No. 23-7567
CAPITAL CASE

In the
Supreme Court of the United States

MICHAEL DAVID CARRUTH,
Petitioner,
v.
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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 20, 2024

CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

The filing of a petition for certiorari in the Alabama Supreme Court on direct appeal is discretionary, not mandatory.[1] To exhaust a claim for § 2254 habeas review, a "'[s]tate prisoner[] must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process,' including review by the state's court of last resort, even if review in that court is discretionary."[2] Michael David Carruth's court-appointed appellate counsel litigated Carruth's case in the intermediate state court but failed to file a cert petition in the Alabama Supreme Court. The questions presented are:

1. Whether the lower federal courts correctly held that the state courts were not unreasonable in finding that Carruth had no Sixth Amendment right to the effective assistance of counsel during a discretionary appeal to the Alabama Supreme Court, even in capital cases.

2. Whether the lower federal courts correctly held that Carruth's claim of ineffective assistance of appellate counsel for failure to file a cert petition was procedurally barred for lack of fair presentation to the state courts.

1. *State v. Carruth*, 21 So. 3d 764, 769 (Ala. Crim. App. 2008).
2. *Pruitt v. Jones*, 348 F.3d 1355, 1358–59 (11th Cir. 2003) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

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INTRODUCTION

On February 17, 2002, Michael David Carruth and Jimmy Lee Brooks, Jr., disguised themselves as police, coerced Forest "Butch" Bowyer and his twelve-year-old son, William Brett Bowyer, out of their house, and ended the night by brutally murdering the pair and burying them in a shallow grave—or so they thought. Brett was dead, having been shot three times, but Butch was still alive. Though his assailants slit his throat multiple times, Butch managed to cling to life and play dead. When Carruth and Brooks departed, Butch dug himself out of his grave, held his throat closed, and staggered to the road to flag down help. He lived to give his harrowing testimony about the events of that night, and Carruth was convicted of capital murder and sentenced to death.

Carruth was given court-appointed counsel for his direct appeal, and appellate counsel managed to get some of Carruth's lesser convictions reversed. But counsel failed to timely petition the Alabama Supreme Court for certiorari, which Carruth did not realize until the State informed him of his missed deadline. Assisted by different counsel, Carruth quickly launched into extended state postconviction proceedings, the procedural history of which is "a bit thorny," per the Eleventh Circuit.[3] In part, Carruth argued that he was entitled to an out-of-time appeal on both state and constitutional grounds, the latter because his appellate counsel was ineffective for failing to petition for cert.

3. Pet. App'x a9.

The district court denied relief, and the Eleventh Circuit correctly affirmed. First, though appellate counsel may have performed poorly after Carruth's appeal to the Alabama Court of Criminal Appeals, that did not give rise to an ineffectiveness claim because there is no Sixth Amendment right to counsel for discretionary appeals.[4] Second, the claim was procedurally defaulted because Carruth failed to fairly present it through one full round of state-court review, and he could not show cause or a fundamental miscarriage of justice to excuse the default.[5]

Carruth now seeks certiorari, claiming that he had a constitutional right to effective counsel through the filing of a cert petition in the Alabama Supreme Court, that the rule underlying his procedural default was not firmly established, and that he fairly presented his claim in state court.[6] But Carruth's claim is factbound and meritless. Moreover, even if he had such a right and even if his claim were not defaulted, his habeas petition would fail under AEDPA because his novel constitutional argument was not "clearly established Federal law, as determined by the Supreme Court" at the time of the state-court decision.[7] Carruth also failed to identify a circuit split, a decision in contravention of this Court's jurisprudence, or other grounds warranting certiorari. Thus, the Court should deny review.

4. Pet. App'x a14.
5. Pet. App'x a14–15.
6. Pet. 9–19.
7. 28 U.S.C. §2254(d)(1); *see also White v Woodall*, 572 U.S. 415, 426 (2014).

STATEMENT OF THE CASE

A. Statement of facts concerning Carruth's crime

The following account of the crime comes from the surviving victim's testimony and the opinion of the Alabama Court of Criminal Appeals (ACCA) on direct appeal.[8]

On the evening of February 17, 2002, Michael David Carruth and Jimmy Lee Brooks, Jr., came to the Phenix City, Alabama, home where Butch Bowyer lived with his twelve-year-old son, Brett. Butch owned a car dealership, Southern Auto Sales. Around ten p.m., while he worked at the kitchen table, a white Ford Crown Victoria pulled up to the house, and a man in a jacket with "Narcotics" markings on it got out. Thinking he was a police officer, Butch opened the door and asked if he could help him. The man claimed to have a warrant for Butch's arrest for the distribution of drugs. By the time Butch noticed that his name was misspelled on the warrant, the man, later identified as Carruth, was handcuffing him.

Carruth said they needed to go to the sheriff's department, and Butch asked if he could call someone to stay with his son. Carruth replied that they did not have time and got Brett. The two were put in the back of the apparent police car, which included a shield between the front and back seats. Another man, later identified as Brooks, was driving.

When the car passed the sheriff's department, Butch knew something was wrong. The men claimed they had to meet someone further down the road, and Brooks made a phone call. Butch recognized his voice; Brooks's father worked for Butch, and

8. *Carruth v. State*, 927 So. 2d 866, 869–70 (Ala. Crim. App. 2005); DE21-21:1455–97.

Brooks had done so as well. Butch knew that the Brookses were aware that he kept cash in his home, as they had come by for loans.

The men drove to a construction site, handcuffed Brett, and took Butch out of the car. They told him they were working for someone, and they wanted to leave Brett there and take Butch back to the house so he could give them money. Butch refused to leave his son, but he agreed to give them cash. As they walked back to the car, Brooks asked Butch if Butch knew who he was; Butch lied and said he did not.

Once they returned to the Bowyer home, the men took Butch to Brett's room, put him on the floor, and told him not to move. After securing the house, one of the men put a knife to his throat, and Butch said he would show them where the money was. He led them to his bedroom closet and pointed to a box with cash inside, saying there was $20,000 available. Brooks counted the money but grew angry when he discovered there was about $47,000 in the box. Carruth hit Butch in the head, and the men put the Bowyers back in the car. Unbeknownst to Butch, one of the men had stolen a .38 pistol from the closet. By that time, Butch had told Carruth that he would give the men more money if they would take the cash on hand and let them go. Carruth led Butch to believe that they would agree to this plan.

