No. 10-63

IN THE
Supreme Court of the United States

CORY R. MAPLES
Petitioner,
v.

KIM T. THOMAS,
ACTING COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF OF *AMICA CURIAE* DEBORAH A. DEMOTT IN SUPPORT OF PETITIONER

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BRIEF OF *AMICA CURIAE* DEBORAH A. DEMOTT IN SUPPORT OF PETITIONER

This brief is submitted on behalf of Deborah A. DeMott as *amica curiae* in support of petitioner.[1]

INTEREST OF *AMICA CURIAE*

Deborah A. DeMott is the David F. Cavers Professor of Law at Duke University where she has been a member of the law faculty since 1975. Professor DeMott served as the sole Reporter for the American Law Institute's *Restatement (Third) of Agency*, published in 2006. She is the author, among other works, of *Fiduciary Obligation, Agency and Partnership*, published in 1991. She has held appointment as the Centennial Visiting Professor in the Law Department of the London School of Economics and has served as a Fulbright Senior Scholar at Sydney and Monash Universities in Australia, and she has been the New Zealand Legal Research Foundation Visiting Fellow at the University of Auckland, in addition to teaching and lecturing at other universities in the United States and abroad. In addition to her scholarship on agency and fiduciary obligation, she has written on corporate law, takeovers, and acquisi-

[1] Pursuant to Rule 37.6, counsel for *amica curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amica curiae* or her counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

tions.[2]

Amica has no stake in the outcome of this case other than her academic interest in the logically coherent development of the law. *Amica* is filing this brief because this case could implicate fundamental doctrines in the common law of agency, and *amica* believes her unique perspective may assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

In an agency relationship, "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006) (hereinafter *Restatement (Third)*). Acting "on behalf of" the principal, the agent represents the principal in interactions with third parties.

A relationship of agency is also a fiduciary relationship, *id.* § 1.01, which requires the agent to act "loyally for the principal's benefit in all matters connected with the agency relationship," *id.* § 8.01. Like its consensual nature, the fiduciary character of agency has long been recognized as essential to the relationship. Justice Story long ago noted the "plain and obvious consideration" that a "principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit." Joseph Story, *Commen-*

[2] Institutional affiliations are listed for identification purposes only.

taries on the Law of Agency § 210 (N. St. John Green revisor 1874, 8th ed.) (reprinted 2006) (*hereinafter* Story, *Commentaries*). The principal retains the agent with "a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may." *Id.*

This case concerns Cory Maples—a prisoner on death row—whose attorney-agents most certainly did not "act with a sole regard to the interests of [their] principal." In particular, Clara Ingen-Housz and Jaasi Munanka were associates at Sullivan & Cromwell LLP, but in accordance with that firm's pro bono representation policy, they represented Maples "on an individual basis." Pet. App. 257a. John Butler, local Alabama counsel, also appeared on Maples's behalf, but acted only to allow Ingen-Housz and Munanka to proceed *pro hac vice*. Butler had no other role in the case, and, indeed, actively avoided any substantive representation of Maples. Pet. App. 255a-56a.

As recounted in detail in Maples's opening merits brief, *see* Pet. Op. Br. 9-13, Ingen-Housz and Munanka filed a post-conviction petition on Maples's behalf in Alabama state trial court. The trial court denied the petition. By that time, however, the two attorneys had left Sullivan & Cromwell, without informing the court or substitute counsel. One counsel left the United States for a government position with the European Commission in Brussels. Pet. App. 258a. The other remained in the United States to become a law clerk to a federal judge, a position that precluded his representation of private clients. Pet.

App. 258a.

When the trial court denied Maples's petition, the clerk's office sent notice to his pro bono counsel of record—Ingen-Housz and Munanka—as well as to Butler. The notices sent to Ingen-Housz and Munanka were returned to the court clerk's office, marked "Return to Sender" and "Left Firm." In response, the clerk's office did nothing. And since Butler played no substantive role in the case whatsoever, he also did nothing. Maples's statutory deadline for appealing the denial of his post-conviction petition passed. The Alabama courts subsequently denied Maples's attempts to appeal as time-barred, and Maples sought to file a habeas corpus petition in federal court.

