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 UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

CAPITAL CASE
QUESTION PRESENTED

In this capital case, the divided Eleventh Circuit held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender—Left Firm" written on an envelope. This Court granted certiorari to address the following question:

Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other courts—that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 586 F.3d 879. The opinion and orders of the district court denying habeas relief (Pet. App. 33a-218a) are not reported. The orders of the district court granting and expanding (*id.* at 219a-21a) the certificate of appealability are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2009. Pet. App. 1a. A timely petition for rehearing was denied on February 9, 2010. *Id.* at 238a-39a. Petitioner timely filed a petition for a writ of certiorari on July 9, 2010. This Court granted certiorari on March 21, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent constitutional and statutory provisions and rules are reprinted at Pet. App. 242a-52a.

INTRODUCTION

This case tests when events beyond an inmate's control may bar federal court review of the merits of serious constitutional claims on habeas. The petitioner, Cory Maples, is on death row in Alabama. The jury recommended death based on the slimmest margin allowed under Alabama law, following a trial and sentencing that were tainted by gross ineffectiveness on the part of Maples's court-appointed counsel, who themselves admitted that they were "stumbling around in the dark" given their inexperience in handling capital cases. *Infra* at 8-9. Maples seeks federal habeas review of the merits of his claim that he was convicted and sentenced to death in violation of the Sixth

Amendment. The courts below, however, held that Maples lost the opportunity even to raise that claim to a federal court due to a missed deadline for which all agree that Maples himself bears no blame.

The events giving rise to this case already have captured national attention. Maples's *pro bono* attorneys of record—who performed all the work on Maples's state post-conviction petition—left their law firm without notifying the state court or substituting counsel. When the state court clerk mailed notice of the denial of Maples's petition to those attorneys of record, the letters were returned to the clerk unopened and unclaimed, with "Return to Sender—Left Firm" written prominently on an envelope. Even though the attorneys of record had previously provided the court with their personal telephone numbers and home addresses, the clerk simply stuck the returned letters in a drawer—and did not attempt to follow up with anyone. The clerk had also mailed a copy of the order to local counsel but that attorney intentionally had assumed "no … role" in the case other than to permit Maples's out-of-state *pro bono* attorneys to appear on behalf of Maples in Alabama. Pet. App. 257a. The deadline for appeal passed, and the courts below held that a state procedural default barred federal habeas review of Maples's constitutional claims.

For two overriding reasons, the courts below erred in concluding that Maples should be denied federal habeas review in such circumstances. First, the default is fairly attributable to the State's own actions because the state court clerk did nothing when both notices addressed to Maples's *pro bono* attorneys of record were returned unopened and unclaimed. This Court has held that a State's failure to do something more in

directly analogous circumstances violates due process when a *house* is at stake. *Jones v. Flowers*, 547 U.S. 220 (2006). The cause standard requires no less when a man's *life* is at stake. Second, the default is fairly attributable to the actions of Maples's attorneys because they abandoned him in his Alabama post-conviction proceeding and were "not operating as his agent in any meaningful sense of that word" when the events at issue unfolded. *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring in part and concurring in the judgment); *see id.* at 2564-65.

This Court has long recognized that cause exists to excuse a procedural default when "some objective factor *external* to the defense impeded" the petitioner's ability to comply with the default rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (emphasis added). Ultimately this case turns on the application of that common-sense and settled rule. The judgment of the court of appeals below should be reversed.

STATEMENT OF THE CASE

A. Alabama's System For Representation Of Indigent Capital Defendants

In our federal system, States have undeniable leeway in fashioning and implementing their systems of criminal justice. The choices made by Alabama in fashioning its virtually unique system governing the representation of indigent defendants on death row have a direct bearing on the events giving rise both to the procedural default at issue and Maples's underlying ineffective assistance of counsel claims.

Practically alone among the 50 States, Alabama has chosen not to provide counsel for indigent capital defendants in state capital post-conviction proceedings.

While Alabama law permits courts to appoint post-conviction counsel, such appointments may be made "only after a petition has been filed." *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005). Thus, "inmates who are unable to find counsel to represent them before the limitations period for filing a [post-conviction] petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their [petition] and prepare and file a petition in the proper form with the proper claims in the proper court." *Id.*

Alabama has defended its decision not to afford post-conviction counsel in capital cases by encouraging this Court to "look[] closely at the sorts of lawyers who represent Alabama death-row inmates." Brief in Opposition 11, *Barbour v. Allen*, No. 06-10605 (May 10, 2007) ("*Barbour* BIO"). In particular, Alabama has stated that, rather than providing for post-conviction counsel, it chooses "to rely on the efforts of typically well-funded *out-of-state* volunteers." *Id.* at 23 (emphasis added). In opposing certiorari in this case, the State argued that "no inmate currently on Alabama's death row" has proceeded through state post-conviction proceedings without an attorney, and represented that "86% of those attorneys either worked for the Equal Justice Initiative …, out-of-state public interest groups …, or an out-of-state mega-firm." Opp. 15 n.4; *see Barbour* BIO 5-22.

At the time Maples filed his post-conviction petition, Alabama law also provided that "[n]o foreign attorney may appear pro hac vice before any court … of this state unless the attorney has associated in that cause an [Alabama] attorney … called local counsel." Ala. R. for Admission to Ala. Bar VII(C) (1998) (JA

365). In 2006, however, Alabama changed that rule to provide that "[p]ro bono counsel need not associate local counsel." *Id.* (2008) (JA 375); *see* Order Amending Rule VII, App. C (2006) (JA 377). That change was made in recognition of the "considerable challenges" that Alabama has faced "in providing adequate legal representation to indigent persons, particularly criminal defendants in postconviction proceedings," and "to facilitate the provision of indigent defense services by foreign attorneys who volunteer to represent indigent defendants pro bono." JA 377.

Alabama claims to "focus[] its funding efforts on the crucial trial and direct-appeal phases of capital litigation." *Barbour* BIO 22. But at the time of Maples's trial, the State capped compensation for out-of-court work in capital cases (including a lawyer's preparation for trial and sentencing) at only $1,000 per attorney. Ala. Code § 15-12-21(d) (1975). As early as 1988—nine years before Maples's capital trial—an independent study commissioned by the Chief Justice of Alabama's Supreme Court concluded that "compensation rates for the private attorney are currently so low … that competent attorneys have been steadily driven out of the system of representing indigent defendants." Robert L. Spangenberg, *Review of the Indigent Defense System in Alabama*, Executive Summary 4 (June 1988); *see also When Death is on the Line*, Birmingham News, Nov. 8, 2005 (Alabama's system has "discourage[d] highly qualified lawyers from taking cases," such that defendants facing the death penalty receive "court-appointed lawyers [who] often have little experience in capital cases").

Unlike most states, Alabama also disclaims any statewide oversight of indigent defense services. The

result is a "patchwork indigent defense system" that varies by circuit and that, "combined with the minimal qualifications and non-existent training required of attorneys representing capital defendants[,] leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable." ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* at iii (June 2006); *see also* Alabama Appellate Court Justices Cert. Br. at 2 (discussing Alabama system); Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel,* 42 Tulsa L. Rev. 253, 257 (2006) ("The problems with Alabama's postconviction counsel system have very real, and very dramatic, consequences."). This case graphically illustrates the collateral consequences of Alabama's system for indigent death row defendants like Maples.

B. Maples's Trial Proceedings And Direct Appeal

1. After he was charged with the capital murder of two individuals, an Alabama court appointed Maples counsel to present his defense because of his indigent status. Maples's court-appointed attorneys had relatively scant experience in capital cases and, by law, were eligible to recover only $1,000 in fees each for their preparation of the case for trial and sentencing. In 1997, an Alabama jury found Maples guilty of two counts of capital murder: intentional murder during a robbery and intentional murder of two or more persons. The jury recommended death by a vote of 10-2—just one vote shy of the number that would have barred the jury from issuing such a recommendation

under state law. Ala. Code § 13A-5-46(f). The trial court then sentenced Maples to death. Pet. App. 1a.

a. Because of trial counsel's gross ineffectiveness, key facts as to both the offenses and appropriateness of a death sentence were never explored. At trial the State introduced evidence that Maples—who had a history of serious drug and alcohol dependence, but no prior record of violent crime—drank heavily and used drugs on the night of the offense. One of the State's witnesses testified that she saw Maples with drugs shortly after the shootings and that Maples told her he had been "doing crystal meth and crack" that evening. R. 1894.[1] Numerous other witnesses testified that Maples's behavior before the shootings was abnormal, R. 1848, R. 1858-59, and that he was "hyper," acting "drunk," or not making sense. R. 1848, 1858, 1803.

Under Alabama law, the jury would have been entitled to conclude that Maples lacked the mental state necessary for capital murder because of voluntary intoxication. *See* Ala. Code § 13A-3-2 cmt. ("[D]runkenness due to liquor or drugs may render defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime."). But Maples's attorneys failed even to investigate evidence that Maples had been drinking and using drugs, presented no evidence at trial that Maples was intoxicated at the time of the shootings, and did not even request an instruction on voluntary intoxication or manslaughter. Pet. App. 20a-21a. Instead, Maples's attorneys told the jury that

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[1] "R." refers to the record for this case in the Circuit Court of Morgan County, Alabama, Case No. CC95-842, as submitted to the Court of Criminal Appeals of Alabama, Case No. CR-03-0021.