They returned to the construction site. Carruth pulled Butch from the car, and Butch walked off with him, thinking the men would let them go. Instead, Carruth suddenly cut the side of Butch's throat and said, "[T]hat's sharp, isn't it?" They walked on a little further to a cleared area, and Carruth slit Butch's throat. As Butch went to his knees, Carruth sat on his back and told him "to be quiet and go to sleep."

Carruth told Butch not to give him any trouble, as Carruth was "the only hope [Butch] had for" Brett's safety.

Brooks and Carruth brought Brett to join them, put the boy on his knees, and started interrogating Butch about whether there was a safe in his house. Brett said, "[P]lease don't hurt my daddy," to which Brooks replied, "[Y]ou better start worrying about what's going to happen to you and not your daddy."

The men took Brett away, and Brooks returned, ranting at Butch that Butch helped Brooks's father but would not help him. Brooks then slit Butch's throat; Butch believed that the only reason Brooks did not decapitate him was because the knife hit his Adam's apple.

Carruth laid Butch down, and the two men began digging a grave. Butch overhead Carruth tell Brooks, "I've done one, now you do one." Butch looked up in time to see Brooks shoot Brett. The child made a gurgling sound, to which Brooks said, "[T]hat little m-f doesn't want to die," then shot him twice more.[9] When the men came to get Butch, he held his breath and played dead. They removed his handcuffs and threw him into the grave on top of Brett's legs. Brooks wanted to shoot Butch, but Carruth said, "[D]on't make anymore noise with that gun, he won't make it, he's not going to make it." The two joked with each other as they filled in the grave.

Butch lay still until the men had left, then started kicking and digging to free himself. He pulled Brett out but realized his son was dead. Holding his wounds closed, Butch walked to the road and managed to flag down a car. The driver called 911

9. Brett was shot in the head. DE21-22:38. Of the five projectiles and fragments recovered from Brett, the two that could be compared matched Butch's stolen .38 pistol. DE21-23:1868, 1871–72.

shortly before one a.m.[10] and waited with Butch until the sheriff and the ambulance arrived. Butch told the deputy what had happened and identified Brooks as one of his assailants; he also mentioned that Carruth had the keys to his house and might return to hunt for a safe.

The deputy wanted Butch to get medical help, but Butch insisted on taking the first responders to Brett's body. Unfortunately, Butch was turned around and could not find Brett, and he was talked into an ambulance while the deputies searched. Butch had surgery and recovered.

On the morning of February 18, Warren McLaughlin, a Phenix City police officer, stopped Carruth's white Crown Victoria near the Bowyer home and arrested him.[11] When Carruth's possessions were inventoried, he was found to have on his person $22,900 in hundred-dollar bills, a Walmart receipt from February 17 for a posthole digger and shovel, a black nylon Velcro patch marked "Agent," and a set of keys to the Bowyer home.[12] In a storage unit belonging to Carruth, offers found a shovel and a posthole digger, the latter of which still had a price tag.[13] When they searched Carruth's home, they recovered a black "Agent" patch similar to the one Carruth had been carrying when arrested, plus a February 16 receipt from Ranger Joe's,[14] a retailer of military and law enforcement gear. The salesclerk testified that Carruth had purchased two badges and a pack of "Agent" Velcro panels.[15] On the

10. DE:21-4:667.
11. DE21-22:1570–80; *see* DE21-5:764.
12. DE21-22:1594–99, 1614.
13. *Id.* at 1622–26.
14. *Id.* at 1629–31.
15. *Id.* at 1666–67, 1670–71.

hard drive of Carruth's computer was found the false arrest warrant, saved on February 17 at 7:04 p.m. and misspelling Butch's surname as "Bowery." The judge's signature and date stamp on the fake warrant matched those on a real warrant saved on the same computer, suggesting they had been cut and pasted into the falsified document.[16] Forensic examination also revealed the presence of Butch's DNA on Carruth's clothing.[17]

Brooks was arrested as well on February 18, having been found burning items at one of his residences.[18] At his other residence, officers found $14,897.[19] Following the discovery of the cash, Brooks made statements to law enforcement implicating himself and Carruth and confirming that the money came from the Bowyer home.[20]

At trial, Brooks's ex-girlfriend's younger brother, who had been at the Brooks residence that day when Carruth came by, recalled that he asked the two men what they were doing when they left on February 17. Carruth told him they were "going to play cops and robbers."[21] The teenager also found a knife in the Brooks residence,[22] and a bloodstain on it matched Butch's DNA.[23]

B. Trial and direct appeal

In April 2002, Carruth was indicted on four counts of capital murder, plus

16. DE21-23:1884–87.
17. DE21-24:1972–73.
18. DE21-22:1616–19.
19. *Id.* at 1621.
20. DE21-4:668.
21. DE21-22:1690–91.
22. *Id.* at 1691.
23. DE21-24:1975–76.

attempted murder, first-degree burglary, and first-degree robbery.[24] The trial court appointed Robert Lane and Jeremy Armstrong to represent him.[25] He was convicted in October 2003,[26] the jury unanimously recommended death,[27] and the court concurred at the December 2003 sentencing hearing.[28]

The trial court appointed Stephen Guthrie to represent Carruth on direct appeal.[29] ACCA affirmed Carruth's capital convictions and sentence in August 2005,[30] then denied rehearing.[31]

Carruth failed to file a timely petition for certiorari in the Alabama Supreme Court, and ACCA issued a certificate of judgment on November 2, 2005.[32]

C. State postconviction (Rule 32)

On October 3, 2006, counsel from the Alabama Attorney General's Office informed Carruth by letter that he had until November 2 to file a Rule 32 petition if he wished to mount a collateral challenge to his conviction. Counsel also sent copies of this letter to the trial court and to Bryan Stevenson, director of the Equal Justice Initiative (EJI), which often provides legal assistance to death row inmates.[33] With the assistance of new counsel, Carruth pursued several avenues in hopes of postconviction relief.

