No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,
v.

KIM T. THOMAS,
Interim Commissioner,
Alabama Department of Corrections,
Respondent.

On Writ of Certiorari to the Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Alabama Criminal Defense Lawyers Association[1] is a non-profit association for criminal defense attorneys, through which criminal defense lawyers express their positions on legislation, court reform, cases affecting rights of defendants, and other matters affecting criminal justice in Alabama. The organization seeks to promote administration of justice and to ensure that courts enforce maximum lawful access to justice by the criminally accused or convicted.

This organization is interested in this case because the Eleventh Circuit has denied access to federal constitutional review to Cory Maples and potentially others in his same circumstances: indigent Alabama Death Row prisoners who, through no fault of their own, relied on volunteer attorneys who missed court or appeal deadlines. The Eleventh Circuit's decision will also have a chilling effect on counsel who volunteer to represent Alabama Death Row prisoners in capital post-conviction litigation. Alabama does not have a state-funded post-conviction litigation program and limits reimbursement for court-appointed post-conviction counsel to $1,000. As a result, Alabama Death Row prisoners rely primarily on volunteer counsel to vindicate their federal constitutional rights.

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[1] The parties consented in writing to the filing of this brief. No counsel for a party authored the brief in whole or in part. No counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of the brief. Attorneys for *Amicus Curiae* notified counsel of record for the parties 10 days prior to the due date for filing briefs.

SUMMARY OF ARGUMENT

No higher calling for a lawyer exists than to represent a death-row inmate. A person's life is at stake, and appreciation for the rights guaranteed by our constitution is heightened. The assistance of counsel, however, is essential to ensure that the inmate's rights are secured. Beyond the maze of constitutional questions and procedural rules, pedestrian-sounding tasks must be performed promptly and fully. If left undone, the inmate's life is jeopardized, and his constitutional rights are at risk.

The United States has witnessed sea changes in the representation of death-row inmates in the last fifty years. Impecunious and unpopular prisoners often obtain the *pro bono* services of lawyers practicing at nationally recognized firms. The practice of law, however, by necessity starts locally. Alabama, for example, requires all out-of-state counsel to associate with local counsel whose responsibilities are unambiguously described in the rules governing professional conduct and *pro hac* admission. Despite the transformations in litigating capital cases, the same ethical principles that governed John Adams and Abraham Lincoln apply today to all counsel for the condemned: diligence, loyalty and communication.

This appeal is before this Court because Cory Maples' local counsel in Alabama, by his own admission, failed in all of his duties. After Maples was convicted and sentenced to death, he was represented locally by John G. Butler. His *pro hac*,

pro bono lawyers, practicing at the law firm of Sullivan & Cromwell in New York, assisted Maples in filing a petition for post-conviction relief, but did not receive the state court's notice of denial of that petition. By that time they had left Sullivan & Cromwell and moved on to other jobs. Local counsel was Maples' only remaining advocate in the Rule 32 proceeding. But local counsel, Butler, did nothing. Indeed, Butler abandoned Maples at the very outset by agreeing only to facilitate the admission of Maples' out-of-state *pro bono* counsel, and thus refusing to undertake the meaningful attorney-client relationship directed by Alabama law.

Maples sat abandoned and uninformed in an Alabama cell. All deadlines passed. No lawyer filed a timely appeal from the denial of his petition for post conviction relief. Alabama law prohibited court clerks from accepting his *pro se* papers, even if the clerk knew the inmate's lawyers had deserted him. Absent relief from this Court, Maples has no chance for post-conviction review. His constitutional rights are lost, and his fate is certain.

In garden-variety commercial cases, courts routinely find that a principal is not charged with notice when the agent is guilty of abandonment. In this capital case, in which Maples' life hangs in the balance, he is merely asking for the same relief. Maples should not be denied *habeas corpus* review. To do so would violate his constitutional rights to due process and conflict with basic common law agency principles.

