, and Fourteenth Amendments.

Appointed counsel abandoned his representation of Mr. Carruth without prior notice to any court. More importantly, appointed counsel abandoned Mr. Carruth without notice to Mr. Carruth and without filing a petition for writ of certiorari. Such conduct clearly constitutes deficient performance by which Mr. Carruth was prejudiced. Such actions violated Mr. Carruth's right to effective assistance of counsel....

(Doc. 21-29 at 25-26). And, again, Carruth argued

Appointed counsel provided ineffective assistance before the Court of Criminal Appeals by failing to complete his duties regarding Mr. Carruth's first appeal as of right. Appointed counsel's representation before the Court of Criminal Appeals did not end when he filed the brief. Rather, he had a duty to inform Mr. Carruth when the appeal to the Court of Criminal Appeals had been denied and to consult with him about any further appeals. The failure to do so constituted ineffective assistance of counsel in the representation of Mr. Carruth before the Court of Criminal Appeals.

(Doc. 21-29 at 26). Carruth again cited *Roe v. Flores-Ortega*. (Doc. 21-29 at 27).

This was sufficient to let the Alabama courts know the substance and grounds of his complaint about the non-filing of a petition for a certiorari and absence of any handover.

CONCLUSION

By granting review, this Court could settle the question of whether a state's mandate of appellate counsel's duties beyond the first decision on an appeal of right by statute or rule, such as Alabama does in death penalty cases, requires effective counsel beyond that first decision. For that reason, this Court should grant review.

Respectfully submitted,

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