Maples was *not* intoxicated—even though they also later told the jury during the penalty phase that "but for the alcohol and drug usage on this occasion, [the shooting] would probably not have happened." R. 3086.

Maples's state-appointed counsel scarcely mounted a defense at trial, presenting roughly one hour's worth of testimony *total*—comprising less than forty pages of the trial transcript including the state's cross-examinations. *See* R. 2732-66; 2848-51. And the defense that Maples's attorneys did put forth was incoherent and inconsistent. In their opening statements, the attorneys suggested that there were serious doubts concerning "who did this crime, who committed it," and implied that Maples had confessed "to protect someone." R. 1471-73. In their closing arguments, however, Maples's attorneys inexplicably shifted course and told the jury that "[w]hat we have here is … [Maples] walking out to the car and in an instantaneous rush killing two people," R. 2918, and "conceded … there was a loss of life caused intentionally at the hand of Corey [sic] Maples," R. 2914. In other words, in their own closing, Maples's state-provided attorneys all but professed Maples's guilt to capital murder under Alabama law.

b. If anything, Maples's court-appointed attorneys only compounded their errors at the penalty stage. The penalty phase began following a lunch break on the same day that the jury handed down its verdict in the guilt phase and lasted all of an afternoon, with closing arguments the following morning. During the hearing, Maples's attorneys—who had never previously tried the penalty phase of a capital case—admitted to the jury that, owing to their inexperience, they "may appear to be stumbling around in the dark." R. 3081-

82. And the manner in which they prepared for and handled the proceeding underscored that admission. Their affirmative case at the penalty phase amounted to unprepared testimony from three family members and the testimony of a psychologist who had met with Maples months earlier for four hours and made no "formal diagnosis." R. 3100, 3105, 3165.

Maples's trial counsel failed to investigate numerous matters highly relevant to sentencing, including Maples's abusive childhood and abandonment by his mother, Maples's mental health and history of depression and suicide attempts as well as the history of mental illness in Maples's family, and his extensive history of alcohol and substance abuse including abuse of crack cocaine, crystal methamphetamine, and LSD. Nor did Maples's attorneys investigate Maples's character, cooperation with the police, and voluntary admission to a drug treatment program.

2. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and sentence. Pet. App. 2a. Consistent with settled Alabama law, Maples was not permitted on appeal to challenge the effectiveness of the assistance that he received from counsel at trial. *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996).

C. Maples's State Post-Conviction Proceedings

1. As noted above, Alabama does not provide post-conviction counsel to indigent defendants, even in capital cases. At first, it nevertheless seemed as though Maples had won the lottery when two attorneys working at an elite New York law firm (Sullivan & Cromwell)—Clara Ingen-Housz and Jaasi Munanka—agreed to represent Maples *pro bono* "on an individual

basis." Pet. App. 257a. But as it turned out, the representation ended tragically for Maples.

a. On August 1, 2001, Maples—with Ingen-Housz and Munanka serving as his *pro bono* attorneys of record—filed a petition for post-conviction relief under Alabama Rule of Criminal Procedure 32.1, raising ineffective assistance of counsel and other claims. Because Ingen-Housz and Munanka were out-of-state attorneys, Alabama law required them to "associate" a local counsel before they could appear in the Alabama courts on behalf of Maples. Ala. R. for Admission to Ala. Bar VII (1998) (JA 365-66). Maples's out-of-state *pro bono* attorneys associated John Butler, a Huntsville, Alabama attorney. Butler appeared as local counsel for the sole purpose of allowing Ingen-Housz and Munanka to proceed *pro hac vice* as *pro bono* counsel (and for that reason lent his name to the briefs, as required by the Alabama rule, JA 365-66), but "had no other role in the case" during the period at issue. Pet. App. 257a; *see id.* at 3a, 255a-56a.

b. The State moved to dismiss Maples's Rule 32 petition. The state trial court initially denied the State's motion to dismiss in December 2001, and Maples's requests for discovery remained pending before the court. In the 18 months that followed, nothing happened in the case. But on May 22, 2003, the Alabama trial court issued an order denying the petition outright. *Id.* at 3a. The order explicitly "CC"'d Maples' *pro bono* attorneys of record (Ingen-Housz and Munanka) as well as Butler. JA 225. Through no fault of his own, Maples did not receive notice of the trial court's order before the general 42-day deadline for appealing the order lapsed.

c. Consistent with the Alabama rule requiring service on "the attorney of record" (Ala. R. Crim P. 34.4) and the terms of the order itself (JA 225), the trial court clerk mailed copies of the order individually addressed to Maples's *pro bono* attorneys of record (Ingen-Housz and Munanka) and to Butler at their work addresses. Pet. App. 222a-23a. Several months earlier, however, both Ingen-Housz and Munanka had left Sullivan & Cromwell—without notice to the Alabama court or substitution of counsel. *Id.* at 223a. Ingen-Housz left the firm on July 2, 2002, to work for the European Commission in Belgium, and Munanka left the firm in the summer of 2002 to serve as a law clerk for a federal judge in New York. *Id.* at 258a. No one else at the law firm contacted the court or sought admission *pro hac vice* to represent Maples. *Id.* at 223a.

The copies of the Alabama court's Rule 32 order mailed to Ingen-Housz and Munanka were returned to the trial court clerk unopened with "Returned to Sender—Attempted Unknown" stamped on the envelope addressed to Munanka, and "Returned to Sender—Attempted Not Known" stamped on the envelope addressed to Ingen-Housz and "Return to Sender—Left Firm" written on the front. Pet. App. 223a; *see* Pet. Reply Br. Add. 7a-8a (reproducing copies of returned envelopes). Butler received the order in the mail, but did nothing. Pet. App. at 256a.

After receiving the unopened and unclaimed envelopes containing the order addressed to Maples' *pro bono* attorneys of record, the court clerk did nothing. The *pro hac vice* applications Ingen-Housz and Munanka filed with the court listed their personal telephone numbers and home addresses, *see* Ingen-Housz Verified Application for Admission to Practice

Under Rule VII at 1, *Maples v. Alabama,* No. CC-95-842.60 (Ala. Cir. July 17, 2001); Munanka Verified Application for Admission to Practice Under Rule VII at 1, *Maples v. Alabama,* No. CC-95-842.60 (Ala. Cir. July 24, 2001), and the clerk obviously had access to Maples's prison address. But the clerk made no further effort to contact *pro bono* counsel (or anyone else at their former law firm), local counsel, or Maples himself. There matters stood and the 42-day period for appeal under Alabama Rule of Appellate Procedure 4(b)(1) passed. Although Maples had earlier instructed his attorneys to appeal any adverse decision, JA 253, no action was taken and Maples remained unaware that his opportunity to appeal had come and gone.

d. On August 13, 2003, about a month after the appeal deadline had passed, the State's attorney sent a letter to Maples himself—not his attorneys—to "inform [him] of recent events" concerning the dismissal of his Rule 32 petition and to advise him that the time for filing a federal habeas corpus petition would soon expire. Pet. App. 253a. When Maples learned of the missed deadline, he immediately informed his step-mother, who then contacted the law firm where Ingen-Housz and Munanka had worked. Other attorneys at that firm—"not yet … admitted to practice in Alabama," *id.* at 223a—sought leave to appeal notwithstanding the missed deadline, but that request was denied. *Id.* at 5a. As the Alabama court explained, Ingen-Housz and Munanka were "still attorneys of record" for Maples in his Rule 32 case, even though they had long since left the case. *Id.* at 223a.

2. The Alabama trial court rejected the argument that the clerk "committed error or neglect in handling th[e] matter," observing: "How can a Circuit Clerk in

Decatur, Alabama know what is going on in a law firm in New York, New York?" *Id.* at 223a-24a. Instead, the court concluded that the clerk had satisfied his obligations by mailing the order to Maples's attorneys of record "at their listed addresses." *Id.* at 224a. Although the Alabama Court of Criminal Appeals recognized that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," it also concluded that the State "was not negligent in its duty to notify the parties of the resolution of the Rule 32 petition" and that Maples had failed to show a violation of due process. *Id.* at 234a, 236a. The Alabama Supreme Court summarily affirmed, and this Court denied certiorari.

D. Maples's Federal Habeas Proceedings

1. On August 29, 2003, Maples filed a federal habeas petition raising, *inter alia*, ineffective assistance of counsel claims. That petition was stayed pending the state court proceedings, and amended in May 2005. Notwithstanding the State's representation to the Alabama Supreme Court that Maples "'may still present his postconviction claims'" on federal habeas, *id.* at 18a (citation omitted), the State responded to Maples's federal habeas petition by arguing that Maples procedurally defaulted on his ineffective assistance of counsel claims due to the missed deadline, and that federal review of those claims was barred.