ARGUMENT

I. In The Courts Of Alabama Local Counsel Has Important Responsibilities After The Admission Of Foreign Attorneys *Pro Hac Vice.*

From 1994 until 2006, Alabama Rules Governing Admission to the Alabama State Bar, Rule VII.C. provided:

> No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the attorney has associated in that cause an attorney who is a member in good standing of the Alabama State Bar (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel shall personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court, unless specifically excused from such appearance by the court or administrative agency. Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

The importance of joint and several responsibility to the client is that an individual represented by counsel may not file an appeal or pleadings *pro se*. *See Thompson v. State*, 860 So. 2d 907, 909-10 (Ala. Crim. App. 2002). "When a party is represented by counsel, the clerk may not accept a brief from that party." Rule 31(a), Ala. R. App. P. *See Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549, 2556-57, 2559 (2010) (On several occasions, Florida objected to Albert Holland filing *pro se* papers while he was represented by counsel and in state court Holland's requests were denied.)

A. Local Counsel Has A Legal And Ethical Responsibility To Participate Actively In The Defense of A Prisoner Client

The "Preamble: A Lawyer's Responsibilities," Ala. R. Pro. Conduct, provided:

> A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> ….
>
> In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation.…
>
> ….
>
> … Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

At all times relevant, Ala. R. Prof. Conduct, Rule 1.1 provided that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." Comment to Rule 1.1, Ala. R. Prof. Conduct.

Rule 1.2 mandated that a lawyer not willfully neglect any legal matter entrusted to him. Rule 1.3 mandated that a lawyer keep his client reasonably informed about the status of his case and to promptly comply with any request for information. Rule 1.3 further mandated that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 8.4(d) provided that a lawyer was guilty of professional misconduct to "engage in conduct that is prejudicial to the administration of justice."

The affidavit testimony of local counsel in this case, John G. Butler, states that he "had no substantive involvement in th[e] case" after appearing as local counsel" and after telling "Ms. Ingen-Housz and Mr. Munanka" that he "did not

have the resources, available time or experience to make it appropriate for [him] to deal with substantive issues in the case" establishes a clear violation of Rule VII.C. Further, a finder of fact could reasonably infer and find, from Butler's affidavit testimony, that he intentionally did not comply with Rules 1.1, 1.2, and 1.3 because he had intentionally determined that his sole role would be to have New York counsel admitted *pro hac*. Such willful flouting of the Rules was in the sole interest of Butler and not in the interest of Cory Maples. Accordingly, Butler's actions or inactions could not even charitably be said to constitute a legal representation of Cory Maples.

A review of the record evidences Butler's non-representation of Cory Maples. Butler did not sign or appear on pleadings, as more than local counsel, until after Maples discovered that his Rule 32 petition had been denied by the trial court. Thus, the record indicates that Butler did not take a role in representing Maples until it was discovered or it would be discovered that he had willfully failed to comply with his Rule VII.C. duties, his officer of the Court obligations, and his Rules 1.1, 1.2, and 1.3 duties.

Moreover, at all times relevant, Rule 8.4, Ala. R. Prof. Conduct, provided, in pertinent part, that "[i]t is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice;" or "(g) engage in any other conduct that adversely reflects on his fitness to practice law."

B. Local Counsel In This Case Violated His Legal and Ethical Responsibilities to Participate Actively In the Defense Of A Prisoner Client

Rule VII.C. required local counsel John G. Butler to "accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause." According to Butler's affidavit testimony, he "had no substantive involvement in th[e] case" after appearing as local counsel" and after telling "Ms. Ingen-Housz and Mr. Munanka" that he "did not have the resources, available time or experience to make it appropriate for [him] to deal with substantive issues in the case." Once again, by his own admission, Cory Maples' local counsel, Butler, prepared to be and executed as a mere facilitator for the *pro hac* admission of local counsel.