The courts below held that Maples is foreclosed from seeking federal habeas corpus relief based on a procedural default that was indisputably no fault of his own. It was, instead, attributable to the actions of Maples's pro bono attorneys—who left Maples without any authorized attorney to represent him in his state post-conviction proceedings at a time when they nevertheless remained his attorneys of record in the case—and of Butler, who had never taken on a true representation in the first place. The central question in the case when it comes to whether attorney conduct may constitute cause to excuse the default is whether those attorneys' error can be attributed to Maples.

Under settled agency principles, the answer is clearly no. No putative agent had actual authority to bind Maples during the relevant period. Under fundamental principles of agency law, the principal-

agent relationship between Maples and his New York counsel terminated before the procedural default, either because Maples's attorneys acted disloyally by abandoning him, or because they renounced their agency. Nor can Maples be held responsible for Butler's actions (or inaction). Butler was, at most, a subagent retained by Ingen-Housz and Munanka to allow them to participate *pro hac vice*, and for no other purpose. Under agency law, his agency ended with Ingen-Housz's and Munanka's. And even if Butler can be said to have been Maples's agent, Butler terminated the agency through renunciation and disloyalty to his putative principal. Finally, neither the mistakes of any other Sullivan & Cromwell attorney, nor of personnel in the Sullivan & Cromwell mailroom, can be imputed to Maples, because none of those actors was ever authorized to act as Maples's agents before the default.

Nor can the state take solace in the doctrine of apparent authority. That doctrine in many circumstances allows a third party to bind a principal to the acts of a putative agent, even when the agent acts without actual authority. But that doctrine has no application with respect to the relationship between a lawyer and a client in fundamental matters left to the client's discretion, especially when (as here) the client has little to no control over his lawyer. And in any event, the doctrine of apparent authority would not help the state even if applicable. In short, agency principles would not permit holding Maples responsible for the procedural default in this case.

ARGUMENT

I. This Court Has Suggested That Principles Of Agency Law Provide Guidance For When An Attorney's Actions Should Be Attributed To His Client In The Habeas Corpus Context

The relationship between a client and his attorney is generally one of principal and agent. Thus, agency law provides a natural framework for determining whether and how an attorney's conduct should be attributed to the client. As the principal's representative, an attorney-agent acts "on behalf of" the principal in the agent's interactions with third parties. *Restatement (Third)* § 1.01. Based on this framework, this Court has consistently mined agency law principles in determining whether an attorney's actions or inactions should be imputed to the affected clients.

For example, this Court has held that an attorney's behavior could not excuse a party from a dismissal for failure to prosecute a civil suit, explaining that "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) (quotation omitted). Similarly, this Court has held that a Title VII statute of limitations—which is triggered by an EEOC

complainant's receipt of a notice from that agency—begins to run when the complainant's lawyer receives the required notification. The Court reiterated that "[u]nder our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.'" *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990) (quoting *Link*, 370 U.S. at 634 (quotation omitted)).

The Court has similarly invoked agency principles in the specific context of federal habeas corpus actions, and in particular in determining whether a habeas petitioner can demonstrate "cause" for a procedural default in state court. In *Murray v. Carrier*, although the Court did not specifically rely on agency law, it did explain that unless a defendant's counsel was constitutionally ineffective, "we discern no inequity in requiring [the defendant] to bear the risk of attorney error that results in a procedural default." 477 U.S. 478, 488 (1986). And in *Coleman v. Thompson*, the Court made its reliance on agency principles in the procedural default context explicit, holding that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" 501 U.S. 722, 753 (1991) (quoting *Murray*, 477 U.S. at 488). Any other rule, the Court explained, "would be contrary to well-settled principles of agency law." *Id.* at 754 (citing *Restatement (Second) of Agency* § 242 (1958) (hereinafter *Restatement (Second)*)).