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24. DE21-1:46–48; DE21-5:793–94; DE21-8:1364–65; DE21-10:1935–36.
25. DE21-1:59.
26. DE21-25:2261–62.
27. *Id.* at 2322.
28. DE21-26:2331–33, 2340–41, 2348.
29. DE21-13:2445; DE21-26:2349–50.
30. *Carruth*, 927 So. 2d at 882.
31. *Id.* at 866.
32. Certificate of Judgment, *Carruth v. State*, CR-03-327 (Ala. Crim. App. Nov. 2, 2005).
33. DE21-28:148–49 (correspondence on file with counsel for Respondent).

i. First Rule 32 proceeding

EJI filed an "emergency" Rule 32 petition on October 25, 2006,[34] along with a motion for appointment of postconviction counsel.[35] First among the grounds alleged was that Carruth was entitled to an out-of-time appeal to the Alabama Supreme Court based on two avenues: (1) Rule 32.1(f) of the Alabama Rules of Criminal Procedure, as Carruth claimed he had missed the filing through no fault of his own, and (2) the Sixth and Fourteenth Amendments, as Guthrie had rendered ineffective assistance for failing to tell Carruth that ACCA had denied rehearing and file a cert petition.[36] On October 30, the circuit court appointed Glenn Davidson to represent Carruth in further postconviction proceedings.[37]

The circuit court ultimately granted Carruth permission to file an out-of-time appeal and reserved the remaining issues until the Alabama Supreme Court had ruled on his petition for certiorari.[38] The State appealed, arguing that there was no basis for the out-of-time petition because a petition for certiorari is a discretionary appeal, and Rule 32.1(f) of the Alabama Rules of Criminal Procedure does not apply.[39] ACCA agreed, reversed the circuit court's grant in May 2008, and denied rehearing.[40]

Two weeks later, Davidson and attorneys from EJI filed a petition for certiorari in the Alabama Supreme Court.[41] Although that court initially granted cert,[42] it

34. DE21-27:4–87.
35. DE21-27:88–90.
36. *Id.* at 8–20.
37. *Id.* at 91.
38. *Id.* at 162.
39. DE21-28:2–24.
40. Pet. App'x a111–18.
41. DE21-28:136–41.
42. DE21-31:55.

quashed the writ in April 2009.[43] The court explained that Carruth had made a procedural error: he should have filed a motion pursuant to Rule 2(b) of the Alabama Rules of Appellate Procedure in the Alabama Supreme Court for permission for an out-of-time appeal, not a Rule 32 petition in the circuit court.[44] By then, as discussed below, Carruth *had* filed a Rule 2(b) motion, which had been denied. Undaunted, counsel filed a petition for certiorari in this Court,[45] which was denied in November 2009.[46]

ii. Rule 2(b) motion

While Carruth's Rule 32 appeal was pending in October 2007, he filed a Rule 2(b) motion in the Alabama Supreme Court, asking the court to extend the time he had for filing a cert petition in that court.[47] The Alabama Supreme Court denied the motion in February 2008.[48]

iii. Second Rule 32 proceeding

As the appellate courts had dealt with the issue of Carruth's out-of-time appeal, Carruth moved to lift the stay in his Rule 32 proceedings in May 2011 so that his other issues might be considered,[49] and the circuit court once more appointed Davidson to represent him.[50] In February 2012, the court summarily dismissed his

43. Pet. App'x a107–10.
44. Pet. App'x a109. The April 2009 opinion was actually the second in this case. On January 23, 2009, the court had affirmed ACCA's decision, but that opinion was withdrawn.
45. DE21-30:2–21.
46. Pet. App'x a105–06.
47. DE21-28:63–69.
48. DE45-1.
49. DE21-31:66–68.
50. *Id.* at 71.

Rule 32 petition as to most claims and directed Carruth to file an amendment as to one paragraph.[51] Carruth filed the requested amendment in April 2012,[52] then filed a second amendment in an attempt to revive dismissed claims in July.[53] After an evidentiary hearing,[54] the circuit court denied the petition in December 2012.[55]

Carruth appealed, but ACCA affirmed in March 2014[56] and denied rehearing. The Alabama Supreme Court denied certiorari that October.[57]

D. Habeas proceedings

Carruth filed his habeas petition in October 2014.[58] Once again, this petition was a stopgap filing authored by EJI, who were then attempting to find new counsel.[59] In January 2015, Thomas M. Goggans, Carruth's current counsel, entered a notice of appearance.[60] Carruth filed an amended petition in May,[61] and the State answered in October.[62]

On September 20, 2022, the district court summarily dismissed the petition,[63] then granted a COA on six grounds.[64] The Eleventh Circuit affirmed in March 2024.[65]

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51. Pet. App'x a151–59.
52. DE21-31:194–DE21-32:208.
53. DE21-32:241–74.
54. *See* DE21-33:8–144.
55. Pet. App'x a148–50.
56. Pet. App'x a125–47.
57. Pet. App'x a123–24.
58. DE1.
59. *Id.* at 1. Allegedly, Davidson told EJI five days before the habeas petition had to be filed that he would not be staying on Carruth's case. DE2:1.
60. DE11.
61. DE34.
62. DE42.
63. Pet. App'x a22–104.
64. Pet. App'x a19–21.
65. Pet. App'x a1–18.

Of relevance to the present matter, that court found that (1) there is no right to counsel for discretionary appeals, and (2) Carruth's claim that his appellate counsel was ineffective for failing to petition the Alabama Supreme Court for certiorari and advise him of his appellate options was procedurally defaulted.[66]

The present petition for writ of certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

Carruth's petition is not worthy of certiorari. His claims are factbound, do not implicate a circuit split, and are wholly meritless.

First, this Court has repeatedly stated that there is no Sixth Amendment right to counsel for discretionary appeals. That Carruth's appointed counsel failed to notify him that his direct appeal had been decided or file a petition for certiorari in the Alabama Supreme Court may have been failings short of counsel's duty to Carruth, but they did not violate his constitutional right to counsel. He is not entitled to relief under AEDPA because he has failed to show that the state courts unreasonably applied this Court's precedent. Here, even if the law were in doubt, it was not "clearly established" in Carruth's favor at the time of the state-court decision denying relief, so his claim failed under AEDPA.

Because Carruth's claim fails under AEDPA, any ruling on the constitutional right to counsel on appeal would be purely advisory.

