No. 15-8753

In The
Supreme Court of the United States

DOYLE LEE HAMM,

Petitioner,

v.

JEFFERSON S. DUNN, 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 OF *AMICI CURIAE* ALABAMA APPELLATE COURT JUSTICES AND BAR PRESIDENTS IN SUPPORT OF PETITIONER

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STATEMENT REGARDING INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are former members of the Alabama Supreme Court and Alabama Court of Criminal Appeals, as well as former Presidents of the Alabama State Bar. Ernest Hornsby is a former Chief Justice of the Alabama Supreme Court and a former President of the Alabama State Bar. Ralph Cook is a former Justice of the Alabama Supreme Court. William Bowen is a former Presiding Judge of the Alabama Court of Criminal Appeals. William Clark and Robert Segall have previously served as Presidents of the Alabama State Bar. In the positions in which they served, each has had an exceptional opportunity to observe, participate in, and be affected by the administration of Alabama's system of capital post-conviction proceedings. As a result of their participation in the process, they have a compelling interest in urging the Court to grant this petition for writ of certiorari and review the matters they address in order to bring some measure of fairness to this procedure.

[1] Pursuant to Sup. Ct. R. 37.2(a), counsel for *amici* gave timely notice of intent to file this brief and all parties have granted written consent for the filing of this Brief. Letters of consent have been submitted to the Clerk of Court. Pursuant to Sup. Ct. R. 37.6, the *amici* state that no person or entity, other than themselves and their counsel, authored any portion of this brief. The *amici* further state that no person or entity, other than themselves and their counsel, made any financial contribution toward the preparation and filing of this brief.

SUMMARY OF ARGUMENT

As detailed in Doyle Lee Hamm's postconviction petition, and in the substantial evidence gathered by his pro bono postconviction counsel, Mr. Hamm was denied the effective assistance of counsel at trial. His trial counsel's failure to provide effective representation led to numerous other violations of Mr. Hamm's constitutional rights, not the least of which was the lack of any consideration of his significant history of seizures, head injuries, and resulting brain damage.

As we advised the Court in our earlier amicus brief in *Maples v. Thomas*, and briefly reiterate here, Alabama's capital punishment system is deeply flawed. As a result, many of the convictions and sentences rendered are inherently unreliable. Proper functioning of the postconviction review process is, therefore, critical. However, Alabama's system of postconviction review in capital cases is exceedingly complicated, inflexible and unforgiving, and subject to the vagaries and pressures of Alabama's death-obsessed politics. Since Alabama stands alone in failing to provide counsel (or any legal assistance) for indigent death-sentenced inmates in postconviction proceedings, those who are fortunate enough to have counsel at all must rely on pro bono counsel, most of whom practice far from Alabama. This particular shortcoming played a key role in the crucial evidence about Mr. Hamm's mental health and intellectual capacity going unheard at his Rule 32 hearing, just as it had at his trial.

Given the multiple procedural bars that dot the route to postconviction relief like so many landmines, the thorough, meaningful, and independent, consideration of a condemned inmate's constitutional claims by a Rule 32 court may be the last substantive chance for a meritorious claim to be fairly heard. On the heels of multiple failures of Alabama's death penalty system to properly safeguard Mr. Hamm's rights, during both his trial and his postconviction proceedings, the State submitted a lengthy, detailed and strategic proposed order denying Mr. Hamm's petition. It had received no direction from the Rule 32 court, but comfortably expected that the Rule 32 court would sign the proposal. A *very* short time later, the Rule 32 court did exactly that.

The practice of Alabama trial court judges of adopting verbatim the State's proposed orders in death penalty cases is, even in the least egregious circumstances, abhorrent. For the indigent petitioner whose life is at stake, the least one might expect is a genuinely thorough and sifting review. In a system in which no one could creditably contend that indigent defendants receive adequate and effective representation and a fair trial, the least one might hope for is a thoughtful analysis of the merits of both sides of the evidence and arguments presented. It is a rare case indeed when that sort of care is devoted by an Alabama Circuit Court in postconviction proceedings.