If agency principles justify binding parties to the mistakes of their lawyers, then it follows that parties—including habeas petitioners—are *not* bound by lawyers' errors when the lawyer is *not* acting as the party's agent. As Justice Alito recently explained, "[c]ommon sense dictates that a litigant cannot be constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 2573 n.9 (Scalia, J., dissenting) (stating that an attorney's "disloyalty or renunciation of his role" would "terminate [his] authority" (citing *Restatement (Second)* §§ 112, 118)).

Of course, to say that agency principles provide guidance in this context is not to say that agency law *must* be applied here as strictly or comprehensively as it would be elsewhere. The consequences of applying strict rules governing when an unknowing principal is bound by his agent are not normally as severe as they would be in this case due to the fact that the petitioner is facing execution. And the harshness of those consequences may counsel in favor of leniency unavailable to the ordinary principal in an ordinary commercial or even litigation context. That is especially true in light of the equitable principles governing habeas corpus. *See, e.g.*, *Holland*, 130 S. Ct. at 2560-61. But the Court need not resolve that question here because, assuming agency principles are applicable, their straightforward application leads to the conclusion that Maples should not be held responsible for the procedural default in this case.

II. Relevant Agency Doctrines

As explained, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third)* § 1.01. It is a fundamental principle of agency law that whether and to what extent an agency relationship exists does not turn on the labels attached to the relationship. Rather, an "agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling." *Id.* § 1.02.

There are three main doctrines under which a principal can be bound by the acts of his agents: i) an agent's exercise of actual authority; ii) apparent authority; and iii) ratification. An agent has actual authority to bind a principal "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Restatement (Third)* § 2.01. The scope of an agent's actual authority depends on the extent to which the principal has delegated that authority, either explicitly or through his manifestations. *Id.* § 2.02.

The doctrine of apparent authority, in contrast, operates parallel to actual authority and asks when a principal can be bound by a putative agent's acts, even in the absence of actual authority. Apparent

authority is the "power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third)* § 2.03. When a principal is bound vis-à-vis a third party on the basis of the putative agent's apparent authority, the principal nevertheless can recover from the agent if there was in fact no actual authority. *Restatement (Third)* §§ 2.03 cmt. a, 8.09 cmt. b.

Finally, a person may be bound by a prior act of another through ratification, i.e., assent to the prior act. *See Restatement (Third)* § 4.01.

There is no plausible argument that Maples ever ratified his purported attorneys' failure to timely appeal the denial of his post-conviction petition. Part III explains why no putative agent had actual authority to bind Maples during the relevant period. And Part IV explains why the doctrine of apparent authority has no application in this context, and why it would in any event not help the state.

III. No Putative Agent Had Actual Authority To Bind Maples During The Relevant Period, And Agency Principles Thus Preclude Holding Maples Responsible For The Procedural Default In This Case

No putative agent had actual authority to bind Maples during the relevant period, i.e., between the trial court's denial of his post-conviction petition and the day the time limit to appeal that determination lapsed. Accordingly, the procedural default in this case cannot be attributed to Maples under agency

principles.

A. Maples's Pro Bono Counsel Terminated Their Agency Before The Relevant Period, And Their Acts Thus Cannot Be Attributable To Maples

The most significant potential principal-agent relationship at issue in this case is the one between Maples and his post-conviction pro bono counsel of record, Clara Ingen-Housz and Jaasi Munanka. For the reasons explained below, Ingen-Housz's and Munanka's conduct is not attributable to Maples under ordinary principles of agency law.

1. Under fundamental agency principles, an agent must "act loyally for the principal's benefit in all matters connected with the agency relationship," *id.* § 8.01, a duty that "disallows the pursuit of self-interest as a motivating force in actions the agent determines to take on the principal's behalf," *id.* cmt. b. An agent breaches this duty by assuming a stance "antagonistic" to the principal, *see* Floyd R. Mechem, *A Treatise on the Law of Agency* § 1189 (2d ed. 1914), because the principal "has a right to assume when he employs an agent, unless he is advised to the contrary, that the agent is in a situation to give to his principal that undivided allegiance and loyalty which the proper performance of the agency requires, *and that he will remain in that situation*." *Id.* § 1206 (emphasis added).