Second, ACCA and the Alabama Supreme Court did not establish a new rule when they opted to follow the plain language of Rule 32.1(f) of the Alabama Rules of

66. Pet. App'x a13–15.

Criminal Procedure, and the federal courts correctly held that Carruth's ineffective assistance claim was not exhausted. But even if the courts erred on exhaustion and procedural default, Carruth would still not be entitled to relief because there is no right to counsel, much less effective counsel, for discretionary appeals.

I. Carruth's petition is due to be denied because there is no Sixth Amendment right to counsel for discretionary appeals, and the state-court decision was not contrary to clearly established law.

The Court should deny certiorari as to Carruth's first claim[67] because there is no Sixth Amendment right to counsel for discretionary appeals, even in capital cases, and the state-court denial of postconviction relief was not contrary to clearly established Supreme Court precedent.

A. Background

Carruth's court-appointed attorney on direct appeal was Stephen Guthrie, appointed on December 3, 2003.[68] Guthrie filed a brief in ACCA on October 1, 2004.[69] On August 26, 2005, ACCA affirmed Carruth's capital convictions and death sentence but reversed some of his lesser convictions.[70] Guthrie then filed an application for rehearing and supporting brief in September,[71] which ACCA denied on October 14.[72] When Carruth failed to timely file a petition for certiorari in the Alabama Supreme

67. Pet. 9–14.
68. DE21-13:2445; DE21-26:2349–50.
69. DE21-26:51–176.
70. *Id.* at 269–85.
71. *Id.* at 218–68.
72. *Id.* at 269.

Court, ACCA issued a certificate of judgment on November 2, 2005, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure.[73]

Apparently, while Carruth's application for rehearing was pending, Guthrie moved offices but failed to inform ACCA or his client of his change of address.[74] Thus, allegedly neither Guthrie nor Carruth was made aware when ACCA denied rehearing or issued the certificate of judgment.

On October 3, 2006, counsel from the Alabama Attorney General's Office informed Carruth by letter that he had until November 2 to file a Rule 32 petition if he wished to mount a collateral challenge to his conviction. Counsel also sent copies of this letter to the trial court and to Bryan Stevenson, director of the Equal Justice Initiative (EJI), which often provides legal assistance to death row inmates.[75] EJI filed an "emergency" Rule 32 petition for Carruth on October 25,[76] along with a motion for appointment of postconviction counsel.[77] Almost a year later, Carruth followed this with a Rule 2(b) motion in the Alabama Supreme Court, asking for the Rules of Appellate Procedure to be suspended so that he could petition for certiorari.[78] Ultimately, Carruth was denied permission to file an out-of-time cert petition.[79]

73. Certificate of Judgment, *Carruth v. State*, CR-03-0327 (Ala. Crim. App. Nov. 2, 2005).
74. *See* DE21-27:13; Pet. App'x a9.
75. DE21-28:148–49 (correspondence on file with counsel for Respondent).
76. DE21-27:4–87.
77. DE21-27:88–90.
78. *See* Pet. App'x a122.
79. *Id.*; *State v. Carruth*, 21 So. 3d 764 (Ala. Crim. App. 2008); Pet. App'x a107–10.

In habeas, Carruth contended that Guthrie had rendered ineffective assistance of appellate counsel for failing to pursue certiorari.[80] While the district court was highly critical of Guthrie's performance, the court disagreed with Carruth's position:

> The right to appellate counsel is limited to appeals taken by right. *See Douglas v. California*, 372 U.S. 353, 356 (1963). There is no federal constitutional right to counsel for discretionary appeals. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals."); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).
>
> 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. That behavior cannot be commended. But during a discretionary appeal, the United States Constitution provides no guarantee as to the quality of counsel, and the court must revert back to the general rule: "[T]he attorney is the prisoner's agent, [and] under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." *Martinez v. Ryan*, 566 U.S. 1, 10 (2012).[81]

The Eleventh Circuit concurred, also citing *Douglas*, *Finley*, and *Martinez*, then continued:

> While the Supreme Court has required trial lawyers to fulfill certain closing duties under *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000), there has not been clear guidance on whether that extends to discretionary appeals. Many of our sister circuits have similarly held that the constitutional right to appellate counsel ends upon the first appeal as of right and, therefore, does not extend to discretionary appeals.[7]
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> [FN7] *See Folkes v. Nelsen*, 34 F.4th 258, 280 (4th Cir. 2022) ("Supreme Court case law thus supports the conclusion that the constitutional right to appellate counsel is satisfied in advance of the appellate court's

80. DE34:12–18.
81. Pet. App'x a47 (citations edited).

decision and that counsel's role ends upon issuance of that decision."), *cert. denied* 143 S. Ct. 736 (2023); *Ahumada v. United States*, 994 F.3d 958, 960–61 (8th Cir. 2021) (holding that appellate counsel's failure to notify the defendant of the deadline and process for a discretionary petition did not run afoul of the constitutional right to appellate counsel); *Pena v. United States*, 534 F.3d 92, 96 (2d Cir. 2008) (per curiam) (finding the defendant's "claim that the filing of…a petition [for discretionary review] should be considered 'the last step in his first appeal as of right—not the first step of the subsequent discretionary appeal' [is]…'ingenious, but wrong'" (citation omitted)); *Jackson v. Johnson*, 217 F.3d 360, 365 (5th Cir. 2000) (holding that there is no right to counsel "after the appellate court has passed on the claims"); *Miller v. Keeney*, 882 F.2d 1428, 1432 (9th Cir. 1989) (holding that advising the defendant about discretionary review is not required because the "opportunity for direct appeal, and thus the defendant's constitutional right to counsel, has come to an end"); *but see Smith v. State of Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 434–35 (6th Cir. 2006) (holding appellate counsel is constitutionally required to provide closing duties to a defendant, including notifying the defendant of the outcome of the appeal).