Sadly, Butler's conduct is commonplace for local counsel in Alabama working with out-of-state *pro bono* counsel in capital cases. Local counsel in such cases often limit their role merely to facilitating out-of-state representation and do nothing more, as was true for Butler here. Such is their expectation, as well as habit and custom. The practice of local counsel is well known in the Alabama, making it even more important for court clerks to ensure that notice is received by out-of-state counsel.

"Abandon" is defined as "to withdraw protection, support, or help from" or "to cease

intending or attempting to perform." *Merriam-Webster's Collegiate Dictionary* 1-2 (11th ed. 2009). Under the circumstances, local counsel Butler, as a special agent of Cory Maples, had a duty and obligation to communicate to Cory Maples the denial of Maples's Rule 32 petition. However, Butler's affidavit makes clear that he "had no substantive involvement in th[e] case" after appearing as local counsel" and after telling "Ms. Ingen-Housz and Mr. Munanka" that he "did not have the resources, available time or experience to make it appropriate for [him] to deal with substantive issues in the case," he did nothing more, in particular he did not communicate with Cory Maples. Accordingly, a reasonable inference from Butler's affidavit testimony is that he "cease[d] intending or attempting to perform" his obligations under Rule VII.C., Alabama Rules Governing Admission to the Alabama State Bar, and Rules 1.1, 1.2, and 1.3, Ala. R. Prof. Conduct, to Cory Maples from the beginning of his representation of Cory Maples. *Merriam-Webster's Collegiate Dictionary* 1-2.

C. Local Counsel Who Abandons His Prisoner Client Ceases To Be The Agent Or Attorney of the Client.

Under Alabama law, "an attorney at law 'is the special agent of his client, whose duties, usually are confined to the vigilant prosecution or defense of the suitor's rights.' *Gullett v. Lewis*, [3 Stew. 23 (1830)]." *National Bread Co. v. Bird*, 226 Ala. 40, 42, 145 So. 462, 463 (1933). *Accord Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988); *Crawford v. Tucker*, 258 Ala. 658, 663, 64 So. 2d 411, 416 (1953);

Daniel v. Scott, 455 So. 2d 30, 33 (Ala. Civ. App. 1984). 'The power of an attorney is not co-equal, co-extensive, or the equivalent of that of the client. He is, as has been said in numerous decisions of this court, a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of the client….' *Robinson v. Murphy*, [69 Ala. 543 (1881)]." *National Bread Co.*, 226 Ala. at 42, 145 So. at 463.

In 1926, the Alabama Supreme Court held that "'[w]hen an attorney accepts a retainer to conduct a legal proceeding, he enters into an entire contract to conduct the proceedings to a conclusion, and he may not abandon his relation without justifiable cause, or the consent of his client….'" *Howard v. McCarson*, 215 Ala. 251, 253, 110 So. 296, 297 (1926) (quoting 6 Corp. Jur. 673, 674, § 186). "The general rule is … the[re is a] presumption that the agent will inform the principal in the line and scope of his duty, but no such presumption arises when the agent is acting for himself adversely to his principal, nor will he be presumed to communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal." *Commonwealth Life Ins. Co. v. Wilkinson*, 23 Ala. App. 561, 563, 129 So. 300, 301 (1930).

According to the Alabama Court of Appeals:

> In the text, 2d Corpus Juris, 868 (549), the rule is stated thus: 'The rule that notice to an agent is notice to his principal does not apply when the circumstances are such as to raise a

> clear presumption that the agent will not transmit his knowledge to his principal; and accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein.' … In … *Frenkel [v. Hudson*, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736 (1886)], Mr. Justice Somerville, speaking said 'It [the rule] is based on the principle that it is the duty of the agent … to communicate the information obtained by him to his principal so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely, in such case, act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. … It would be both unjust and unreasonable to impute notice by mere construction under such circumstances.'"

Wilkinson, 23 Ala. App. at 563-64, 129 So. at 301-02. *Accord J.J. McCaskill Co. v. United States*, 216 U.S.