In Mr. Hamm's case, the circumstances demanded an even greater level of scrutiny. Having been denied the effective assistance of trial counsel, Mr. Hamm had seemingly been fortunate to obtain the services of a zealous volunteer postconviction attorney who worked over a period of many years to gather and develop the wealth of available evidence his trial counsel had failed to uncover, and who had engaged experts and consultants to analyze and assist in the presentation of that evidence. Through no fault of his own, Mr. Hamm was denied the services of that attorney. Another lawyer was appointed, over Mr. Hamm's objection, to represent him at the Rule 32 hearing. She failed to present the vital evidence and testimony that had been prepared. The State's dense order rejecting all of Mr. Hamm's claims was signed just one business day after it was submitted without a single alteration – the trial court did not even bother to delete the word "proposed" from the title.

Decisions countenancing the practice of Rule 32 courts adopting a proposed order submitted by the State often refer to indications in the record that the trial court conducted its own analysis, carefully reviewed the evidence presented to ensure the accuracy of the proposed order, and was thoroughly familiar with the record below, having also presided over the original trial in the case. None of those allegedly ameliorating factors are present here. Judge Hardeman received the State's 89 page proposed order and signed it the next business day. Since Judge Hardeman did not

preside over Mr. Hamm's trial, he could not have relied upon his own knowledge of the record in making such a hasty determination that the entirety of the State's proposal was accurate on both the facts and the law. Without even the passage of a respectable period of time to support the notion that the order had been carefully reviewed and considered, a member of the Eleventh Circuit panel in Mr. Hamm's case remarked that he did not believe for a second that Judge Hardeman had done anything to make it his own. We do not believe it either, nor should this Court. Mr. Hamm's postconviction claims received no meaningful review. The order denying those claims, and the Alabama appellate court decisions upholding it, are entitled to no deference in the federal courts.

ARGUMENT

Undersigned *amici curiae*, in our former capacities as Justices of the Alabama Supreme Court and Alabama Court of Criminal Appeals, and Presidents of the Alabama State Bar, have had first-hand experience with the practice and procedures surrounding the death penalty in Alabama. We are in a unique position to inform the United States Supreme Court of the state of that process in Alabama, and to offer insight concerning the unconstitutional consequences of its failures.

I. Alabama's Broken Capital Punishment System Means Adequate Postconviction Review Is Indispensable.

We previously detailed for this Court the constitutional crisis in Alabama's death penalty processes. Brief for Alabama Appellate Court Justices et al. as Amici Curiae in Support of Petitioner, *Maples v. Thomas*, (No. 10-63) (2011), 132 S.Ct. 912 (2012). The desperate inadequacies of legal representation at trial form a necessary backdrop to fully understanding the crisis at the postconviction stage. We briefly review that background here.

The complexities and pitfalls of the capital postconviction process in Alabama cannot be overstated, nor can the importance of the proper functioning of that process, particularly as applied to indigent defense. Alabama's death penalty processes in general, and its "system" of providing representation for indigent defendants during trial and direct appeals in particular, are deeply flawed. As a consequence, many verdicts and sentences are inherently unreliable, making adequate postconviction review crucial. While numerous reports have documented Alabama's myriad failures to provide a system that adequately safeguards the rights of indigent people in capital cases, two comprehensive documents gather the most glaring deficiencies. In 2003, the American Bar Association's Section of Individual Rights and Responsibilities established teams to assess death penalty systems in sixteen jurisdictions, including Alabama. The eight members of the Alabama Assessment Team

included defense attorneys experienced in capital litigation,[2] a state legislator, a district attorney, a law professor, and the dean of a law school. Its June 2006 report set forth conclusions and recommendations concerning numerous failings of constitutional proportion in Alabama's capital punishment system.[3] A 2005 report by the American Civil Liberties Union, *Broken Justice: The Death Penalty in Alabama*, (October 2005) ("*Broken Justice*"), similarly documented many unacceptable flaws in what passes for justice in the State's imposition of death.[4]

The Assessment Report analyzed key aspects of Alabama's death penalty process, from defense services, jury instructions, and judicial independence to treatment of racial and ethnic minorities and those with mental illness and developmental disabilities. The Assessment Report correctly concluded that Alabama "cannot ensure . . . fairness and accuracy" in cases in which death is sought or imposed,[5] and joined "over 450 other organizations, religious institutions,

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[2] William N. Clark, one of *amici*, was a member of the Assessment Team.