[…]

[FN10] Even if these claims were not procedurally barred or unexhausted, Carruth would still lose on the substantive ineffectiveness claims under de novo review for (1) failing to file a certiorari petition and (2) failing to inform Carruth about the rehearing denial and counsel him about future appeals because there is no right to counsel for discretionary appeals. While Carruth indicates he desired to petition for certiorari to the Alabama Supreme Court, the Constitution does not guarantee quality counsel, so the general rule applies: the principal bears the risk of negligent conduct on the part of his agent. *Martinez,* 566 U.S. at 10.[82]

82. Pet. App. a14–15 (citation edited).

B. Carruth's claim is meritless.

In his present petition, Carruth contends that the lower courts erred, based upon *Ross v. Moffitt*,[83] *Evitts v. Lucey*,[84] and *Roe v. Flores-Ortega*.[85] He is mistaken.

As both the district court and the Eleventh Circuit noted below, the right to counsel on appeal is limited to those appeals taken by right. In Alabama, while decisions of ACCA are "subject to review by the Alabama Supreme Court,"[86] "[c]ertiorari review is not a matter of right, but of judicial discretion," even in capital cases.[87]

This Court's case law from the last sixty years establishes that an inmate petitioner is not entitled to counsel for discretionary appeals. In *Douglas v. California*, the Court considered petitions from two indigent inmates who fired their unprepared public defender, lost at trial, were denied counsel on appeal, lost on appeal, and then had their discretionary petitions to the California Supreme Court denied without a hearing.[88] The Court found that the state had denied the inmates due process by denying them appellate counsel,[89] but it went on to explain:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court.[90]

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83. 417 U.S. 600 (1974).
84. 469 U.S. 387 (1985).
85. 528 U.S. 470 (2000).
86. ALA. CODE §§ 13A-5-53(a), (b), (d).
87. ALA. R. APP. P. 39(a). Certiorari was granted as a matter of right in death cases prior to the 2000 amendments to the rule. The court comment to the amendments notes, "With this amendment, review of death-penalty cases will be at the discretion of the [Alabama] Supreme Court."
88. 372 U.S. at 353–54.
89. *Id.* at 355.
90. *Id.* at 356.

On this theme, the Court made clear almost a quarter-century after *Douglas* in *Pennsylvania v. Finley* that "[o]ur cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals."[91] ACCA has "consistently followed the *Douglas* holding and concluded that the right to counsel does not extend beyond the first appeal as of right."[92] Twenty years ago, that court set forth, "As we stated in *State v. Tarver*, 629 So. 2d [14, 18 (Ala. Crim. App. 1993)], also a death-penalty case, 'a criminal defendant is guaranteed one appeal from his conviction, and that appeal is to this court.'"[93]

Wainwright v. Torna is illustrative here. In that case, the Florida Supreme Court dismissed an inmate's untimely cert petition. The inmate then pursued federal habeas relief, arguing that he had been denied the effective assistance of counsel because his retained counsel failed to timely file the petition. Noting that review by the Florida Supreme Court was discretionary—as it is in Alabama—this Court disagreed with the inmate, explaining:

> In *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court.…Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely.[94]

91. 481 U.S. at 555 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982), and *Ross v. Moffitt*, 417 U.S. 600 (1974)) (citations edited).
92. *Jenkins v. State*, 972 So. 3d 111, 125 (Ala. Crim. App. 2004), *aff'd in relevant part, rev'd on other grounds*, 972 So. 2d 159 (Ala. 2005) (collecting cases).
93. *Id.*
94. 455 U.S. at 586–88 (citation edited, footnotes omitted).

The Court has thus been consistent for decades in holding that a criminal defendant is not constitutionally entitled to counsel beyond his first appeal as of right—for Carruth, that would be to ACCA—and certainly not for discretionary appeals. The fact that the Court has not invalidated state laws that go beyond the constitutional minimums to provide indigent inmates with counsel at later stages of review[95] does not mean that other states must follow those laws.

Carruth cites *Evitts v. Lucey* for the proposition 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."[96] But *Evitts* stands for the rule that principles of due process entitle criminal defendants to effective counsel on their *first appeal as of right*.[97] The Court made clear in that decision that "the considerations governing a discretionary appeal are somewhat different. Of course, the right to effective assistance of counsel is dependent on the right to counsel itself."[98] Therefore, the fact that the Alabama Rules of Appellate Procedure state that counsel in a death penalty case "shall prepare and file" a cert petition[99] does not create a constitutional right to counsel for the purposes of such discretionary appeals. In other words, while Guthrie may have fallen afoul of state rules in failing to file a cert petition for Carruth, that does not mean

95. *See Ross*, 417 U.S. at 618.
96. 469 U.S. at 401.
97. *Id.* at 396.
98. *Id.* at 396 n.7 (citing *Wainwright*, 455 U.S. at 587–88).
99. ALA. R. APP. P. 39(a)(2).

that Carruth had a constitutional right to effective counsel in the filing of that petition.

Carruth also directs the Court to *Roe v. Flores-Ortega*, which concerned an ineffective assistance claim where counsel failed to file notice of direct appeal after the defendant's conviction.[100] That case concerned an appeal as of right, not a discretionary petition for certiorari, and does not thus confer upon Carruth the right to effective assistance of counsel after his direct appeal.

The decisions the Eleventh Circuit cited from other courts of appeals demonstrate the general agreement among the circuits to have considered the question of the right to counsel following the direct appeal:

- **Second Circuit:** "Pena urges this Court to hold that his right to the effective assistance of counsel on first-tier appeal encompasses a requirement that his attorney inform him of the possibility of certiorari review and assist him with filing a petition. We disagree. In *Chalk v. Kuhlmann*, 311 F.3d 525 (2d Cir. 2002), we considered whether an attorney's obligation to represent a defendant on direct appeal of a state conviction included a duty to assist with the filing of a petition to seek the next stage of appellate review in the New York Court of Appeals. We rejected the claim that the filing of such a petition should be considered 'the last step in his first appeal as of right—not the first step of the subsequent discretionary appeal.' We held that such an argument was 'ingenious, but *wrong*.' The same is true here."[101]

- **Fourth Circuit:** "[I]t is precisely because the appeal has already 'been presented by a lawyer and passed upon by an appellate court' that the Supreme Court has concluded no further right to counsel exists beyond the initial appeal as of right.…Supreme Court case law thus supports the conclusion that the constitutional right to appellate counsel is satisfied in advance of the appellate court's decision and that counsel's role ends upon issuance of that decision."[102]