An ongoing agency relationship may of course be terminated by mutual consent, *Restatement (Second)* § 117, or unilaterally by the principal, *id.* § 118. The relationship can also be terminated by the conduct of

the agent. Thus, for example, the agency relationship terminates if the agent, "without knowledge of the principal … is … guilty of a serious breach of loyalty to the principal." *Id.* § 112; *see also Restatement (Third)* § 5.04 ("[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."). Similarly, an agent's renunciation terminates the agency relationship, *Restatement (Second)* § 118, and the "agent may manifest renunciation by conduct inconsistent with the continued performance of his duties to the principal," *id.* § 119 cmt. b.

2. Ingen-Housz and Munanka terminated the agency relationship by abandonment, if not also by renunciation.

Maples's counsels of record ended their representation to accept other employment on terms that effectively if not legally forbade the representation—including the continuing representation—of a private client like Maples. While Maples's post-conviction petition was pending before the Alabama trial court, Ingen-Housz left the country and joined the European Commission in Belgium, and Munanka left the firm to become a law clerk to a federal judge in New York. Pet. App. 258a. Ingen-Housz and Munanka knew that their acceptance of such employment would disable them, both legally and logistically, from continuing to represent petitioner. Moreover, Ingen-Housz and Munanka left the representation without notifying the court or substituting counsel, as required by Alabama law—

leaving Maples without authorized pro bono counsel in the proceeding at a time when he believed he was in fact represented.

a. Ingen-Housz's and Munanka's conduct plainly terminated the agency relationship, even though they remained Maples's pro bono attorneys of record in the case. Abandoning a client contravenes the "plain and obvious" undertaking of loyal service to the principal's interests that underpins any agency relationship. *See* Story, *Commentaries* § 210. The agency relationship terminates in the face of such disloyalty even without a communication of renunciation from the agent to the principal. *See Restatement (Second)* § 112 (agency relationship terminates if the agent, "without knowledge of the principal … is … guilty of a serious breach of loyalty to the principal").

The abandonment (and thus disloyalty) by Maples's pro bono attorneys of record is obvious here. Ingen-Housz and Munanka left their representation of Maples without substituting counsel or notifying the court—leaving Maples unrepresented in his state post-conviction proceeding at a time when Ingen-Housz and Munanka were "still attorneys of record" in Maples's case. Pet. App. 223a.[3] Because of

[3] Whether Maples believed his "lawyers at Sullivan and Cromwell" (J.A. 253) were Ingen-Housz and Munanka, or "other attorneys at the firm," as the state has suggested, Br. in Opp. 34, the fact is that—as the Alabama court itself found, Pet. App. 223a—Maples was left unrepresented in the action at the time of the default. Under either account, therefore, Maples was abandoned, believing that he was represented in the Alabama post-conviction proceeding when in fact he was not.

Ingen-Housz's and Munanka's actions, the Alabama court clerk's office sent notifications to the departed attorneys at their former law firm, and those notices were returned to the sending court stamped "Return to Sender," with one envelope carrying the handwritten addition: "Left Firm." As a result, neither counsel of record—nor anyone remaining at the law firm—learned of the petition's denial.

b. Termination through renunciation may be found based on an agent's conduct under even less egregious circumstances. The Restatement (Second) illustrates:

> A is P's local agent in town X. A moves away without communication to P, intending to abandon the old job and obtain a new one. Failing to get it, he returns promptly to X and transacts business for P. In the meantime P learns of A's conduct. It may be found that A's authority is terminated.

Restatement (Second) § 119 illus. 5. Termination of authority follows *a fortiori* on the facts here. Unlike in the illustration, neither Ingen-Housz nor Munanka returned purporting to resume their representation of Maples. And, as explained, both attorneys took new jobs that made it impossible to continue the representation. The agency relationship was terminated under a straightforward application of agency principles.