[3] *American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) ["*Assessment Report*"], available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf, last visited April 19, 2016.

[4] *Broken Justice*, available at http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf, last visited April 19, 2016.

[5] *Assessment Report* vi.

newspapers, and city/town/county councils" in calling for a moratorium on executions until the plethora of injustices it identified could be addressed.[6] Despite a number of exonerations, as well as strong indications of innocence in currently ongoing cases, this call remains unheeded, as do most recommendations contained in the Report. We continue to have a complete lack of confidence in the process, and in the convictions and sentences it produces.

The indigent accused in Alabama begin and end at an acute disadvantage. Appointed counsel in capital cases receive wholly inadequate compensation for the herculean task assigned them. Prior to 1999 (Mr. Hamm's trial took place in 1987), appointed attorneys were compensated at $40 an hour for time in court and $20 per hour for work outside the courtroom, Ala. Code § 15-12-21 cmt. (2006), and "could not be compensated more than $1,000 for out-of-court work for each phase of the capital trial." *Hyde v. State*, 950 So. 2d 344, 359-60 (Ala. Crim. App. 2006). According to the Assessment Report, seventy percent of Alabama death row inmates were, like Hamm, convicted when defense lawyers were limited to $1,000 for out-of-court work.[7] Given the $1,000 cap extant at the time of most of Alabama's death row convictions, including Mr. Hamm's, a defense attorney who expended the hours required to provide even

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[6] *Id.*

[7] *See, Assessment Report* at 126 (*citing* Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005).

marginally competent representation could reasonably expect to be paid $5 per hour or less.[8] "An in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889."[9] At the statutory rate, if counsel representing those accused of a capital offense in Alabama put in equivalent time, they would have done so for about 53 cents an hour. It is little wonder, then, that Mr. Hamm's trial counsel did not uncover the prodigious available evidence concerning Mr. Hamm's longstanding history of seizures, head injuries, and resulting brain damage. The "noble ideal" that every person stands equal before the law "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him,"[10] nor when he is permitted only

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[8] "One lawyer said the court paid him the equivalent of $4.98 per hour to defend his client's life." *Broken Justice*, 2.In an interview, the same lawyer declared that he would go to jail before handling another capital case. *Questions of Death Row Justice for Poor People in Alabama*, New York Times, March 1, 2000, available at http://www.nytimes.com/2000/03/01/us/questions-of-death-row-justice-for-poor-people-in-alabama.html?scp=3&sq=alabama+death+penalty+local+counsel&st=nyt, last visited April 19, 2016.

[9] *ABA Guidelines* 40, *citing* Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 14 (1998) [emphasis added].

[10] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

the services of the grossly underfunded, the inexperienced, and the incompetent.

Lack of judicial independence in Alabama's administration of the death penalty also is a significant concern here. All of Alabama's state court judges are chosen through partisan elections, and those interested in being re-elected face fierce pressure to present a "tough on crime" reputation. Partisan judicial elections operate in tension with core principles of an independent judiciary: that a judge ought to behave with "probity, fairness, honesty, uprightness, and soundness of character,"[11] without regard to inappropriate outside influences. The impact of such influences is evident each campaign season in Alabama.

One judge's 1994 campaign ad declared: "some think he's too tough on criminals, AND HE IS . . . We need him now more than ever." Committee to Re-Elect Judge Mike McCormick, Birmingham News, November 4, 1994, at C4 (advertisement). It was that same year, at the height of Alabama's death penalty blood lust, that the judge who presided over Mr. Hamm's Rule 32 proceedings, was first elected. In December 1999, when he hastily signed off on the State's proposed order denying all of Mr. Hamm's claims, his first six-year term was winding down – Judge Hardeman won re-election in November 2000.