- **Fifth Circuit:** Concerning counsel's failure to file a motion for rehearing or inform the inmate of his right to do so pro se, "'A criminal defendant does not

100. 528 U.S. at 473–74.
101. *Pena*, 534 F.3d at 95–96 (citations omitted).
102. *Folkes*, 34 F.4th at 280.

have a constitutional right to counsel to pursue discretionary state appeals.' When a state grants a criminal defendant an appeal of right, the Constitution requires only that the defendant's claims be 'once…presented by a lawyer and passed upon by an appellate court.' Not only does a motion for rehearing come after the appellate court has passed on the claims; there can be no question that the granting of a motion for rehearing lies entirely within the discretion of a court of appeals. Rehearing at that point is by no means an appeal of right."[103]

- **Eighth Circuit:** Concerning a petition for rehearing following direct appeal, "There is no constitutional right to counsel for discretionary appeals. A defendant without a constitutional right to counsel 'cannot be deprived of the effective assistance of counsel.' Because Ahumada has no constitutional right to rehearing counsel, he cannot claim ineffective assistance of counsel."[104]

- **Ninth Circuit:** "In *Wainwright v. Torna*, the Court made explicit what had been implicit in its prior opinions: The fourteenth amendment right to the effective assistance of appellate counsel is derived entirely from the fourteenth amendment right to appellate counsel, and the former cannot exist where the latter is absent. *Torna* held that a state criminal defendant has no fourteenth amendment right to the effective assistance of counsel when pursuing a discretionary state appeal. 'Since respondent had no constitutional right to counsel,' the Court observed, 'he could not be deprived of the effective assistance of counsel.' The four-paragraph opinion relies on only one authority, *Ross v. Moffitt*, which denied the existence of a fourteenth amendment right to counsel for both discretionary state appeals and certiorari petitions. It is impossible to escape the conclusion that the logic of *Torna* is equally applicable to petitions for certiorari: Because *Moffitt* found there to be no right to counsel in connection with the filing of certiorari petitions, there must be no corresponding right to the effective assistance of counsel."[105]

Even the Sixth Circuit, which held that direct appeal counsel was ineffective for failing to timely inform the inmate of the outcome of his appeal, explained that the inmate had the right to effective assistance during his "direct appeal as of right," and the decision was part of it. The court did not suggest that the inmate had the right to

103. *Jackson*, 217 F.3d at 364–65 (citations omitted).
104. *Ahumada*, 994 F.3d at 960–61 (citations omitted).
105. *Miller*, 882 F.3d at 1431–32 (citations omitted).

counsel during a discretionary appeal *after* that initial appeal, such as a petition to the Ohio Supreme Court.[106]

Carruth has failed to point to a true circuit split or to the incorrect application of this Court's case law by the lower courts or the Alabama courts. The principle at issue—that inmate defendants are not entitled to counsel for discretionary appeals—is well settled. Even if the law were in doubt, it was not "clearly established" in Carruth's favor at the time of the state-court decision denying relief, so his claim failed under AEDPA. Carruth's cert petition does not even attempt to surmount AEDPA, and thus, the Court should deny certiorari.

II. Carruth's petition is due to be denied because the lower courts correctly found that his claim was procedurally defaulted.

Turning then to Carruth's second claim,[107] the Court should deny certiorari because the lower federal courts correctly held that his claim was procedurally barred for lack of exhaustion in state court.

A. Background

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court."[108] To do so, he "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."[109] In Alabama, to exhaust

106. *Smith*, 463 F.3d at 433–35.
107. Pet. 14–19.
108. *O'Sullivan*, 526 U.S. at 842.
109. *Id.* at 845.

a postconviction (Rule 32) claim for federal habeas purposes, an inmate must fairly present a federal constitutional claim in the state circuit court via Rule 32 petition, on appeal to ACCA, and in a petition for certiorari in the Alabama Supreme Court. If an inmate presents an unexhausted claim in habeas that would at that time be barred under state procedural rules, then the federal court may consider it procedurally defaulted,[110] and the inmate will then be denied relief unless he can show both cause for the default and resulting prejudice or demonstrate that the failure to consider the claim would result in a "fundamental miscarriage of justice."[111] Generally, attorney negligence does not excuse procedural default.[112]

The complicating factor for reviewing Carruth's Rule 32 litigation is that his proceedings were bifurcated. After Carruth was made aware of his imminent Rule 32 deadline, he filed a petition in October 2006.[113] The petition's primary purpose was to secure an out-of-time appeal to pursue certiorari in Carruth's direct appeal,[114] which Carruth argued was warranted for two reasons:

- **State:** the fault for the missed deadline was Guthrie's, thus entitling Carruth to a late appeal pursuant to Rule 32.1(f) of the Alabama Rules of Criminal Procedure.
- **Federal:** Carruth was entitled to relief under the Sixth Amendment and *Strickland v. Washington*[115] because Guthrie's performance was constitutionally deficient and both actually and presumptively prejudicial.[116]

Following those claims, Carruth raised a number of additional claims, including

110. *Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008).
111. *Harris v. Reed*, 489 U.S. 255, 262 (1989) (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986)).
112. *Coleman v. Thompson*, 501 U.S. 722, 753 (1999).
113. DE21-27:4–87.
114. *Id.* at 85.
115. 466 U.S. 668 (1984).
116. DE21-27:8–20.

ineffective assistance of appellate counsel—but only for counsel's failure to raise meritorious issues before ACCA and failure to file an adequate motion for new trial.[117]

In August 2007, the circuit court granted Carruth an out-of-time appeal to the Alabama Supreme Court in his direct appeal without specifying which of the two grounds (Rule 32.1(f) or *Strickland*) was meritorious. The court held all other Rule 32 issues in abeyance.[118] The State appealed.