504, 514 (1910); *Union Cent. Life Ins. Co. v. Robinson*, 148 F. 358, 360 (5th Cir. 1906); *Florence v. Carr*, 226 Ala. 654, 656, 148 So. 148, 149 (1933).

Further, when "an agent occupies a dual relation, notice acquired by him in such other agency is not binding on the principal--this is sound in principle and necessary to a right conduct of the agency and fidelity to the respective principals." *Florence*, 226 Ala. at 656, 148 So. at 149.

"[U]nder fundamental tenets of agency law, a principal is not charged with an agent's actions or knowledge when the agent is acting adversely to the principal's interests." *Downs v. McNeil*, 520 F.3d 1311, 1321 (11th Cir. 2008). *Accord In re JLJ, Inc.*, 988 F.2d 112, 116 (11th Cir. 1993) ("[T]he general rule is that an agent's act against the general interest of the principal is void…."); *Schuleter v. Varner*, 384 F.3d 69, 81 (3d Cir. 2004) (Ambro, J., dissenting) ("[W]hen … an attorney ceases altogether to serve the interests of his client, the law of agency is clear that the attorney acts alone."); *Baldayaque v. U.S.*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds.'" (quoting *Nat'l Union Fire Ins. Co. v. Bonnanzio*, 91 F.3d 296, 303 (2d Cir. 1996)); *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (suggesting that equitable tolling may be appropriate where attorney conduct reaches the level of "utter abandonment."); *Restatement (Third) of Agency* § 5.04 (2006) ("[N]otice of a fact that an agent knows or has reason to know is not imputed to

the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person.")

Butler abandoned Cory Maples. When Butler acted adversely to Maples by not acting or communicating in any way with Maples in violation of Rule VII.C., Alabama Rules Governing Admission to the Alabama State Bar, and Rules 1.1, 1.2, and 1.3, Ala. R. Prof. Conduct, Butler ceased to be the special agent or attorney of Cory Maples and acted in his own interests of not performing duties or obligations to Cory Maples. Butler's affidavit contains an admission of his conflict of interest evidencing his abandonment of Maples by focusing his "time" and "resources" elsewhere, presumably on other clients.

Under the above-quoted agency-principal tenets of law, when Butler ceased being the special agent or attorney of Cory Maples, notice to Butler was not notice to Maples. *Wilkinson*, 23 Ala. App. at 563-64, 129 So. at 301-02. *Accord Florence*, 226 Ala. at 656, 148 So. at 149; *Downs*, 520 F.3d at 1321; *In re JLJ, Inc.*, 988 F.2d at 116; *Schuleter*, 384 F.3d at 81 (Ambro, J., dissenting); *Baldayaque*, 338 F.3d at 154 (Jacobs, J., concurring); *Rouse*, 339 F.3d at 250 n.14; *Restatement (Third) of Agency* § 5.04 (2006).

D. When Local Counsel Abandons A Prisoner, Client, The Client Has Demonstrated Cause To Excuse A Procedural Default.

"Habeas Corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 553 U.S. 67493 (2008) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)). *Accord Holland*, 130 S.Ct. at 2560. Courts in equity "tailor relief, and related procedure, to the exigencies of particular cases and individual circumstances." *Miller v. French*, 530 U.S. 327 (2000) (Breyer, J., joined by Stevens, J., dissenting). *See also Federalist* Papers No. 80, *The Powers of the Judiciary*, Hamilton, Alexander ("It has also been asked, what need of the word 'equity'? What equitable cause can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not invoke those ingredients of *fraud, accident, trust, or hardship*, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate.").