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[11] Ala. Canon Jud. Ethics 1 cmt.

Justice Sotomayor recently lamented the deadly influence of campaign pressures on Alabama judges in her dissenting opinion in *Woodward v. Alabama*, 134 S. Ct. 405 (2013). Addressing Alabama trial courts' lopsided use of judicial override to impose death, rather than to spare the lives of defendants, Justice Sotomayor wrote that the only explanation "supported by empirical evidence" is that Alabama judges "who are elected in partisan proceedings, appear to have succumbed to electoral pressures." *Id.* at 408. She went on to highlight one Alabama judge who had imposed death via override six times, and whose campaign ad "boasted" that he had presided over 'some of the most heinous murder trials in our history,' and expressly named some of the defendants whom he had sentenced to death. . . ." *Id.* at 409. Justice Sotomayor also referenced a study published by the Equal Justice Initiative ("EJI"), whose work on Alabama's death row is unparalleled in its depth. EJI concluded that "[t]hese political pressures produce the appearance and reality of a judiciary that is insufficiently independent to provide a fair and impartial hearing on controversial issues. . . ."[12] *Id*. at 16.

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[12] *The Death Penalty In Alabama: Judge Override,* Equal Justice Initiative (2011), available at http://eji.org/files/Override_Report.pdf, last visited April 19, 2016.

II. Mr. Hamm Did Not Receive A Meaningful Review Of His Rule 32 Postconviction Claims, And The Decisions Of The Alabama Courts Are Therefore Not Entitled To Deference.

While Mr. Hamm's postconviction proceedings began in somewhat promising fashion, subsequent circumstances resulted in the unjust extinguishment of what appear likely to have been meritorious claims. In December 1991, with the assistance of his volunteer postconviction attorney Bernard Harcourt, Mr. Hamm filed his petition for postconviction relief pursuant to Ala. R. Civ. P. 32. He asserted a number of substantial and troubling claims regarding the conduct of his trial, including the failure of his trial counsel to uncover and present evidence of brain damage, use of an invalid prior conviction as an aggravating factor, and that the jury was impermissibly told that he had been previously charged with armed robbery, when in fact he had only been convicted of simple robbery. Mr. Harcourt continued representing Mr. Hamm throughout the next eight years. During that time, Mr. Harcourt uncovered significant evidence in support of Mr. Hamm's claims concerning his brain damage, and engaged expert consultants to assist in the development, analysis and presentation of that evidence.

Far from being unusual, Mr. Hamm's representation by volunteer counsel from outside Alabama was, and remains, the norm in postconviction proceedings. Most death-sentenced indigents in Alabama, if they

have counsel at all, rely upon volunteers. The vast majority of these volunteers, like Mr. Hamm's counsel, reside in states far from Alabama.[13] The State of Alabama makes no bones about the fact that it has chosen "to rely on the efforts of typically well-funded out-of-state volunteers," instead of providing postconviction counsel, or indeed any legal assistance, to indigent inmates sentenced to death. Brief in Opposition at 23, *Barbour v. Allen*, No. 06-10605 (May 10, 2007). Some of these volunteers are indeed "well-funded," their law firms having chosen to donate private resources in an effort to make up for some small portion of what Alabama denies its own poor. Mr. Hamm's counsel, on the other hand, is a law professor whose representation of Mr. Hamm was not backed by a large, well-heeled law firm.[14]

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[13] Since this Court's decision in *Murray v. Giarratano*, 492 U.S. 1 (1989), there has been a "virtually unanimous decision of the death penalty states to provide lawyers for capital postconviction proceedings." Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital PostConviction Proceedings*, 91 Cornell L. Rev. 1079, 1094 (2006). Most state legislatures recognize the critical role postconviction counsel serve in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners, leaving indigent inmates to rely upon the services of volunteer counsel.