The district court found that Maples had defaulted his ineffective assistance of counsel claims by missing the deadline under Alabama law for appealing the denial of his Rule 32 petition and failed to establish cause to overcome the default on the ground that "ineffectiveness of postconviction counsel cannot establish … cause." *Id.* at 55a (citing *Coleman v.*

Thompson, 501 U.S. 722, 752 (1991)). The court nevertheless authorized an appeal, recognizing that "[j]urists of reason" could "debat[e]" whether the alleged default rule was "firmly established and regularly followed" and whether Maples had established cause given the extraordinary circumstances underlying the default. Pet. App. 221a.

2. A divided panel of the Eleventh Circuit affirmed. The panel majority held that the Alabama procedural rule underlying Maples's default was adequate and that Maples had failed to show cause to excuse that default on the ground that attorney performance can never constitute cause to excuse a default "because there is no right to post-conviction counsel." *Id.* at 17a-18a (citing *Coleman,* 501 U.S. at 752). Judge Barkett dissented. *Id.* at 27a-32a. She concluded that the State's default rule was not adequate, and that, in any event, equity, if not the Constitution, required that Maples be afforded federal review of his claims given that he had raised a serious ineffective assistance of counsel claim that would go unreviewed for reasons involving no fault of his own. *Id.* at 30a-31a & n.3.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that Maples failed to establish cause to excuse the procedural default based on the external factors that impeded his ability to meet the appeal deadline.

I. Consistent with the equitable nature of the writ, this Court has held that the federal courts have the power to excuse a state procedural default when a petitioner can establish cause for and prejudice from the default. In determining whether cause exists—the question in this case—this Court looks to whether the

default may "fairly be attributed" to the petitioner, or instead, is fairly attributable to an "external" factor. *Coleman v. Thompson*, 501 U.S. 722, 753 (1992). Cause exists when "some objective factor external to the defense impeded [the petitioner's] efforts" to comply with the default rule. *McCleskey v. Zant,* 499 U.S. 467, 493 (1991) (citation omitted). The State's own interference with a petitioner's ability to meet a filing deadline is a classic example of cause because a default attributable to the State's own conduct is imputed to the State, not the petitioner. And cause likewise also exists when a petitioner can show that other external factors impeded his ability to comply with the default rule. In either case, it would be grossly inequitable to cut off federal habeas review on the basis of a default that is not fairly attributable to the petitioner himself.

II. The State's failure to follow up on the returned notices impeded Maples's ability to comply with the default rule and thus establishes cause. Indeed, that failure violated due process. In *Jones v. Flowers*, 547 U.S. 220, 229 (2006), this Court held that a State may not simply "shrug [its] shoulders and say 'I tried'" when it learns that its attempt to provide notice of the deprivation of an important *property* interest has failed because the letters it has mailed have been returned unclaimed. Instead, due process requires the State to do something more to notify the property owner in such circumstances. Due process requires no less when a *life* is at stake. Yet here, the court clerk did nothing when the notices to both Maples's out-of-state *pro bono* attorneys of record were returned unopened and unclaimed, except to stick the notices in a file drawer. The State's failure to do anything more deprived

Maples of constitutionally adequate notice and directly impeded his ability to meet the deadline for appeal.

The fact that the notice mailed to local counsel was received, rather than returned, does not alter that result. It is well-known that volunteer out-of-state counsel play a critical and primary role under Alabama's unique post-conviction representation scheme for indigent capital inmates. That alone makes it unreasonable for the State to rely solely on the fact the notice was sent to local counsel—and do nothing further—when the notice to an inmate's out-of-state *pro bono* counsel is returned unclaimed. Further, because both Alabama law and the order in this case required *all* attorneys of record to be served, the clerk's failure to do anything when notice to the out-of-state lead counsel was returned impeded the provision of notice to the client by creating an undue risk of confusion among counsel—who are entitled to presume in such circumstances that reasonable efforts to provide notice will in fact be made to the attorneys required by statute or court order. It also defies common-sense to say that someone who really wanted to provide notice of a life-or-death matter would sit on his hands when two out of the three notices that were mailed come back unopened and unclaimed.

III. The extraordinary conduct of Maples's attorneys independently establishes cause to excuse the procedural default. The court of appeals cut off any inquiry into whether the actions of Maples's attorneys established cause because it believed that *Coleman* compels the conclusion that attorney conduct can never constitute cause. That was error. *Coleman* establishes that attorney conduct in post-conviction proceedings cannot be *imputed to the State* on the ground that

inmates are constitutionally entitled to effective assistance of counsel at that stage. But *Coleman* does not prevent a petitioner from showing that attorney error is nevertheless still external to the defense—and therefore may constitute cause—because it cannot fairly be attributed to the petitioner under general agency principles or the law governing the attorney-client relationship. And this Court recently recognized that a petitioner cannot be held constructively responsible for the extraordinary misconduct of an attorney who has effectively abandoned his client. *Holland v. Florida*, 130 S. Ct. 2549 (2010).

The misconduct of Maples's attorneys cannot fairly be attributed to Maples. Maples's *pro bono* attorneys of record—Ingen-Housz and Munanka—left the law firm where they had worked without notifying the court or substituting counsel, and then assumed new employment that precluded them from continuing to work on Maples's case. That abandonment terminated the agency relationship and constituted a breach of the duty of loyalty. And as the Alabama court found, once Ingen-Housz and Munanka had left the case, there was no one at Sullivan & Cromwell authorized to represent Maples in his Rule 32 proceeding, Pet. App. 223a—leaving him without *pro bono* counsel in that proceeding. Butler likewise was not operating as an agent in any meaningful sense at the time of the default and abandoned Maples as well. By his own admission, the *only* role that Butler assumed before the default was to facilitate the representation by Maples's out-of-state *pro bono* attorneys. He was never Maples's agent in any genuine sense. Moreover, the highly circumscribed role that he did assume represented a gross breach of his duty of loyalty to Maples.

Because these external events—both collectively and independently—impeded Maples's ability to meet the deadline for appealing the denial of his Rule 32 petition, cause exists to excuse the default. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THIS COURT HAS LONG RECOGNIZED THAT FACTORS EXTERNAL TO THE PETITIONER PROVIDE CAUSE TO EXCUSE A PROCEDURAL DEFAULT

"The writ of habeas corpus is one of the centerpieces of our liberties." *McCleskey v. Zant,* 499 U.S. 467, 496 (1991). From Chief Justice Marshall to Chief Justice Roberts, this Court has recognized that the availability of the writ ultimately is governed by equitable principles. *See Ex parte Watkins*, 28 U.S. (3 Pet. 193) 193, 201 (1830) (Marshall, C.J.) ("No doubt exists respecting the power [of the Court to issue the writ]; the question is, whether this be a case in which it ought to be exercised."); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (Habeas is "'governed by equitable principles.'") (Roberts, C.J.) (citation omitted). The focus on equity not only reflects "a long historic tradition," but also Congress's express statutory command. *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part); *see id.* (noting that "the text of the federal habeas statute … enjoins the court to 'dispose of the matter as law *and justice* require.'") (quoting 28 U.S.C. § 2243) (emphasis in original); 1 William Blackstone, *Commentaries on the Laws of England* 131 (1765) (explaining that in exercising the writ, courts were directed to do "as to justice shall pertain").

This Court has limited adjudication in federal habeas corpus of claims defaulted in state court because of concerns surrounding the "costs of federal habeas review" in such circumstances. *McCleskey*, 499 U.S. at 490-91. At the same time, however, this Court has stressed that the federal courts have the "power to *excuse* … defaulted claims" in exercising their "equitable discretion" in administering the writ. *Id.* at 490 (emphasis added); *see Reed v. Ross*, 468 U.S. 1, 9 (1984) (This Court's decisions "have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated."); *Withrow*, 507 U.S. at 717-18 ("equitable principles" govern whether a state procedural default should be excused so that a petitioner may obtain review of his habeas claims in federal court) (Scalia, J., concurring in part and dissenting in part).

When a habeas petitioner's claims are procedurally defaulted pursuant to an adequate state rule, federal habeas review is available to petitioners who can demonstrate "cause" for and "prejudice" from the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see Wainwright v. Sykes,* 433 U.S. 72, 90-91 (1977). Consistent with equitable principles, this Court's inquiry into cause has focused on whether the cause of the procedural default may "fairly be attributed" to the petitioner or to some "external" factor. *Coleman*, 501 U.S. at 753; *see McCleskey*, 499 U.S. at 493 ("In procedural default cases, the cause standard requires the petitioner to show that 'some objective factor external to the defense impeded

counsel's efforts' to raise the claim in state court.") (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

When a state procedural default is fairly attributable to *the petitioner*, there is "no inequity in requiring him to bear" the consequences of the procedural default, particularly given the costs that this Court has identified of allowing federal habeas review of defaulted claims when it comes to comity and finality. *Carrier*, 477 U.S. at 488. But equity tips decisively in the opposite direction when the petitioner can "show that some objective factor *external* to the defense" impeded compliance with the State's procedural rule. *Id.* (emphasis added); *see Coleman,* 501 U.S. at 753; *Holland v. Florida,* 130 S. Ct. 2549, 2566 (2010) (Alito, J., concurring in part and concurring in the judgment). The obvious inequities of barring federal habeas review of potentially meritorious constitutional claims when a procedural default is not attributable to the petitioner himself are exponentially magnified in capital cases. *Cf. Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) (noting that a "substantial proportion of [capital] prisoners succeed in having their death sentences vacated in habeas corpus proceedings").