The actions by Maples's attorneys do not meet any plausible standard for attributing responsibility. Their conduct was not the ordinary or mundane negligence of an otherwise faithful lawyer-agent. *See,*

e.g., *Coleman*, 501 U.S. at 753. Rather, either their abandonment (disloyalty) or their renunciation served to end the agency relationship altogether. Translated into the immediate habeas context, Maples's state-level procedural default should be excused, because it was the fault of attorneys who were no longer serving as Maples's agents, and their conduct thus cannot be attributed to him.

B. Local Counsel's Conduct Cannot Be Imputed To Maples

As explained, apart from Ingen-Housz and Munanka, John Butler, local Alabama counsel, also appeared on Maples's behalf in the Alabama trial court. Butler received notice from the state court of the denial of Maples's post-conviction petition but did nothing in response. Butler's conduct cannot be attributable to Maples under agency principles.

Although Butler filed an appearance stating that he was Maples's counsel, that did not give him actual authority to bind Maples as his agent. As explained above, the question whether a putative agent has actual authority to bind a principal does not depend on labels. Rather, the existence and scope of actual authority are determined by whether the elements of an agency relationship have as a matter of fact been established. *See Restatement (Third)* § 1.02. Butler's failure to act on the notice of the denial of Maples's post-conviction petition does not bind Maples under agency law, for several reasons.

First, even if Butler did have some agency authority, his duty would best be described under agency law not as that of Maples's agent, but as In-

gen-Housz's and Munanka's subagent. "A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal." *Restatement (Third)* § 3.15. That aptly describes Butler's limited role here. Butler fulfilled a narrowly defined function as an intermediary or middleman of sorts, which was to obtain the *pro hac vice* admission of counsels of record in Alabama courts. *See* Pet. App. 255a. Butler performed no other role and there is no indication that Butler ever communicated with Maples, or that Maples understood him to play any role in his defense. Although the Alabama rules required the inclusion of local counsel's name on "all notices, orders, pleadings, and other documents filed in the cause," J.A. 365-66, counsels of record had agreed that local counsel would bear no substantive responsibility toward petitioner. Pet. App. at 256a. Given the onus placed on Ingen-Housz and Munanka to find and retain local counsel, at most Butler occupied the role of Ingen-Housz's and Munanka's subagent, to whom they delegated responsibility for enabling their representation of Maples *pro hac vice*.

Because Butler is best classified as a subagent, his actual authority to bind Maples terminated with that of Ingen-Housz and Munanka. "Whether a subagent acts with actual authority depends on three separate consensual relationships: (1) between principal and appointing agent; (2) between appointing agent and subagent; and (3) between principal and subagent. A subagent's actual authority terminates upon notice to the subagent that any of these relationships is severed." *Restatement (Third)* § 3.15

cmt. e. And under agency doctrine, a person has "notice" of a fact when the person "knows the fact, has reason to know it, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." *Id.* § 5.01(3).

Here, as explained, Ingen-Housz and Munanka severed their agency relationship with Maples, either through abandonment (disloyalty) or renunciation. *See supra* Part III.A. And Butler had "notice" of that severance; as Maples's local counsel and Ingen-Housz's and Munanka's subagent, he plainly "should [have] know[n]," in order "to fulfill [his] duty to" Maples, that the attorneys who Butler had insisted would handle all matters in Maples's case had in fact ended their representation. *Id.* § 5.01(3); *see also* Story, *Commentaries* § 469 (explaining that the subagency is automatically terminated upon severance of the primary agency relationship because the subagency is a "dependent power," and because termination is "a natural result from the presumed intention of the principal"). Thus, when Ingen-Housz and Munanka terminated their agency relationship with Maples, so too did they sever Butler's authority to act as a subagent.