[14] As the State of Alabama noted in its brief to this Court in *Barbour v. Allen*, most lawyers providing pro bono assistance to indigent death-sentenced inmates in Alabama are operating at a significant distance, most often practicing in large law firms located in major northeastern cities. Br. in Opp. at 11, *Barbour v. Allen*, No. 06-10605 (May 10, 2007).

After several years of delays, the circuit court set Mr. Hamm's Rule 32 petition for hearing. By that time, his pro bono counsel had accepted a new teaching position, moved across the country, and become the parent of two small children. He sought to put the evidentiary hearing off while trying to determine if suitable substitute counsel could be recruited. The circuit court declined to wait and, treating counsel's correspondence on the subject as a motion to withdraw, involuntarily terminated his representation of Mr. Hamm, instead appointing a new attorney of the court's own choosing. The newly appointed attorney proceeded to conduct the evidentiary hearing, over the objections of both Mr. Hamm and Mr. Harcourt, and inexplicably failed to introduce the critical evidence that Mr. Harcourt had painstakingly developed. She called only Mr. Hamm's trial counsel as witnesses. She did not call the expert psychologist and mitigation specialist who were prepared to testify about Mr. Hamm's brain damage and related matters (despite their availability), even after the circuit court refused to admit the psychologist's affidavit. Mr. Hamm *himself* had to proffer the criminal, school, medical, and mental health records, and a chronology of his life, that would have been relevant to the testimony of his psychologist and mitigation specialist had they been called.

On the heels of these multiple failures of Alabama's death penalty system to properly safeguard Mr. Hamm's rights, during both his trial and his postconviction proceedings, came the final nail in his

proverbial, and perhaps literal, coffin. As is its habit, the State submitted a very long, detailed, and of course extremely biased, proposed order, strategically designed to cut off all remaining avenues for Mr. Hamm to seek relief. It did so without having received any direction from the Rule 32 court, but in the comfortable expectation that (as is the unfortunate habit of trial court judges in Alabama) the Rule 32 court would simply affix its signature to the proposal and wash its hands of the matter. Indeed, the circuit court signed the State's dense order rejecting all of Mr. Hamm's claims just one business day later without a single alteration – the judge didn't even bother to delete the word "proposed" from the order's title.

The routine practice of Alabama trial court judges of adopting verbatim the State's proposed orders in death penalty cases[15] is, even in the least egregious circumstances, abhorrent. For the indigent petitioner (and they are, nearly without exception,

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[15] According to a 2003 analysis by the Equal Justice Initiative, "the trial judge adopted verbatim an order denying or dismissing the Rule 32 petition which was written by the State" in seventeen of the 20 most recent capital cases. Decl. of Aaryn M. Urell ¶ 4, *Barbour v. Campbell*, No. 01-S-1530-N (M.D. Ala. Aug. 28, 2003). Nothing has changed since that time, except that the State has grown more clever in its attempts to shield the adopting court from criticism, often expressly advising that the court include statements claiming that the contents of the order are its own. *E.g.*, Letter from David Clark, Asst. Att'y Gen. to Hon. Philip Reich, (Jan. 17, 2002), *Borden v. State*, No. CC-93-228.60.

indigent) whose life is at stake, the least one might expect is a genuinely thorough and sifting review. In a system in which no one could confidently contend that indigent defendants receive adequate and effective representation and a fair trial, the least one might hope for is a thoughtful analysis of the merits of both sides of the evidence and arguments presented. It is a rare case indeed when that sort of care is devoted by an Alabama Circuit Court in postconviction proceedings.[16] Instead, "state court judges repeatedly gave prosecutors a blank check to say anything they wanted in proposed orders, and then signed on the bottom line converting advocate's briefs into judicial orders."[17] In Mr. Hamm's case, given the multiple failures that had already threatened to deprive him of any genuine consideration of his