While this Court has never "attempt[ed] an exhaustive catalog of such objective impediments to compliance with a [state] procedural rule," it has repeatedly made clear that conduct *by the State* that impedes a petitioner's ability to comply with a state procedural rule provides cause to excuse a default. *Carrier*, 477 U.S. at 488; *see, e.g., Strickler v. Greene*, 527 U.S. 263, 283-84 & n.22 (1999) (unanimously finding cause when defense's reasonable reliance on a State's actions, assertions, and policy precipitated state

procedural default); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (finding cause where factual basis for claim had been "concealed by … County officials"); *Brown v. Allen,* 344 U.S. 443, 485-86 (1953) (noting that "interference by officials" may provide cause); *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 207-08 (1951) (finding that default could not bar federal review where state prison rules prevented petitioner from mailing appeal papers on time).

It likewise follows that when a state procedural default cannot otherwise fairly be imputed to the petitioner, equitable considerations counsel against depriving the petitioner of his right to assert the writ. When a default is caused by "something *external* to the petitioner, something that cannot be fairly attributed to him," *Coleman*, 501 U.S. at 753, it would be grossly inequitable to force the blameless petitioner to bear the consequences of that default. *See Carrier*, 477 U.S. at 488 (asking whether there would be "inequity in requiring [a petitioner] to bear" the consequences of the default). For example, no one could reasonably argue that a petitioner should bear the consequences of a procedural default where a natural disaster, like an hurricane, flood, or tornado, prevented the petitioner from meeting a deadline. So too for a man-made event, like an anthrax attack, that shuts down the mail system or courts. The result is no different when some other *external* factor—which cannot fairly be attributed to the petitioner—causes the missed deadline.

The courts below concluded that there was no cause to excuse the procedural default at issue. But that was error. Two external factors impeded Maples's ability to comply with the asserted default rule and unquestionably led to the default. First, the court clerk

inexplicably failed to do anything when it learned that the State's effort to notify Maples's *pro bono* attorneys of record had failed—even though those attorneys had submitted their home addresses and telephone numbers, and Maples himself was in state custody. That failure makes *the State itself* fairly responsible for what happened, and indeed violated Maples's due process rights. Second, Maples's attorneys had abandoned him and were no longer functioning as his agents in any meaningful sense during the critical juncture. The conduct of Maples's attorneys therefore is not fairly attributable to Maples either. Any of those external factors is sufficient to excuse the default.[2]

II. THE STATE'S MISHANDLING OF ITS NOTICE OBLIGATIONS ESTABLISHES CAUSE FOR THE DEFAULT

The State's attempt to provide notice to Maples's attorneys of record of the denial of his Rule 32 petition was so deficient that the procedural default is fairly attributable to the State itself. The court clerk's failure to do something more when the notices to Maples's *pro bono* attorneys of record were returned

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[2] Because it held that cause did not exist, the court of appeals did not reach the question of prejudice. It is clear, however, that Maples's lost opportunity to pursue his constitutional claims on appeal and federal habeas amounts to prejudice. *See Holland*, 130 S. Ct. at 2565 (noting that such "failures *seriously prejudiced* a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence") (emphasis added); *Roe v. Flores-Ortega,* 528 U.S. 470, 483 (2000) (holding that attorney's deficient conduct resulting in missed appeal "mandates a presumption of prejudice"). Accordingly, if this Court concludes that there is cause, it should hold that the prejudice element is met as well.

unopened violated Maples's due process rights under the rule of *Jones v. Flowers*, 547 U.S. 220, 230 (2006)—a case that the State simply ignored in opposing certiorari. Although a constitutional violation is not required to establish cause for a procedural default, it is always sufficient—because when such a violation exists the Constitution "itself requires that responsibility for the default be imputed to the State," rather than the petitioner. *Carrier*, 477 U.S. at 488.

A. The State's Notice Obligations

1. Alabama law provides that notices of rulings "shall be made upon the attorney of record" in a case. Ala. R. Crim. P. 34.4. It is undisputed that, as the Alabama courts below found, this rule required that the clerk provide notice to Maples's *pro bono* attorneys of record as well as local counsel. Pet. App. 234a ("Here, Maples was represented by three attorneys. Because Maples was represented by attorneys, all correspondence from the circuit clerk was directed to the attorneys. See Rule 34.4, Ala.R.Crim.P."). The Alabama rules do not attach any consequence to the failure to provide such notice. But as this Court long ago observed in interpreting an analogous provision of a federal court's rules requiring a court clerk to provide notice of the entry of judgment, "we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given." *Hill v. Hawes*, 320 U.S. 520, 523 (1944).

2. The State's own, self-imposed notice obligations must also be informed by the minimum requirements of due process. This Court has long recognized that a State's duty to provide notice is an "elementary and fundamental requirement of due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314

(1950). And it is established that a State must provide notice "prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

The minimum due process requirements for notice are well-settled. As Justice Jackson wrote for the Court in the seminal *Mullane* case, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. In assessing "all the circumstances," the State must give due regard to the "practicalities and peculiarities of the case," *id.* at 314-15, including any "unique information about an intended recipient," *Jones*, 547 U.S. at 230. Likewise, if circumstances generally exist that, as a practical matter, would "not infrequently" prevent interested parties from receiving notice, then such circumstances must be factored into the equation of what notice is reasonable. *Greene v. Lindsey,* 456 U.S. 444, 453 (1982) (taking into account in *Mullane* analysis that notices posted on apartment doors in pertinent area "were 'not infrequently' removed by children or other tenants before they could have their intended effect").

This Court has made clear that the notice required by due process is not a "mere gesture," but "must be such as one *desirous of actually informing* the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315 (emphasis added); *see Jones*, 547 U.S. at 238. Thus, for example, notice published in the "back pages of a newspaper," *id.* at 315, or in the "general vicinity" of a property owner's premises is inconsistent with a true desire to provide notice,

Schroeder v. City of New York, 371 U.S. 208, 210 (1962). Instead, "*Mullane* said that we look to what a person who *really wanted* to find the [intended recipient of notice] would do." Tr. of Oral Arg. 54, *Jones v. Flowers*, No. 04-1477 (Jan. 17, 2006) (Question by Roberts, C.J.) (emphasis added).

In "assessing the adequacy of a particular form of notice," this Court has also held that due process "requires balancing the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment." *Jones*, 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314). Thus, in calibrating what notice was reasonable in *Mullane*, this Court balanced the State's "vital interest … in bringing any issues as to its fiduciaries to final settlement," 339 U.S. at 313, with the importance of the property rights at issue and practical ease of notifying beneficiaries by mail, *id.* at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.").

3. The Court recently applied these settled principles in *Jones v. Flowers*, a case that bears remarkable similarities to the one at hand. *Jones* concerned a State's efforts to take a house based on the homeowner's unpaid taxes. The State attempted to notify the owner through certified mail, but the notices were returned "unclaimed." 547 U.S. at 223-24. Although the returned letters informed the State that its "attempt at notice had failed," the State did nothing. *Id.* at 238. The Court rejected the argument that the notice was sufficient because it was reasonably calculated to reach its intended recipient *when it was mailed.* Instead, the determination whether notice was

adequate had to take into account "'practicalities and peculiarities of the case,'" which included the State's knowledge that the letters in fact were *returned* "unclaimed." *Id.* at 229-31 (citation omitted).

The Court's decision took a common sense, real world approach to the situation—and what was at stake. The Court explained that, "when a letter is returned by the post man, the sender will ordinarily attempt to resend it, if it is practicable to do so." *Id.* at 230. The Court emphasized that the "subject matter of the letter" at issue concerned the "important and irretrievable prospect [of] the loss of a house." *Id.* And the Court flatly rejected the notion that "a person who *actually desired* to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Id.* at 229 (emphasis added). It is not enough, in other words, for the State, when it learns that the letters were not received, simply to "shrug [its] shoulders … and say 'I tried.'" *Id.* Rather, the Court held, due process obligates the State to do *something* more, particularly given that "additional reasonable steps were available for [the State] to employ before taking Jones' property." *Id.* at 238-39.

B. The State Mishandled Its Notice Obligations In The Circumstances Here

The State seriously mishandled its notice obligations in attempting to provide notice to Maples of the order denying his Rule 32 petition. And as a result of its missteps, Maples's failure to file a timely appeal of that order is fairly attributable to the State itself.

1. *Jones* alone establishes that notice was inadequate in this case. Here, as in *Jones*, the State learned that its attempt to provide notice by mail had

failed—and yet the State failed to follow up in any way. The clerk received copies of the unopened orders sent to both *pro bono* attorneys of record in the return mail, and the envelopes plainly indicated that they were not delivered and even explicitly said that an attorney had "Left Firm." *See* Pet. Reply Br. Add. 7a-8a. Yet, just as in *Jones*, upon receiving the unopened and unclaimed envelopes, the state court clerk did "nothing." *Jones*, 547 U.S. at 234. And just as in *Jones*, the state clerk's "[f]ailure to follow up [was] unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.* at 229.