Second, even if Butler could have been considered Maples's agent at one time, his failure to respond to the notice of the denial of Maples' post-conviction petition cannot be attributable to Maples, because Butler severed the agency through his intentional conduct. As explained, an agent must "act loyally for the principal's benefit in all matters connected with the agency relationship," *Restatement (Third)* § 8.01, a duty that "disallows the pursuit of self-interest as

a motivating force in actions the agent determines to take on the principal's behalf," *id.* cmt. b. But Butler plainly did not act in accordance with his duty of loyalty in *any* matter other than assuring that Ingen-Housz and Munanka could appear *pro hac vice*. Indeed, Butler informed Ingen-Housz and Munanka "at the outset of the case" that he would have no role beyond allowing the New York attorneys to appear *pro hac vice*, because he "did not have the resources, available time or experience" to take on any broader role. Pet. App. 255a. And although Butler communicated those restrictions to Ingen-Housz and Munanka, nothing in the record suggests that they were communicated to Maples.

By so restricting the range of his activity, local counsel abandoned petitioner and severed any agency relationship between them. To be sure, unlike Ingen-Housz and Munanka, local counsel did not leave the physical site of his law practice, but the impact of his considered inaction was the same for petitioner—Butler ceased to function (indeed, never began to function) as Maples's agent. Even though Butler agreed to the use of his name in filings, his renunciation and conduct provided Maples with "counsel in name only." *McLaughlin v. Lee*, 2000 WL 34336152, at *3 (E.D.N.C. Oct. 19, 2000). And if Butler's conduct were not enough by itself to sever the agency relationship, the given reason for that conduct certainly would be. Butler's stated motivation for his inaction was explicitly self-regarding, *viz.*, his preference to allocate his "resources," including his time, to his own ends or those of other clients, rather than to Maples. Butler's representation restrictions and his inaction thus constituted a serious

breach of his duty of loyalty to Maples, which plainly severed any agency relationship that may have existed. Maples cannot be held responsible for the actions (or inaction) of local "counsel," who was—if an agent at all—an agent in name only.

C. The Failure Of Other Potential Agents At Sullivan & Cromwell To Respond To The Denial Of Maples's Post-Conviction Petition Cannot Be Attributed To Maples

The state may argue that Maples can be held responsible for the mistakes of other attorneys at Sullivan & Cromwell, or by personnel in that firm's mail room. Not so.

1. No other attorneys at Sullivan & Cromwell received notice of the denial of Maples' post-conviction petition. To the extent that their failure to become notified was negligent, that negligence cannot be imputed to Maples for the simple reason that no Sullivan & Cromwell attorney other than Ingen-Housz and Munanka was ever Maples's agent in the state post-conviction proceeding or could have had actual authority to act for Maples.

The record evidence is clear that "[l]awyers at S&C handle *pro bono* cases on an individual basis." Pet. App. 257a. Thus, according to the record, when Maples engaged Ingen-Housz and Munanka as his agents, he engaged *only* them, and not their law firm or any other individuals in the firm. And while other lawyers at the firm reportedly may have made plans to take over Maples's representation when Ingen-Housz and Munanka departed, they never became Maples's authorized agents in the post-

conviction proceeding before the default.

First, because any other Sullivan & Cromwell attorneys would have represented Maples in their individual capacity, there would be no agency relationship unless Maples manifested his assent to have such individuals act as his agents in his post-conviction proceeding. *See, e.g.*, *Restatement (Third)* § 1.01 (requiring that the principal "manifests assent" that "the agent shall act on the principal's behalf and subject to the principal's control"). The record does not answer whether such assent was given.

Second, even if Maples agreed to have other attorneys at Sullivan & Cromwell represent him, he still would not be bound by their actions (or inactions). Under agency law, the "failure to acquire a qualification by the agent without which it is illegal to do an authorized act … terminates the agent's authority to act." *Restatement (Second)* § 111. And, as the Alabama court itself found, no other Sullivan & Cromwell attorney became admitted to practice in Alabama during the relevant period. Thus, no other Sullivan & Cromwell attorney could have had actual authority to bind Maples.[4]

Third, and finally, even if other attorneys at Sullivan & Cromwell were at any point Maples's agent, they abandoned him. No one at the firm made any