Courts of equity are not "controlled by rigid rules adhered to." *Di Giovanni v. Camden Fire Ins. Ass'n.*, 296 U.S. 64, 70 (1979). *Accord Holland*, 130

S.Ct. at 2554 ("In the Court of Appeals' view, when a petitioner seeks to excuse a late filing on the basis of his attorney's unprofessional conduct, that conduct, even if it is 'negligent' or 'grossly negligent,' cannot 'rise to the level of egregious attorney misconduct' that would warrant equitable tolling unless the petitioner offers 'proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth.' 539 F.3d 1334, 1339 (C.A.11 2008) (per curium). In our view, this standard is too rigid.")

In *Holland*, this Court said:

> In this case, the 'extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care. The Court of Appeals held that, where that is so, even attorney conduct that is 'grossly negligent' can never warrant tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.' 539 F.3d at 1339. Bur in our view, the Court of Appeals' standard is too rigid.
>
> "We had said that courts of equity 'must be governed by rules and precedents no less than the courts of law.' *Lonchar v. Thomas*, 517 U.S. 314, 323 … (1996) (internal quotation marks omitted). But we have also made clear that often the 'exercise of a court's equity powers … must be made on a case-by-case basis.' *Baggett v. Bullitt*,

> 377 U.S. 360, 375 … (1964). In emphasizing the need for 'flexibility,' for avoiding 'mechanical rules.' *Holmberg v. Armbrecht*, 327 U.S. 392, 396 … (1946), we have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which if strongly applied, threaten the 'evils of archaic rigidity,' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 … (1944). The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct … particular injustices.' *Ibid.* (permitting post-deadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of proper precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case."

130 S.Ct. at 2562-63.

Before this Court's decision in *Holland*, several Circuits held that serious misconduct by an attorney may constitute an extraordinary circumstance for equitable tolling. *Baldayaque v.*

United States, 338 F.3d 145, 152 (2d Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *abrogated in part*, *Carey v. Saffold*, 536 U.S. 214 (2002); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005); *Spitsyn v. Moore*, 345 F.3d 796, 801-02 (9th Cir. 2003); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007). Butler's abandonment of Cory Maples, however, is more than ineffectiveness or incompetence of counsel. Butler's abandonment of Maples is the severing of the agent-principal relationship.

Under the "equitable principles" governing habeas, Maples should not be held responsible for his own abandonment. As this Court said in *Holland*, "[c]ourts of equity have sought to relieve 'hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which if strongly applied, threaten the 'evils of archaic rigidity,' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 … (1944)." 130 S.Ct. at 2563.

When Butler ceased being the special agent or attorney of Maples, any notice to Butler was not notice to Maples. Equity and justice require that Cory Maples not be penalized because Butler abandoned Maples and ceased performing legal duties. *Wilkinson*, 23 Ala. App. at 563-64, 129 So. at 301-02. *Accord Florence*, 226 Ala. at 656, 148 So. at 149; *Downs*, 520 F.3d at 1321; *In re JLJ, Inc.*, 988 F.2d at 116; *Schuleter*, 384 F.3d at 81 (Ambro, J., dissenting); *Baldayaque*, 338 F.3d at 154 (Jacobs, J., concurring); *Rouse*, 339 F.3d at 250 n.14;

Restatement (Third) of Agency § 5.04 (2006). Under equitable principles, *Holland*, 130 S.Ct. at 2562-63, and *Federalist* Papers No. 80, *The Powers of the Judiciary*, Cory Maples demonstrated extraordinary circumstances that excuse his procedural default, warranting review of his *habeas corpus* petition.

In *Maples v. Allen*, 586 F.3d 876, 888-89 (11th Cir. 2009), the Eleventh Circuit failed to recognize that Cory Maples could not have filed any pleadings, any appeals, or otherwise appeared *pro se.* The Eleventh Circuit further failed to recognize that attorney abandonment was a ground for an out-of-time appeal and failed to address *Thompson, supra*. The Eleventh Circuit failed to exercise its equitable powers and grant Cory Maples relief from the Maples' abandonment by counsel.