For at least three reasons, the State's failure to do *something* more when the letters were returned to the court clerk unclaimed is even more unreasonable here than it was in *Jones*. First, the individual interest in obtaining notice is even greater here. Both *Mullane* and *Jones* hold that "the adequacy of notice" in a particular case depends on "balancing 'the interest of the State' against "the individual interest sought to be protected by the Fourteenth Amendment.'" *Jones,* 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314). Whereas the notice in *Jones* "concern[ed] such an important and irreversible prospect as the loss of a house," *id.* at 230, the notice in this case ultimately concerned the "important and irreversible prospect" of extinguishing a *life*. The fact that a man's life is at stake makes it all the more unreasonable for the State to sit on its hands and do nothing when it learned that notice to both *pro bono* attorneys of record had failed.

Second, the corresponding "interest of the State" in not doing something more is vanishingly small if not non-existent in this case. *Id.* at 229. In *Jones*, although

this Court identified several "reasonable steps" the State could have taken to notify Jones, the State did not have any address on file other than the one it had already (unsuccessfully) used. *Id.* at 234-36. Here, Ingen-Housz and Munanka's motions for admission to practice *pro hac vice* in the Alabama courts—which presumably were sitting in the clerk's case file—listed their personal phone numbers and addresses (in addition to their work information). *See supra* at 11-12. So the clerk could have simply picked up the phone and dialed their personal numbers or put the orders in the mail to their home addresses. Following up in that fashion would have made perfect sense since one of the envelopes had "Left Firm" written on it. Pet. Reply Br. Add. 7a.[3] And the State knew exactly where to find Maples himself—he is confined to a cell on death row in Alabama. Pet. App. 5a; *see Small v. United States*, 136 F.3d 1334, 1338 (D.C. Cir. 1998) ("Certainly, if, as is true here, the government knows that a claimant is in prison, it cannot, with a straight face, claim it does not know where he is.").

Third, the State took fewer initial steps to provide notice to Maples than did the State in *Jones*. Here, the State mailed the orders to the attorneys of record by regular mail, then did nothing. By contrast, in *Jones*, the State mailed a certified letter that obligated the post office to make three separate attempts to deliver it. *See Jones*, 547 U.S. at 241 (Thomas, Scalia, and Kennedy, JJ., dissenting). Two years later, the State in

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[3] Ingen-Housz had left the country by that time, but Munanka remained in New York. *Supra* at 11. And even as to Ingen-Housz, attempting to contact her through her personal telephone number or home address could have led to successful notice.

Jones published a notice of sale in a local paper and sent "yet another certified letter to petitioner," which was also returned unclaimed after three delivery attempts. *Id.* Despite these far greater efforts, this Court held that the notice in *Jones* violated due process. *A fortiori* the same result follows here.

2. In its brief in opposition, the State—tellingly—did not even acknowledge *Jones*, much less attempt to distinguish it. Instead, the State focused its efforts on arguing (incorrectly) that this issue had been waived. To the extent the State addressed the notice deficiency at all, its only response was to rely on the fact that local counsel received a copy of the order. Opp. 31-32. Of course, at the critical time—when the clock was ticking on the deadline for an appeal—the State did not *know* that local counsel had received the order because the order was sent by regular mail rather than certified mail. But in any event, ultimately the question is whether notice was reasonably calculated, under *all the circumstances*, to apprise Maples of the denial of his Rule 32 petition. *Mullane*, 339 U.S. at 314. Here, there were several circumstances that made it unreasonable for the clerk to do nothing when notice to Maples's *pro bono* attorneys of record was returned.

First, as discussed above, Alabama has made a conscious and well-known choice to rely primarily on "out-of-state volunteers" to serve as the principal—if not, as a practical matter, sole—counsel to Alabama's substantial death row population. *Barbour* BIO 23; *see also* JA 339 (explaining "typical[]" role of "out of state counsel" in capital cases) (Counsel for State); Alabama Appellate Court Justices Cert. Br. 6-7, 17-18 (discussing the State's reliance on out-of-state *pro bono* counsel in post-conviction proceedings and fact that

"local counsel for out-of-state attorneys in postconviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted"); ACDLA Cert. Br. 17-18 (noting reliance on volunteer counsel). Indeed, the State recently told this Court that 75% of Alabama's death row inmates are represented in post-conviction proceedings by "'out-of-state law firms and/or public interest groups.'" *Barbour* BIO 11 (citation omitted); *see* Opp. 16 n.4.

The State's *ex ante* awareness of this scheme is one of the "practicalities and peculiarities of the case" that defines what notice was reasonably calculated. *Mullane*, 339 U.S. at 314-15; *see also Jones*, 547 U.S. at 230 ("[W]e have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."). Given the well-known "realities" of the situation on the ground in Alabama, *Greene*, 456 U.S. at 451, it was unreasonable for the clerk to do nothing when it learned that the notices to both of Maples's out-of-state *pro bono* attorneys had failed, even if the clerk assumed *ex ante* that local counsel had in fact received the letter. *Cf. id.* at 453 (more was required where notices were "not infrequently" removed from apartment doors). The role of out-of-state *pro bono* counsel under Alabama's unique representation scheme for post-conviction proceedings is simply too important for a clerk to do nothing in these circumstances.[4]

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[4] The combination of the State's conscious decision to rely on out-of-state volunteers to handle the representation of indigent capital defendants in post-conviction proceedings—and the failure of court clerks to do anything when notice to such counsel is returned unclaimed—raises an additional constitutional defect: it

Second, even apart from the weight placed on out-of-state counsel under Alabama's representation scheme, the State sent notice to Maples's *pro bono* attorneys of record for a reason—it was required to do so by its own rules. As noted, Alabama law provides that "service *shall be made* upon the attorney of record," Ala. R. Crim. P. 34.4 (emphasis added), and it is undisputed that Rule 34.4 required service on Maples's *pro bono* attorneys of record. *See supra* at 23. Having undertaken to serve all attorneys of record, Alabama may not reasonably defend its actions on the ground that one out of three attorneys actually received notice. *Cf. Frank v. Mangum*, 237 U.S. 309, 327 (1915) (even though a State is not compelled to provide a particular procedure, when it chooses to do so such procedure must be factored into the equation in determining whether there has been a deprivation of due process). When a State's rules *require* that all attorneys of record be served in a matter, counsel may reasonably rely on fact that such notice will be reasonably calculated actually to work. *Cf. Hill*, 320 U.S. at 523 ("[W]e can think of no reason for requiring

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deprives capital inmates like Maples of "meaningful access" to the judicial process. *Giarratano*, 492 U.S. at 14 (Kennedy, J., joined by O'Connor, J., concurring in the judgment) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)). Indeed, "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Id.* Ultimately, Maples's access to the courts has been severed largely as a result of the one-of-a-kind representation scheme created by Alabama. In 2006, Alabama attempted to address the problem in part by eliminating the requirement that out-of-state volunteers associate with local counsel in capital cases. *See supra* at 5. But that change occurred long after the events at issue here.

the notice if counsel in the cause are not entitled to rely upon the requirement that it be given.").[5]

Moreover, the Alabama court's own actions reinforced the expectation that all attorneys of record *would* receive notice, heightening the likelihood of confusion among counsel if notice was not received by one set of counsel. At the end of the order denying Maples's petition for relief, the court specified—by way of a "CC" listing counsel—that Maples's *pro bono* attorneys of record would receive notice of the order in addition to local counsel. JA 225. In directly analogous circumstances, courts have recognized that a court order stating that "*all* counsel of record" will be served can create "confusion" among local counsel and out-of-state lead counsel when (as it turns out) the former receives the order and the latter does not. *Babich v. Clower*, 528 F.2d 293, 295 & n.2 (4th Cir. 1975); *see also Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983) (citing *Babich* as a "particularly apposite" example of a situation where counsel's failure to meet a filing deadline "occurs because the party has been misled by action of the court or its officers"). The likelihood of confusion—which, in such circumstances, is fairly attributable to the State itself—makes it all

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[5] Other jurisdictions have adopted rules providing that the clerk is required to send copies of court orders only to local counsel, even when the "principal counsel" is out-of-state. *See, e.g.*, *Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 89 (3d Cir. 1995). Such a rule at least has the benefit of informing counsel upfront that *only* local counsel will be served. Because the Alabama rules—not to mention the Rule 32 order itself—required service on *all* attorneys of record, the validity of such a local-counsel-only notice rule in a capital post-conviction proceeding handled by *pro bono* out-of-state counsel is not presented here.

the more unreasonable for the clerk to do nothing when notice to out-of-state counsel is returned unopened.[6]

Third, regardless of the fact that all attorneys of record were required to be served, when three letters go out to counsel and *two* of the three letters—not to mention both letters to *pro bono* attorneys of record—are returned unopened and unclaimed, it is common sense that someone "desirous of actually informing the absentee" would do *something* more. *Mullane*, 339 U.S. at 315; *see Jones*, 547 U.S. at 230 ("[W]hen a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."). Ultimately the question is what would someone who actually wanted to provide notice do? On main streets across America, the question practically answers itself: someone who really wanted to provide notice would follow up in some way, even when the third letter did not come back. There is no reason why this Court should reach any different conclusion, especially where the notice at issue concerned a matter of life or death.