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[16] The cases in which Alabama trial courts have adopted a proposed order submitted by the State, denying the claims of a death-sentenced inmate, are legion. *See, e.g.*, *Ex parte Jenkins*, 105 So. 3d 1250 (Ala. 2012); *Slaton v. State*, 902 So. 2d 102, 107 (Ala. Crim. App. 2003); *McGahee v. State*, 885 So. 2d 191, 229 (Ala. Crim. App. 2003); *Dobyne v. State*, 805 So. 2d 733, 741 (Ala. Crim. App. 2000), *aff'd,* 805 So. 2d 763 (Ala. 2001); *Lawhorn v. State*, 756 So. 2d 971, 977 (Ala. Crim. App. 1999); *Jones v. State*, 753 So. 2d 1174, 1180 (Ala. Crim. App. 1999); *Grayson v. State*, 675 So. 2d 516, 519 (Ala. Crim. App. 1995); *Hallford v. State*, 629 So. 2d 6, 8 (Ala. Crim. App. 1992); *Hubbard v. State*, 584 So. 2d 895, 900 (Ala. Crim. App. 1991); *Morrison v. State*, 551 So. 2d 435, 436 (Ala. Crim. App. 1989).

[17] Stephen Bright and Patrick Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 Boston L. Rev. 759 (May 1995).

claims, the circumstances demanded a much greater level of scrutiny by the court charged with reviewing them. His claims have not, as yet, received such scrutiny.

We recognize the general rule under existing precedent that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 572 (1985). Death, however, is (and must be) different. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). This Court has consistently recognized that "the taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring).

In decisions affirming the denial of Rule 32 claims, and countenancing the practice of trial courts adopting a proposed order submitted by the State, Alabama appellate courts frequently cite indications in the record of the trial court's own purportedly thorough analysis,[18] careful review of the evidence

[18] *E.g.*, *Thompson v. State*, 615 So. 2d 129, 132 (Ala. Crim. App. 1992) ("Here, it is evident that the trial court thoroughly considered the petition before denying it. . . ."); *Hallford v. State*, 629 So. 2d at 8 (trial court issued opinion and order two months

(Continued on following page)

presented to ensure the proposed order is accurate,[19] and thorough familiarity with the record below, the trial court having also presided over the original trial in the case.[20] Many decisions also note that the trial court had provided guidance to the prevailing party as to what the order should say, and that the other party was provided an opportunity to respond to the proposed order before its entry.

As Mr. Hamm's Petition for Writ of Certiorari notes, Alabama courts have made a handful of efforts to criticize or curtail the wholesale adoption of opinions ghostwritten by the State, but those efforts are ever so modest. The Alabama Supreme Court went so

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after the proposed order was filed by the State, and "we do not have a situation here where the trial court merely adopted verbatim the proposed order of the State. It is clear from the trial court's order denying the petition that the trial court independently evaluated each allegation and denied the petition.").

[19] *E.g.*, *Hubbard v. State*, 584 So. 2d at 900 ("A review of the record reveals that although the trial court's order is substantially similar to the proposed order, there are some differences. Furthermore, the trial court clearly stated that it spent two full days fashioning its own order even though it adopted many of the State's proposed findings.").

[20] *E.g.*, *Dobyne*, 805 So. 2d at 742 ("the circuit judge who presided over this Rule 32 proceeding also presided over Dobyne's trial; the circuit judge was thoroughly familiar with the case."); *Slaton v. State*, 902 So. 2d at 108 ("judge who presided over the Rule 32 proceedings and issued the order denying Slaton's petition is the same judge who presided over Slaton's trial and, therefore, was thoroughly familiar with the record.").

far as to reverse cases in which the State's opinion had the trial judge purporting to rely on his personal knowledge of hearings at which he wasn't present, *Ex parte Ingram*, 51 So. 3d 1119 (2010), and where the trial court's opinion was not the State's proposed order, but its Answer. *Ex parte Scott*, No. 1091275, 2011 WL 925761 (Ala. Mar. 18, 2011). An Alabama Court of Criminal Appeals opinion authored by Justice Bowen, one of the *amici curiae*, admonished that "courts should be reluctant to adopt verbatim findings of fact and conclusions of law prepared by the prevailing party," but went on to affirm the decision because, among other things, the petitioner had made no objection to the trial court's adoption of the State's proposed order. *Weeks v. State*, 568 So. 2d 864, 865 (Ala. Crim. App. 1989).