[4] It goes without saying that the later efforts of Sullivan & Cromwell attorneys to represent Maples and to cure the procedural default do not remedy the fact that no attorney, including any Sullivan & Cromwell attorney, acted as Maples' agent during the relevant time period—between the time the trial court denied Maples's post-conviction petition and the running of the statute of limitations to appeal that denial.

effort to file an appearance in the Alabama trial court or to otherwise investigate the state of play there, even though they presumably knew that Ingen-Housz and Munanka were gone and would no longer have any role in Maples's case. That is not simply negligent conduct, as missing a filing deadline would be. It is disloyal conduct, because it deprives Maples of any representation at all—when Maples believed he was represented by counsel in that proceeding. Accordingly, even if any Sullivan & Cromwell attorney other than Ingen-Housz or Munanka was ever Maples's agent, they severed that relationship by failing to give Maples their undivided loyalty.

2. Maples is similarly not chargeable with the actions or errors of personnel in Sullivan & Cromwell's mail room, which returned the notices of the denial of Maples's post-conviction petition to the state. As explained, Ingen-Housz and Munanka, and not the firm itself, were petitioner's agents. Once counsel abandoned their agency relationship with petitioner, any conceivable basis for holding Maples responsible for mishaps in the mailroom terminated as well.

In any event, under Alabama's Rule of Professional Conduct 5.3(c), a lawyer is generally not responsible for conduct of a nonlawyer that, if done by a lawyer, would breach the lawyer's duties. The only potentially relevant exception to that rule is if the lawyer specifically ordered or ratified the conduct or is a partner in a law firm with direct supervisory re-

sponsibility over the nonlawyer.[5] But there is no evidence that any lawyer specifically ordered or ratified any conduct of the mailroom here, or had direct supervisory responsibility over the mailroom at all. As such, even if Ingen-Housz and Munanka had been employed by the firm at the time of the mailroom's actions, they would not have been chargeable with the mailroom's conduct under this Rule. As Ingen-Housz and Munanka never had responsibility for the conduct of those in the mail room, the actions of the mail room are no different than if FedEx or UPS had failed to deliver the notices in the first place. In no event can the mailroom's conduct be attributed to Maples.

IV. The Doctrine Of Apparent Authority Has No Application In This Context

The only other plausible basis on which to hold Maples responsible for his putative agents' conduct is the doctrine of apparent authority, under which a third party may bind a principal to the acts of a putative agent, even when the agent has no actual authority, "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's mani-

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[5] Rule 5.3(c) says that "[a] lawyer shall be responsible for conduct of [a nonlawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

festations." *Restatement (Third)* § 2.03. Apparent authority has no application in the context of the relationship between a criminal defendant and his lawyer, particularly in the circumstances of this case. And even if it did, that doctrine would not hold Maples responsible for the conduct of any putative agent.

A. The Doctrine Of Apparent Authority Does Not Apply In The Context Of A Lawyer And His Client, At Least In The Circumstances Here

The doctrine of apparent authority has no application here, for several reasons.

To begin, the doctrine of apparent authority is generally inconsistent with ordinary understandings of the attorney-client relationship, in which certain fundamental decisions require that the agent act with actual authority. *Restatement (Third) of the Law Governing Lawyers* § 27 cmt. d (2000) (retaining an attorney does not create apparent authority in such matters as the decision to take a criminal appeal). While the client is of course bound by the conduct—even the negligent or wrongheaded conduct—of his attorney acting *within* the scope of his agency, it would be utterly bizarre to hold a client responsible for an attorney's conduct *when the attorney is not acting as his agent at all*. Were it otherwise, a lawyer purporting to represent a client but having no actual authority could, for example, forfeit an appeal or negotiate a guilty plea. That is not the law. *Cf. Restatement (Third)* § 3.03 cmt. b (explaining that clients may not be bound under the doctrine of apparent authority by an attorney's attempt to settle a

case).