3. Of course, the court clerk was not to blame for the fact that the letters were sent back to the court in the first place. *See* JA 302. No question, Ingen-Housz and Munanka should have notified the court when they ceased representing Maples, just as the homeowner in *Jones* should have updated his address (*see* 547 U.S. at

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[6] In this case, as discussed below, local counsel was not even serving as a "mail drop." As this Court explained in *Jones*, however, "the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*." 547 U.S. at 231.

231-32). And the New York mailroom should have had a better system in place to deal with mail to former employees, including where the firm's name is not on the envelope. But by definition, the *Jones* issue arises only when something has "gone awry" on the other end. *Id.* at 226. And the whole point of *Jones* is that it is not enough for the State to simply sit back—when it *learns* notice has not gone through—and say, "Well tough luck, the notice was fairly calculated to reach its intended recipient at the outset." Instead, regardless of *why* things go awry, *Jones* holds that the State has a duty to do something more when it learns that its attempt at notice has failed. *Id.* at 239. Here, the clerk simply stuck the returned letters in a file drawer.

C. The State's Actions Establish Cause

Interference by the State or its officials that impedes a petitioner's ability to comply with the State's procedural rule is a paradigmatic example of cause. *See supra* at 20-21. Here, the State has never denied that, if the clerk had done something more when the notices to Maples's *pro bono* attorneys of record were returned unclaimed—whether trying to reach Ingen-Housz and Munanka through their personal contact information, sending the order directly to Maples in prison, or reaching out to local counsel to inform him that *pro bono* counsel did not receive the notice—the missed deadline would have been prevented. And taking any one of those modest—and, indeed, constitutionally mandated—steps almost certainly would have prevented Maples from missing the deadline for appeal. The State's mishandling of its basic notice obligations therefore provides a sufficient basis to excuse the procedural default at issue.

III. THE CONDUCT OF MAPLES'S POST-CONVICTION COUNSEL ESTABLISHES CAUSE FOR THE DEFAULT

The actions of Maples's attorneys independently establish cause to excuse the procedural default. Whether viewed from the standpoint of agency principles, the law governing the attorney-client relationship, or the equitable principles underlying habeas corpus, the attorney conduct underlying the default is not fairly attributable to Maples. Indeed, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment). Because the attorney conduct at issue in this case falls into that exceptional category, the conduct is *external* to the petitioner—and therefore also establishes cause for the default.

A. The Court of Appeals Erred Insofar As It Held That Attorney Misconduct Automatically Fails To Constitute Cause

The court of appeals short-circuited any inquiry into whether the actions of Maples's attorneys established cause based on *Coleman*. Pet. App. 17a-18a. In so doing, the court erroneously conflated the question whether attorney conduct in post-conviction proceedings may be imputed *to the State* based on a violation of the Sixth Amendment with the distinct question whether attorney conduct is always fairly attributable to the client under the law of agency or other principles. *See id.* at 17a (attorney conduct

"cannot establish cause for [the] default because there is no right to post-conviction counsel").[7]

Coleman's refusal to recognize a Sixth Amendment right to effective assistance of counsel in post-conviction proceedings eliminates the argument that attorney error such as negligence or inadvertence automatically must be "'imputed *to the State*'" because of a constitutional violation. *Coleman*, 501 U.S. at 754 (quoting *Carrier*, 477 U.S. at 488) (emphasis added). But *Coleman* did not consider, much less resolve, the question whether attorney error may be external to the defense because the kind of conduct at issue is not fairly attributable to the petitioner under agency law or the law governing the attorney-client relationship.

Quite apart from whether any Sixth Amendment right is implicated, there are longstanding limits on the attorney misconduct—beyond garden-variety negligence or the like—that may be constructively attributed to a client. As every member of this Court appeared to recognize in *Holland*, those principles are not only informative but operative in the habeas context—at least when the attorney misconduct rises to the level of de facto abandonment or breach of the duty of loyalty. *See Holland*, 130 S. Ct. at 2564-65 (referring to equitable principles, agency principles,

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[7] Maples has argued that depriving him of federal habeas review on the basis of the kind of attorney conduct at issue would violate his constitutional rights. *E.g.*, Pet. 30-32; *cf. Coleman*, 501 U.S. at 755 (reserving question whether right to counsel extends to instances where collateral review is the first place a prisoner can present a particular challenge to his conviction). However, holding that Maples has established cause because the conduct of his attorneys is not fairly attributable to Maples would obviate the need for the Court to reach that constitutional question here.

and canons of professional responsibilities); *id.* at 2568 (Alito, J., concurring in part and concurring in the judgment) (agency principles); *id.* at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting) (same).

Coleman does not preclude the application of those principles to hold that attorney conduct such as abandonment or disloyalty is external to the defense because the kind of attorney error involved in *Coleman*—mere "inadvertence" or negligence—*is* constructively attributed to the client under settled background principles. 501 U.S. at 753-54 (citing Restatement (Second) of Agency § 242 (1958)); *see Holland*, 130 S. Ct. at 2568 (*Coleman* "rel[ied] on 'well-settled principles of agency law' to determine whether attorney error was attributable to [the] client.'") (Alito, J., concurring in part and concurring in the judgment); *Holland*, 130 S. Ct. at 2571 n.4 ("*Coleman* did not invent, but merely applied, the already established principle that an attorney's acts are his client's.") (Scalia, J., joined by Thomas, J., dissenting); *see also Carrier*, 477 U.S. at 491 (attorney error involving "ignorance or inadvertence" is attributed to the client).

Nor is the application of those principles precluded by this Court's prior precedents recognizing the unquestioned rule that a client is typically "deemed bound by the acts of his lawyer-agent." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962); *see also, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990); *Smith v. Ayer,* 101 U.S. 320, 325-26 (1880). Those cases, like *Coleman,* involved attorney misconduct that amounted to negligence, inadvertence, or similar failings, which have long been treated as constructively attributable to the client. *See Irwin,* 498 U.S. at 92 (missed deadline due to inadvertence); *Link,*

370 U.S. at 628-29, 634 (inexcusable failure to appear at pretrial conference); *Smith*, 101 U.S. at 325-26 (failure properly to evaluate effect of legal instruments). And it is, of course, "quite impossible" for the Court's holding in those cases—including *Coleman*—"to be any broader" than the facts of the cases. *American Dredging Co. v. Miller,* 510 U.S. 443, 457 (1994).

But not all attorney misconduct is equal. And while most attorney failures are attributed to the client, not all are. For example, as Justice Alito observed in *Holland*, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment). And, at a minimum, a petitioner cannot be held constructively responsible for the conduct of an attorney when the lawyer has essentially abandoned him, breached his duty of loyalty to him, or never entered into a meaningful agency relationship with him to begin with. *See id.* at 2564-65; *id.* at 2568-69 (Alito, J., concurring in part and concurring in the judgment); *id.* at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting); *infra* at 39-43.

Courts accordingly have refused to constructively attribute attorney abandonment or disloyalty to clients, including in the habeas context. *See, e.g.*, *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc) (assuming "utter abandonment constitutes extraordinary circumstances 'external to the party's own conduct,'" such that it could not be attributed to a habeas petition) (citation omitted); *Baldayaque v. United States*, 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.'") (citation omitted); *Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors not attributable to client when attorney "does not actually represent the client"); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (8th Cir. 1992) (acknowledging that attorney's alleged conflict-of-interest would be "external" factor for default because attorney would have "effectively ceased to be [the client's] agent"); *see also McLaughlin v. Lee,* No. 5:99-HC-436-BO, 2000 WL 34336152, at *3 (E.D.N.C. Oct. 19, 2000) (refusing to hold habeas petitioner responsible when he was "in the extraordinary situation of believing that he had counsel when, in fact, he had counsel in name only").

The court of appeals erred in not considering whether the attorney conduct at issue in this case is external to Maples. At a minimum, the court's failure to do so requires a remand. But for the reasons explained next, this Court should hold that the attorney misconduct here is not fairly attributable to Maples under settled background principles.

B. Attorney Conduct Amounting To Abandonment Or Breach Of Loyalty Is Not Fairly Attributable To The Client

The same basic agency principles to which this Court looked in cases like *Coleman* and *Holland* provide important guideposts for determining when attorney conduct is not fairly attributable to the client. That question is also informed by the law governing the attorney-client relationship as well as the equitable principles underlying habeas corpus.

An agent's authority follows from the premise that "at the time of taking action that has legal

consequences for the principal, the agent reasonably believes … that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01 (2006). But because "[a]gents are appointed to forward the principal's interests … when the agent ceases to do this and prefers his own or another's interests, ordinarily the principal no longer would desire the agent to act for him, and this the agent should realize." Restatement (Second) of Agency § 112 cmt. b. An abandonment thus terminates the agency relationship. And indeed, an abandonment itself amounts to a renunciation of the relationship. *See id.* § 119 cmt. b ("The agent may manifest renunciation by conduct inconsistent with the continued performance of his duties to the principal.").