E. A Prisoner Abandoned By Local Counsel And Not Served With Notice Of Critical Ruling Is Denied Due Process Of Law.

The Fourteenth Amendment prohibits "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." "'Each of our due process cases has recognized, either explicitly or implicitly that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (quoting *Viteck v. Jones*, 445 U.S. 480, 491 (1980)). "As our decisions

have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Zimmerman Brush Co.*, 455 U.S. at 434. "A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999).[2]

"Attorneys are officers of the court…." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). *Accord Federated Mut. Ins. Co. v. McKinnon Motors, LLC.*, 329 F.3d 805, 808-09 (11th Cir. 2003); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); *Ex parte Sparks*, 368 So. 2d 528, 533 (Ala. 1979). "[I]n addition to his duty of diligently researching his client's case, [an attorney] always has a duty of candor to the tribunal." *Burns*, 31 F.3d at 1095. "The duty of candor goes beyond the moral duty imposed on counsel by ethical codes or good conscience." *Burns*, 31 F.3d at 1095 n5. "[A]s an officer of the court[, counsel has] 'a continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation."

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2 The Alabama Criminal Defense Lawyers Association agrees completely with the Petitioner's points and authorities on notice. (*See* Brief of Petitioner, pp. 22-34.) This *amicus* brief focuses on the failings of local counsel, not the adequacy of the notice provided by the State. Nonetheless, as Petitioner has explained, the notice in this case created an unreasonable risk of confusion for a local counsel performing his ethical obligations because both Alabama law and the order denying Maples' Rule 32 petition required that *all* attorneys of record be served, thus entitling local counsel to presume that (at least) reasonable efforts to notify out-of-state counsel would in fact be made. *Id.* at 16.

Byrne v. Nezhat, 261 F.3d 1075, 1117 n.83 (11th Cir. 2001) (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993)).

Butler had a continuing duty to inform the Morgan County Circuit Court that he did not intend to personally appear at any hearing on Maples' Rule 32, Ala. R. Crim. P., petition, and that he was not accepting joint and several responsibility with Ms. Ingen-Housz and Mr. Munanka to Maples, to the State of Alabama, and to the Morgan County Circuit Court in all matters arising from Maples' Rule 32 petition.

Butler failed to be candid with Maples, the Court, and the State of Alabama that he was not fulfilling his responsibilities under Rule VII.C. As a direct result of Butler's failure to satisfy his duty of candor as an officer of the Court, Maples was denied his appeal of right of the denial of his Rule 32 petition by the Morgan County Circuit Court, as well as all other post-conviction relief mechanisms to determine whether the State of Alabama has the right to take his life.

Butler's abandonment of Maples deprived him of notice of the denial of his Rule 32 petition, of timely appeal of the denial of his Rule 32 petition, and judicial review of his *habeas corpus* petition. Butler's abandonment of Maples effectively denied him due process of law and, unless equitable principles are applied to permit judicial review of his *habeas corpus* petition, Butler's actions deny Maples judicial review that could reverse his conviction or his sentence and save him from execution. To

permit an attorney to abandon a client during post-conviction without finding extraordinary circumstances to allow judicial review, grants deprivation of life without due process of law. It ignores the equitable powers with which the Founding Fathers imbued federal courts. Further, Butler's failure to comply with Rule VII.C, and with his duty of candor as an officer of the court, has effectively denied Cory Maples of his life and liberty without due process of law.

CONCLUSION

John G. Butler's abandonment of Cory Maples during the pendency of Maples' Rule 32 petition severed the attorney-client and the principal-special agent relationship. Thus, notice to Butler of the denial of Maples' Rule 32 petition was not notice to Maples. The equity powers of this Court, as well as the lower federal courts, were intended to correct "hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which if strongly applied, threaten the 'evils of archaic rigidity,' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 … (1944)." 130 S.Ct. at 2563. To permit the denial of Maples' *habeas corpus petition* without a review of the merits is inequitable, as well as a miscarriage of justice.

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