The doctrine of apparent authority is a particularly poor fit in the context of this case, where the putative principal is a death row inmate with little if any control over his putative agent. As the statement of the general rule of apparent authority makes clear, the underlying rationale for that doctrine stems from manifestations made *by a principal* concerning an agent's authority. *Restatement (Third)* § 2.03 & cmt. c. When the principal is in control of manifestations of authority, he is responsible for actions that third parties reasonably take in response to the conduct of the putative agent. In those circumstances, the principal is in a better position to disabuse the third party of the existence of actual authority than the third party is to figure out the parameters of the agency relationship for himself. But when the principal makes no manifestation of authority, the doctrine of apparent authority loses its bearings.

Maples had little or no control over his manifestation of authority concerning Ingen-Housz, Munanka, Butler, or anyone else. The first two abandoned him, and the third was never his agent in the first place. Meanwhile, Maples was locked up in a prison cell in Alabama and reasonably believed he was represented by lawyers who would—and could—consult with him and appeal the denial of his state post-conviction petition when the court acted. Accordingly, Maples had no opportunity to renounce his agents or cabin their authority.

Apparent authority is inapplicable in this context for another reason. Normally, when a principal is

bound vis-à-vis a third party on the basis of the putative agent's apparent authority, the principal nevertheless can recover from the agent if there was in fact no actual authority. *Restatement (Third)* §§ 2.03 cmt. a, 8.09 cmt. b. But here, Maples cannot possibly be made whole by bringing an action against any of his putative agents. While they may be subject to money damages, money cannot give back Maples's opportunity to appeal the denial of his post-conviction petition in state court, or to challenge his conviction and sentence in federal habeas. Indeed, the radically asymmetrical consequences that would result in applying the doctrine of apparent authority here—Maples will be executed without any opportunity to challenge his conviction in federal habeas, and without any adequate recourse against his fleeing agents, while the state would have to defend a conviction in federal court, as it would have had to do anyway—make clear that this doctrine is inapplicable in these circumstances.

B. Even If The Doctrine Of Apparent Authority Were Generally Applicable, It Would Not Bind Maples Here

Even if the doctrine of apparent authority were applicable in this context, that doctrine would not hold Maples responsible for the conduct of Ingen-Housz, Munanka, or Butler. As explained, a third party may bind a principal only when the "third party *reasonably* believes the actor has authority to act on behalf of the principal." *Restatement (Third)* § 2.03 (emphasis added). Thus, an agent ceases to act with apparent authority "when it is no longer reasonable for the third party with whom an agent

deals to believe that the agent continues to act with actual authority." *Id.* § 3.11(2). "If a third party has notice of facts that call the agent's authority into question, and these facts would prompt a reasonable person to make inquiry of the principal before dealing with the agent, the agent does not act with apparent authority.") *Id.* cmt. e. As explained, a person has "notice" of a fact when the person "knows the fact, has reason to know it, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." *Id.* § 5.01(3).

The Alabama court clerk's office could not have had a reasonable belief that Ingen-Housz and Munanka continued to act as Maples's agents. When the "Return to Sender" and "Left Firm" notifications arrived back at the state courthouse, the court clerk—and the state—were placed on notice of facts that called into serious question whether petitioner continued to be represented by his counsels of record. Yet despite receiving the notifications stamped "Return to Sender," the state failed to make reasonable inquiry into whether Ingen-Housz and Munanka continued to serve as Maples's agents.

The state is also precluded from relying on apparent authority as to Butler. The returned notices from the counsels of record sufficed to place the clerk on notice that something was seriously awry with respect to Maples's legal representation. The clerk thus had "notice of facts that call" all of Maples's purported lawyers' "authority into question." *Id.* cmt. e. Brief inquiries would have clarified the matter—and in time for an appeal within the relevant 42-day period—but the clerk did nothing. In all

events, but particularly in a context with such grave consequences for the principal, the state's failure to inquire into the circumstances of Maples's representation precludes any reliance on the doctrine of apparent authority.

CONCLUSION

For the foregoing reasons, if principles of agency are applied, the judgment below should be reversed.

Respectfully submitted,

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