It is also well-settled that a lawyer-agent's authority terminates altogether when he commits "a serious breach of loyalty to the principal." Restatement (Second) of Agency § 112; *accord Holland*, 130 S. Ct. at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting); *see United States v. Galindo*, 871 F.2d 99, 101 (9th Cir. 1989) ("When an agent acts contrary to the interests of the principal, the agency relationship ceases.") (citing, *e.g.,* Restatement (Second) of Agency § 112); *State v. DiGiulio*, 835 P.2d 488, 492 (Ariz. Ct. App. 1992) ("Violating the duty of loyalty, or failing to disclose adverse interests, voids the agency relationship."). Moreover, in such circumstances, neither the lawyer's actions, nor the lawyer's knowledge, may "fairly be attributed" to the client. *See* Restatement (Third) of Agency § 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.").

Abandoning a client is an obvious violation of an agent's basic duty of loyalty. As Professor Mechem explained, "[t]he amount of time which an agent is required to devote to his principal's interests in order to satisfy the requirement of loyalty, must, of course, depend upon the circumstances of the case," but at a minimum "there shall be a fair and reasonable devotion to the business of the principal." *See* 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 1232 (2d ed. 1914). And of course, an attorney who has abandoned his client by definition eschews *any* "devotion to the business of the principal." An agent may also breach the duty of loyalty by taking on added responsibilities or a new master that effectively prevent him from serving the principal's interests. *See* Restatement (Second) of Agency § 394 cmt. a (an "agent commits a breach of duty to his principal by acting for another in an undertaking which has a substantial tendency to cause him to disregard his duty to serve his principal with only his principal's purpose in mind"); Mechem, *supra*, § 1206 ("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 his principal that undivided allegiance and loyalty which the proper performance of the agency requires, and that he will remain in that situation.").

Refusing to hold a client constructively responsible for an agent's actions in the case of an abandonment or breach of the duty of loyalty is also consistent with the longstanding rule that the agency relationship automatically terminates even in the *no-fault* situation where an agent becomes incapacitated, dies, or loses a

license essential to the performance of his duties. As Justice Story explained, "[t]he case of the insanity of the agent would seem to constitute a natural, nay, a necessary, revocation of his authority; for the principal cannot be presumed to intend, that acts done for him, and to bind him, shall be done by one, who is incompetent to understand, or to transact, the business which he is employed to execute." Joseph Story, *Commentaries on the Law of Agency* § 487 (1839); *see also* Restatement (Second) of Agency § 111 & illus. 1 ("loss of or failure to acquire" legal qualifications terminates agency). An agent who has abandoned his principal or accepted duties that prevent him from being his agent occupies the same position as an agent who has become incompetent, died, or lost his license. He cannot perform his duties, so the "natural, nay, necessary" conclusion is that the agency terminates.

In *Holland*, this Court also held that "egregious" attorney misconduct that transcends mere negligence and that "violate[s] fundamental canons of professional responsibility" is not fairly attributable to the client for purposes of equitable tolling—which also looks to whether a factor is external to the petitioner. 130 S. Ct. at 2563-65; *see id.* at 2562 (equitable tolling appropriate only when a petitioner can show that an external factor prevented timely filing); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (for equitable tolling, petitioner must show circumstances "external to the party's own conduct"). That conclusion is consistent with traditional agency law when—as was true in *Holland* and is true here—the misconduct rises to the level of abandonment or disloyalty. *See* 130 S. Ct. at 2564; *see id* at 2568 (Alito, J., concurring in part and concurring in the judgment). And it furthers the

equitable principles on which habeas is grounded by ameliorating the grossly inequitable consequences of holding a client responsible for attorney conduct that is properly regarded as external. *See id.* at 2563.

In any event, whether viewed through the lens of agency law or other principles, attorney misconduct that is not constructively attributable to a client is, by definition, "*external* to the petitioner." *Coleman*, 501 U.S. at 753 (emphasis added). As a result, such attorney conduct may constitute cause when it impedes the petitioner's ability to comply with the default rule.

C. The Actions Of Maples's Post-Conviction Counsel Establish Cause

The actions of Maples's attorneys establish cause because those actions are not fairly attributable to Maples. Indeed, as discussed next, none of Maples's attorneys was "operating as his agent in any meaningful sense of that word," *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment), at the time of the default, and their actions constituted a severe breach of the duty of loyalty.

1. Maples's *pro bono* attorneys of record abandoned Maples when they left their firm without notifying the Rule 32 court or substituting counsel. In July 2002, while Maples's Rule 32 petition had been pending before the Alabama trial court for more than a year without any action—and months before the court eventually issued its order denying the petition in May 2003—Ingen-Housz left the country to assume a job for the European Commission in Brussels. Pet. App. 258a. That job prevented her from representing non-

European Commission clients.[8] And during the same summer, *id.*, Munanka left Sullivan & Cromwell to become a law clerk for a federal judge in New York—a position that also precluded him from continuing to work on Maples's case. *See Code of Conduct for Judicial Employees*, Canon 4(D). Both attorneys not only left their representation of Maples without word to the court, but they transferred their loyalties to new principals and undertook new employment that prevented them from representing Maples.

This constituted a material breach of the duty of loyalty. The new jobs that Ingen-Housz and Munanka assumed not only had a "substantial tendency to cause [them] to disregard [their] duty to serve [Maples] with only [Maples's] purpose in mind," Restatement (Second) of Agency § 394 cmt. a; the jobs effectively *barred* them from doing anything on Maples's behalf and thus completely vitiated the "undivided allegiance and loyalty which the proper performance of the agency require[d]," Mechem, *supra*, § 1206. *See, e.g., Cameco, Inc. v. Gedicke*, 690 A.3d 1051, 1057-58 (N.J. Super. Ct. App. Div. 1997) (duty of loyalty violated by side business that significantly impaired employee's performance). Moreover, undertaking a job that prevents an agent from working on a principal's behalf results in the agent's total incapacitation and thus terminates the agency relationship "by operation of

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[8] Article 12b of the European Commission's Consolidated Staff Regulation requires specific authorization before an employee may engage in outside work of any kind. Staff Regulations of Officials of the European Communities art. 12b (2004), *available at* http://ec.europa.eu/civil_service/docs/toc100_en.pdf. There is no evidence that Ingen-Housz sought such permission and she performed no work for Maples after she left the law firm.

law" based on "a change of condition, or of state, producing an incapacity of either party." Story, *supra*, § 481; *see* Restatement (Third) of Agency § 3.08 cmt. b (rule applies to incapacitation of agent).

Significantly, Ingen-Housz and Munanka were required by Alabama law to obtain the court's approval before withdrawing. Pet. App. 223a; Ala. R. Crim. P. 6.2(b); *see, e.g.*, *McWilliams v. State*, 897 So. 2d 437, 442-43 (Ala. Crim. App. 2004) (citing motions to withdraw filed by out-of-state *pro bono* counsel). Under the Alabama rules, "[c]ounsel must move to withdraw by means of a formal written motion," and "[w]ithdrawal will be permitted only upon order of the court in response to such motion." Ala. R. Crim. P. 6.2 cmt. As the Alabama rules make clear, the purpose of this requirement is "to protect the interests of the defendant, and to aid the trial court in providing continuity in legal representation." *Id.* Counsel's failure to obtain the court's approval to withdraw left Maples abandoned by his *pro bono* attorneys of record.

Courts have recognized that abandonment or disloyalty severed the agency relationship in analogous circumstances. *See, e.g., Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (Petitioner alleged he was "effectively abandoned" where "attorney failed to inform him when the [court] denied review of his motion[,] … his attorney refused to remove herself as appointed counsel[,] … [and] his attorney led him to believe that she was going to file the federal habeas petition on his behalf …."); *Porter v. State*, 2 S.W.3d 73, 74-75 (Ark. 1999) (finding "cause" where attorney of record ceased representation but "had not taken any formal steps to withdraw," precipitating default). And here, the State itself must have believed that Maples

had been abandoned by counsel because, after the default, the State's attorney sent notice to Maples directly without even copying Maples's attorneys of record, Pet. App. 253a-54a—notwithstanding the general ethical rule barring a lawyer from contacting a client that is represented by another lawyer about the underlying matter. *See* Ala. R. of Prof'l Conduct 4.2.

In its brief opposing certiorari, the State never denied that Ingen-Housz and Munanka abandoned Maples. Instead, the State argued that *other* attorneys at Sullivan & Cromwell represented Maples at the time of the default. Opp. 33-35. New counsel from Sullivan & Cromwell advised the Eleventh Circuit that other lawyers at the firm had "agreed to handle the matter" after Ingen-Housz and Munanka left. JA 299; *see* Pet. App. 4a. But the record is largely undeveloped concerning what arrangements had been made and whether or to what extent such attorneys had actually formed an attorney-client relationship with Maples before the default or, whether they instead were just "waiting for any further proceedings" before deciding how to proceed in the matter. JA 301. If this Court believed it was necessary to resolve these issues in deciding whether Maples has established cause, a remand for evidentiary proceedings would be required. But ultimately such a remand is not required because, as a matter of law, the existence of these attorneys cannot alter the fact that Maples was abandoned during the critical time frame based on the findings of the Rule 32 court itself.