This Court's opinion in *Anderson*, *supra*, upon which the aforementioned cases affirming ghostwritten trial court opinions rely, noted that:

> [T]he District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's

> proposed findings: the findings it ultimately issued – and particularly the crucial findings . . . vary considerably in organization and content from those submitted by petitioner's counsel. *Under these circumstances, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.*

Anderson, 470 U.S. at 572-73 (emphasis added).

None of these allegedly ameliorating factors are present here. Judge Hardeman received the State's 89-page proposed order and signed it the next business day. Since he did not preside over Mr. Hamm's trial, Judge Hardeman could not have relied upon his own personal knowledge of the trial record in making such a hasty determination that the entirety of the State's proposal was accurate on both the facts and the law. Without even the passage of a respectable period of time to support the notion that the order had been carefully reviewed and considered, Judge Adalberto Jordan, a member of the Eleventh Circuit panel in Mr. Hamm's case remarked at oral argument that he didn't "believe for a second that that judge went through 89 pages in a day and then filed it as his own." Transcript of Oral Argument, 24:50-25:28. We don't believe it either. There is every reason to

conclude, as Judge Jordan did,[21] that the trial court abdicated its responsibilities and "uncritically accepted findings prepared without judicial guidance" by the State.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in deference to State court proceedings, provides that a writ of habeas corpus with regard to a State court judgment

> 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.

28 U.S.C. § 2254(d). This Court has already recognized that the unreasonableness of the determination under § 2254(d)(2) may relate not only to the ultimate correctness of the State court's findings, but to the

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[21] Judge Jordan also stated on the record his understanding that, although "it sticks in my craw," he had no choice but to defer to the state court's findings: "I know what AEDPA deference requires me to do. . . ." Oral Argument 24:50-25:28).

procedure the State court used in reaching those findings. In *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), this Court reversed the Fifth Circuit's order finding the petitioner had not shown that the dismissal of his petition by a Louisiana court constituted an unreasonable determination of the facts. The Louisiana court had refused to hold an evidentiary hearing or grant funds for experts on Brumfield's claims of intellectual disability pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). Reiterating its previous admonition that "'[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief,'" *Brumfield*, 135 S. Ct. at 2277*, quoting Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), this Court held that the Louisiana trial court's failure to grant the petitioner expert funds and an evidentiary hearing before rejecting his claims constituted an unreasonable determination of the facts. *Id*. at 2282.

The actions of the Alabama trial court judge in Mr. Hamm's case no more constitute a reasonable determination of the facts than did those of the Louisiana judge in *Brumfield*. And although the *Brumfield* Court declined to reach the additional question of whether the resulting denial of due process constituted an unreasonable application of clearly established Federal Law pursuant to § 2254(d)(1), we believe that it did, as did the Alabama court's conduct in Mr. Hamm's case. No trial judge, but especially one who does not himself have a personal command of the underlying record (Judge

Hardeman had not presided over Mr. Hamm's trial), can carry out his constitutional responsibility to provide due process by rubber-stamping an 89-page order the next business day after it hits his desk. The fact that this practice – which renders many death penalty postconviction proceedings in Alabama a mere sham – has been allowed to become standard operating procedure for Alabama trial courts makes this Court's review of Mr. Hamm's case all the more urgent.

While this Court must, of course, show "due regard for States' finality and comity interests," *Dretke v. Haley*, 541 U.S. 386, 393 (2004), it must also "ensur[e] that 'fundamental fairness [remains] the central concern. . . .'" *Id*., *quoting Strickland v. Washington*, 466 U.S. 668, 697 (1984). Where the State courts afford no meaningful review for the death-sentenced inmate's postconviction claims, fundamental fairness demands that Federal courts afford no deference to the resulting denial of those claims.

CONCLUSION

For these reasons, we urge the United States Supreme Court to grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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