About two months later, Carruth filed a Rule 2(b) motion for extension of time to pursue certiorari on direct appeal in the Alabama Supreme Court.[119] Therein, he claimed that Guthrie violated Rule 39(a)(2) of the Alabama Rules of Appellate Procedure—a state-law claim—but ***did not*** argue that Guthrie was ineffective under *Strickland.*[120] The Alabama Supreme Court denied the motion in February 2008.[121]

ACCA reversed and remanded the grant of an out-of-time appeal in May 2008, explaining that (1) certiorari is discretionary, and Rule 32.1(f) does not apply, and (2) there is no Sixth Amendment right to counsel for certiorari.[122] Carruth then sought certiorari, asking the Alabama Supreme Court to "affirm the circuit court's order granting him an out-of-time petition for writ of certiorari [for direct appeal] in this Court."[123] He argued, among other grounds:

- **State:** Carruth was indigent and entitled to counsel under section 15-12-22 of the Code of Alabama, and Rule 39 of the Alabama Rules of Appellate Procedure

117. *Id.* at 41–44 (¶¶ 78–80).
118. *Id.* at 162.
119. DE21-28:63–69.
120. 466 U.S. 668 (1984).
121. DE45-1.
122. Pet. App'x a116–18.
123. DE21-28:183.

mandates that counsel in a death case "shall" file a petition for certiorari.[124]

- **Federal:** Guthrie's actions denied Carruth his Sixth Amendment right to effective assistance of counsel before ACCA and in filing a cert petition, and he was prejudiced.[125]
- **State:** Carruth was entitled to an out-of-time appeal under Rule 32.1(f).[126]

The Alabama Supreme Court granted cert, then quashed the writ, holding that the correct way to ask for an extension of time for filing a cert petition is through a motion to that court pursuant to Rule 2(b) of the Alabama Rules of Appellate Procedure, not via Rule 32 petition.[127] This Court denied certiorari in November 2009.[128]

With the appeal concerning the out-of-time appeal concluded, the Rule 32 proceedings returned to the circuit court on remand for consideration of the merits of the remaining claims. There, the State argued that (1) Carruth's appealed and litigated claim had only sought an extension of time to petition for certiorari, and since the Alabama Supreme Court had just said that the only way to get that was through a Rule 2(b) motion, the issue had been decided against Carruth, and (2) again, there is no Sixth Amendment right to counsel for certiorari.[129] The circuit court concurred and dismissed the claim.[130]

Carruth continued to litigate the merits of his other claims in the circuit court, including via an evidentiary hearing in 2012. But while he had argued appellate ineffectiveness under *Strickland* for failure to petition for certiorari as grounds for a

124. *Id.* at 151–55.
125. *Id.* at 160–74, 178–81.
126. *Id.* at 181–83.
127. Pet. App'x a108–10.
128. Pet. App'x a106.
129. DE21-31:83–87.
130. Pet. App'x a153.

late cert petition, he never raised the issue as a claim for ***postconviction relief*** when he returned to ACCA[131] and the Alabama Supreme Court[132] on the merits of his Rule 32 claims.

In Carruth's amended habeas petition, he claimed that he was denied effective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments when Guthrie "abandoned him."[133] Included was a claim that Guthrie was ineffective for failing to file a cert petition in the Alabama Supreme Court.[134] The district court denied relief because this claim had not been exhausted.

First, Carruth asked for "review of his conviction and sentence by the Supreme Court of Alabama"[135]—that is, permission to file an out-of-time cert petition. But the state courts had said that only a Rule 2(b) motion was an appropriate vehicle to pursue this remedy, and when Carruth filed a Rule 2(b) motion, "he did not invoke any federal basis for relief."[136] Thus, the district court held, "[a]ny federal claim underlying Carruth's first claimed remedy is…unexhausted, procedurally defaulted, and—because Carruth has presented no sufficient grounds to excuse the default—barred by 28 U.S.C. § 2254(b)(1)."[137]

Second, Carruth asked the district court for "a writ of habeas corpus granting petitioner relief from his unconstitutionally obtained convictions and sentence of

131. DE21-35:2–76.
132. DE21-36:112–68.
133. DE34:7–26.
134. *Id.* at 12–18.
135. *Id.* at 24.
136. Pet. App'x a49.
137. *Id.* (footnote omitted).

death."[138] But Carruth did not raise a *Strickland* claim as to Guthrie's conduct post-ACCA in the latter half of his Rule 32 proceedings, which concerned the merits of the claims and was not merely an attempt to secure an out-of-time appeal. While Carruth did raise a claim of ineffective assistance of appellate counsel in his Rule 32 petition, it was only as to Guthrie's failings concerning a motion for new trial and the claims he raised in the direct appeal brief.[139] Therefore, the district court held, "Because the federal claims underlying Carruth's second claimed remedy were not pressed in the proper appeal, the claims are unexhausted, procedurally defaulted, and—because Carruth has presented no sufficient grounds to excuse the default—barred by 28 U.S.C. § 2254(b)(1)."[140]

Finally, the district court concluded that even if Carruth's claims had been exhausted, they were meritless. The Alabama courts had stated that cert petitions are discretionary, and the district court "has no power to correct any error in that decision."[141] Carruth's other arguments were unsupported by case law from this Court, there is no constitutional right to counsel for discretionary appeals, and so the Alabama courts did not run afoul of this Court's precedent.[142]

The Eleventh Circuit concurred:

> Carruth's ineffectiveness claim regarding failing to file for certiorari and failure to counsel on appellate options is unexhausted and procedurally barred under the second prong of the procedural default analysis. While Carruth argued appellate ineffectiveness as grounds for an entitlement to a late certiorari petition both in his Rule 2 motion and first Rule 32

138. DE34:125.
139. *See* DE21-27:41–44 (¶¶ 78–80).
140. Pet. App'x a49.
141. *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)).
142. Pet. App'x a50.

appeal, he did not raise an independent issue of ineffective assistance of appellate counsel in the second Rule 32 appeal, which dealt with the merits of his Rule 32 claims. Thereby, his appellate ineffectiveness claim was not presented to the ACCA nor the Alabama Supreme Court on the merits. Further, Carruth staked his ineffectiveness claim in the first Rule 32 appeal on [the Alabama Rules of Appellate Procedure] and did not cite an independent federal basis for review. *See Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (explaining that a habeas petition grounded on issues of state law provides no basis for federal habeas relief). Also, any future attempt to exhaust state remedies would be futile under the state's procedural default doctrine, which renders Carruth's claim procedurally barred and unexhausted.