As the Alabama Rule 32 court found, no other lawyers at Sullivan & Cromwell represented Maples in his Rule 32 proceeding at the time of the default. Pet. App. 223a. Any other attorneys on which the State

relies had "not yet been admitted to practice in Alabama" and had "not entered appearances as attorneys of record." *Id.*; *see also id.* at 4a. Thus, even *after* the default, the Alabama Rule 32 court made clear that Ingen-Housz and Munanka—who had not withdrawn from the case—were "*still* attorneys of record for [Maples]." *Id.* at 223a (emphasis added); *see Esters v. State*, 894 So. 2d 755, 761 (Ala. Crim. App. 2003) (attorneys' "representation of, and attendant obligations to [the client] exist[] as long as they remain[] attorneys of record"). If any other lawyers had even attempted to file pleadings on Maples's behalf at the time of the default, the pleadings would have been "stricken from the record" and the attorneys disciplined for "unlawful practice of law." JA 372.

As explained above, under traditional agency law, a principal is never responsible for the actions or inactions of a purported agent who lacks a license necessary to the performance of the relevant tasks. *See* Restatement (Second) of Agency § 111; *see id. illus.* 1 ("In a state in which it is illegal for one not an attorney to represent another in court, P authorizes A to appear for him in a case. A is disbarred. A's authority is terminated."). That principle governs here because, as the Rule 32 court found, any other Sullivan & Cromwell attorneys relied upon by the State lacked the authority to represent Maples in his Rule 32 proceeding. Pet. App. 223a. Thus, regardless of who was doing what (if anything) in New York after Ingen-Housz and Munanka had left, Maples was left completely abandoned in his Rule 32 proceeding.[9]

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[9] The findings of the Alabama Rule 32 court on who represented Maples should control. However, to the extent that any other

2. Maples's local counsel, John Butler, also was not operating as Maples's agent in any meaningful sense of that word. As a practical matter, Butler had abandoned Maples as well, though it could also be said —given that one ordinarily can abandon only that which he has once possessed—that Butler *never* assumed any meaningful agency relationship with Maples in the first place. According to his own testimony, the only role that Butler ever agreed to serve on behalf of Maples was to make possible the out-of-state representation of Maples by his *pro bono* attorneys of record. Pet. App. 255a-56a. Accordingly, besides enabling Ingen-Housz and Munanka to represent Maples *pro hac vice* in the matter, Butler had "no other role in the case." *Id.* at 257a.

To be sure, although it was unfortunately not uncommon for local counsel to take on such a perfunctory role in post-conviction cases in Alabama, *see* Alabama Appellate Court Justices Cert. Br. 18, that arrangement—however it is characterized—violated Alabama law from the get-go. The Alabama rules state that local counsel "shall … accept joint and several responsibility with the foreign attorney." JA 366, 375. By his own admission, Butler intentionally abandoned such responsibility, Pet. App. 255a-56a, and thus never operated as Maples's agent in any meaningful sense of the word. He was "local counsel" in name only, and thus was no more operating as an agent of Maples than Ingen-Housz and Munanka were

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attorneys at Sullivan & Cromwell—or indeed the law firm itself—could be deemed to have been Maples's attorneys at the time of the default and such attorneys knew that Maples was left without any functioning attorney of record in his Rule 32 proceeding, then that would simply underscore the abandonment that Maples faced.

after they had left Maples but nevertheless nominally were "still attorneys of record for [Maples]" because they had not withdrawn from the case. *Id.* at 223a.

Consistent with his clearly expressed intentions, Butler did nothing when he received the dispositive Rule 32 order in Maples's case. He did not inform Maples or *pro bono* counsel of the order. He took no action to prepare an appeal on Maples's behalf, or to ensure that Maples's *pro bono* attorneys of record were doing so. Unlike the typical case in which attorney error occurs, that inaction was not the product of negligence or inadvertence on Butler's part. Rather, it was the product of Butler's intentional decision from the very outset to avoid any role that would resemble that of an agent in the meaningful sense of that word. That decision—which was consciously designed to serve *other* interests, *id.* at 255a—not only represents a de facto abandonment but embodies a fundamental breach of the duty of loyalty. Butler failed to serve Maples's interests in any meaningful way and deprived Maples of the "undivided allegiance and loyalty which the proper performance of the agency require[d]." Mechem, *supra*, § 1206. And because Butler was not operating as Maples's agent in any meaningful sense, his knowledge of the Rule 32 order cannot be attributed to Maples under agency law. *See* Restatement (Third) of Agency § 5.04; *supra* at 40-41.

At the very most, Butler could be viewed only as a *sub*-agent of Ingen-Housz and Munanka. Indeed, there is no evidence that Butler ever had any direct communications with Maples, and the Alabama rules explicitly call on the out-of-state *pro bono* counsel who wishes to appear *pro hac vice* to "associate[] in th[e] cause an [Alabama] attorney" who shall appear as local

counsel, Ala. R. for Admission to Ala. Bar VII (2008) (JA 375), directly putting on out-of-state counsel—not the inmate—the onus of "associat[ing]" local counsel. *Cf.* Restatement (Third) of the Law Governing Lawyers § 58 cmt. e (2000) (When a lawyer obtains assistance from a "temporary lawyer who has no direct relationship with the client … the outside lawyer" is often best thought of as a "subagent."). To the extent that Butler operated as a subagent—rather than as no agent at all—his authority would have automatically terminated when Ingen-Housz and Munanka abandoned Maples. *See* Restatement (Second) of Agency § 137 cmt. a ("[A] subagency terminates if the relations between either the principal and the agent or the agent and subagent are severed ….").

After Butler learned of the default, Butler did purport to act on behalf of Maples and signed at least two filings, including the initial request for relief from the Alabama trial court when Ingen-Housz and Munanka had abandoned Maples and no other attorneys had been admitted to represent Maples *pro hac vice.* JA 235-36, 239-40. But Butler's actions *after* the events at issue can in no way alter the fact that he was not operating as Maples's agent in any meaningful sense of the word when the default occurred. And the same goes for the conduct of the lawyers at Sullivan & Cromwell who subsequently entered appearances in the case and filed papers on behalf of Maples.

3. Viewed from the standpoint of professional standards of care and equitable considerations inherent in habeas, the attorney conduct at issue is also at least as problematic as that in *Holland*, and thus also falls into the category of "extraordinary" circumstances recognized in *Holland* that cannot fairly be attributed

to a petitioner. *E.g.,* 130 S. Ct. at 2562-64; *id.* at 2568 (Alito, J., concurring in part and concurring in the judgment). Indeed, "[a]bandonment of one's (imprisoned) client in a criminal case is one of the most serious offenses a lawyer can commit." *In re Riggs*, 240 F.3d 668, 671 (7th Cir. 2001) (Easterbrook, J.).

Just as in *Holland,* the actions of Maples's *pro bono* attorneys and local counsel violated fundamental professional standards of care as well as principles of agency. For example, by leaving the case without even notifying the court, Maples's *pro bono* attorneys of record violated their obligation under Alabama law to obtain the court's *approval* before withdrawing—as this case underscores, a critically important duty. *See* Ala. R. Crim. P. 6.2(b). By assuming new employment that precluded them from working on Maples's case, those attorneys also violated Alabama's "conflict of interest" rules. *See* Ala. R. of Prof'l Conduct 1.7 ("A lawyer shall not represent a client if the representation of that client may be *materially limited* by the lawyer's responsibilities to a another client ….") (emphasis added). By intentionally limiting his involvement to facilitating the representation by Maples's out-of-state *pro bono* counsel, Butler egregiously violated his duty to assume "joint and several responsibility" in the matter. Rule VII(c) of the Ala. Rules of Practice; JA 366, 375. And, as discussed, in abandoning him, Maples's attorneys also violated their fundamental duties of loyalty and obedience to Maples.

In sum, whether measured by agency law, standards of professional care, equitable principles, or just plain common sense, the conduct of Maples's attorneys cannot fairly be attributed to Maples. In other words, that conduct is *external* to Maples and

thus establishes cause for excusing the default. Moreover, while the conduct of Maples's *pro bono* attorneys and that of local counsel together establishes cause, the conduct of either is sufficient to establish cause under the extraordinary circumstances of this case because the conduct of either alone constituted a substantial "external impediment" to Maples's ability to appeal. *Carrier*, 477 U.S. at 492.

* * * * *

No sustainable system of capital punishment would mandate the execution of a man in the circumstances here without any federal habeas review of the inmate's constitutional claims on the merits. And this Court's precedents—backed by centuries of jurisprudence recognizing the equitable nature of the writ—already supply the necessary safeguard. Cause exists to excuse a procedural default where some objective factor external to the defense impeded the petitioner's efforts to comply with the State's default rule. Because Maples's ability to comply with the State's default rule was impeded, if not completely thwarted, by external events including the State's own misconduct, the courts below erred in holding that Maples could be executed without any federal review of the merits of his serious ineffective-assistance-of-counsel claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

May 18, 2011