The only way Carruth could overcome the default would be by demonstrating either (1) a fundamental miscarriage of justice, i.e., convicting an innocent person, will result without excusing the default, or (2) cause for the default. Here, it is unquestionable that the evidence produced at trial, including the graphic testimony of Butch Bowyer, clearly demonstrated Carruth's guilt. As to cause, Carruth argues that his attorney's negligence in filing his certiorari petition fulfills the exception. But attorney negligence is not generally cause for default, especially when Carruth's counsel at the discretionary appeal level was not constitutionally required. Since procedural default occurred and no exception applies, we affirm the district court's determination that the claim is procedurally barred.[10]

[FN10] Even if these claims were not procedurally barred or unexhausted, Carruth would still lose on the substantive ineffectiveness claims under de novo review for (1) failing to file a certiorari petition and (2) failing to inform Carruth about the rehearing denial and counsel him about future appeals because there is no right to counsel for discretionary appeals. While Carruth indicates he desired to petition for certiorari to the Alabama Supreme Court, the Constitution does not guarantee quality counsel, so the general rule applies: the principal bears the risk of negligent conduct on the part of his agent. *Martinez*, 566 U.S. at 10. Lastly, Carruth has also failed to establish a reasonable probability that he would have succeeded on his appeal if certiorari were granted, and therefore his claim must fail.[143]

143. Pet. App'x a14–15 (footnote omitted).

B. Carruth's claims are meritless.

Carruth raises two subclaims in his present petition, but neither is meritorious or cert-worthy.

First, Carruth claims that the Eleventh Circuit erred because it did not address whether the state procedural rule underlying his procedural bar was "firmly established and regularly followed."[144] He contends that the rule requiring the use of Rule 2(b) of the Alabama Rules of Appellate Procedure instead of Rule 32.1(f) of the Alabama Rules of Criminal Procedure to obtain permission to file an out-of-time cert petition was not an established rule.

Carruth directs the Court to *State v. Martin*.[145] In July 2008, the state circuit court considering Martin's Rule 32 petition held that pursuant to Rule 32.1(f), it was authorized to allow Martin to file an out-of-time application for rehearing in ACCA.[146] While the court was "aware of" ACCA's decision in Carruth's case holding that Rule 32.1(f) was an improper avenue for an out-of-time appeal—a decision released less than two months prior—the court felt that Martin's case was distinguishable and noted that ACCA's decision did not discuss the statutory right to appointed counsel on appeal or Rule 39(a)(2).[147] ACCA reversed in August 2009:

> Based on this court's reasoning in *Carruth*, we conclude that the circuit court did not have the authority, pursuant to Rule 32.1(f), Ala. R. Crim. P., to grant Martin permission to file an out-of-time application for a rehearing with this court and an out-of-time petition for a writ of certiorari with the Alabama Supreme Court.

144. Pet. 15.
145. 56 So. 3d 709 (Ala. Crim. App. 2009).
146. *Id.* at 711.
147. *Id.* at 711–12.

> Based on the Alabama Supreme Court's ruling in *Ex parte Carruth*, we also conclude that the circuit court erred when it purported to grant Martin relief pursuant to Rule 32.1(a), Ala. R. Crim. P. In *Ex parte Carruth*, the Alabama Supreme Court held that "[a] Rule 32 petition simply cannot provide the relief requested by Carruth." 21 So. 3d at 772. Rather, it held that, "for a defendant who is sentenced to death and who failed to timely file a petition in this Court for a writ of certiorari to review the decision of the Court of Criminal Appeals, the proper means to request permission to file an out-of-time petition is to make the request in a Rule 2(b), Ala. R. App. P., motion in this Court." 21 So. 3d at 772.[148]

One circuit court misinterpreting state law does not constitute proof that the rule was not firmly established. Indeed, in its May 2008 decision in Carruth's case, ACCA cited *Elliott v. State*,[149] a 1999 decision in which ACCA stated that Rule 32.1(f) is not a valid avenue to pursue out-of-time applications for rehearing, as the rule's plain language made clear that it "applies only to situations where the *notice of appeal* is untimely."[150] Though Rule 32.1(f) was amended after *Elliott* to allow out-of-time appeals in Rule 32 petitions, its plain language still showed that it was inapplicable to out-of-time cert petitions.[151] Thus, at least as far back as 1999, it was clear and established that ACCA would follow the plain language of Rule 32.1(f).

Second, Carruth protests that he raised the issue of Guthrie's ineffectiveness in his initial Rule 32 proceedings, so "[h]aving 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

148. *Id.* at 724.
149. 768 So. 2d 422 (Ala. Crim. App. 1999). Carruth protests that *Elliott* was not a capital case, Pet. 16, but this is an immaterial distinction.
150. Pet. App'x a116.
151. *Id.*

argument again."[152] He is mistaken.

As set forth above, Carruth's *Strickland* claim concerning Guthrie's actions after the direct appeal to ACCA was raised only in his initial Rule 32 proceedings. In other words, it was a claim being used as grounds to entitle Carruth to an out-of-time cert petition in his direct appeal, not as an independent ground for postconviction relief, and so it "was not presented to the ACCA nor the Alabama Supreme Court on the merits."[153] This does not constitute full and fair presentation of the claim to the state courts, and so the district court and Eleventh Circuit correctly held that the claim was procedurally defaulted for lack of exhaustion.

But even if, arguendo, the lower courts were incorrect about the procedural default, they properly held that Carruth was due no relief. Carruth would have the federal courts consider his *Strickland* claim that Guthrie rendered ineffective assistance by not informing him of the status of his direct appeal in ACCA or filing a cert petition in the Alabama Supreme Court. As "there is no right to counsel for discretionary appeals,"[154] however, the fact that Guthrie made mistakes is irrelevant for *Strickland* purposes. And the Eleventh Circuit was right to add that Carruth's *Strickland* claim would have failed for lack of prejudice. He failed to show a reasonable probability that the Alabama Supreme Court would have granted certiorari in his direct appeal, and a reasonable probability that he would have succeeded in having his conviction overturned if certiorari were granted. Because

152. Pet. 16.
153. Pet. App'x a14.
154. Pet. App'x a15.

Carruth would lose regardless of his default, this case is an especially poor vehicle. Therefore, this Court should deny certiorari.

CONCLUSION

Carruth offers this Court meritless, factbound claims that do not concern a true circuit split. The lower courts correctly denied relief, and this Court should deny certiorari.

Respectfully submitted,

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