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 OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than seven decades. LDF has a long-standing concern with the fair and unbiased administration of the criminal justice system in general, and the death penalty in particular. For this reason, LDF has served as counsel in cases before this Court including, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *Coker v. Georgia*, 433 U.S. 584 (1977), *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Banks v. Dretke*, 540 U.S. 668 (2004), and *House v. Bell*, 547 U.S. 518 (2006), and it has appeared as amicus curiae in, *inter alia*, *Roper v. Simmons*, 543 U.S. 551 (2005), *Kennedy v. Louisiana*, 554 U.S. 407 (2008), and *Graham v. Florida*, 560 U.S. __, 130 S. Ct. 2011 (2010).

SUMMARY OF THE ARGUMENT

Through no fault of his own, Cory Maples faces execution by the state of Alabama without any merits review of serious constitutional challenges to his conviction and sentence. His trial lawyers admitted to "stumbling around in the dark" due to their inexperience litigating capital cases. Pet. Br. 8-9. Then, his state post-conviction counsel aban-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

doned him while proceedings were pending. When the state court clerk's office learned this, it did nothing to alert Maples before a critical filing deadline expired.

It is well settled that federal habeas courts have equitable authority to excuse a state-court procedural default such as a missed filing deadline. Nonetheless, a divided panel of the Eleventh Circuit held that there was insufficient "cause" to do so here, notwithstanding the incomprehensible failings of Maples's attorneys and the court clerk's office. As a result, federal habeas review was entirely foreclosed.

That decision cannot stand. An appropriate remedy must account for the developments that have dramatically altered the legal landscape over the past twenty years. In *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court declined to provide constitutional or equitable safeguards against incompetent state post-conviction counsel in capital cases. Since 1991, however, numerous procedural obstacles have been erected throughout the post-conviction process. This increasing "complexity . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of a person learned in the law." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). Although most death-penalty states (with the notable exception of Alabama) have recognized these perils and now guarantee capital post-conviction counsel as a matter of state law, this right is frequently under-enforced, and the performance of appointed counsel is often woefully inadequate.

In light of these developments, it would be unwarranted for this Court to extend *Giarratano* and *Coleman* to the distinctive circumstances at issue here. Maples — sentenced to death in one of the few states that provides no right to capital post-conviction counsel — was entirely blameless for a state-court procedural default caused by attorney abandonment and state misconduct. Accordingly, amicus agrees with Petitioner that the Eleventh Circuit's refusal to find cause to excuse the procedural default in this case should be reversed.

In addition, this case offers the Court an occasion to take account of the dangerous fissures that have opened in the post-conviction landscape in the past two decades and to provide additional safeguards to ensure that death-sentenced prisoners in Alabama and elsewhere are not unfairly penalized for attorney misconduct that would rise to the level of a constitutional violation if committed during trial or on direct appeal. To this end, amicus sets out a graduated series of protections that this Court could adopt — either as a matter of constitutional right or through the equitable principles underlying the Great Writ of Habeas Corpus.

ARGUMENT

I. *Giarratano* and *Coleman* establish the framework for this case.

The legal foundations for this case trace back to this Court's decisions in *Giarratano* and *Coleman*.

Decided in 1989, *Giarratano* held that Virginia death-row prisoners were not constitutionally entitled to increased legal assistance in state post-conviction proceedings. 492 U.S. at 3-4. On behalf

of a four-justice plurality, then-Chief Justice Rehnquist built upon the Court's prior holding that, as a general matter, there is "no underlying constitutional right to appointed counsel in state postconviction proceedings." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). That proposition is settled, and amicus does not contest it here.

Rather, amicus takes issue with the *Giarratano* plurality's reasoning that this proposition "should apply no differently in capital cases than in noncapital cases." 492 U.S. at 10. The Court's 5-4 decision did not turn on that categorical pronouncement. Justice Kennedy's separate concurrence provides a more nuanced, fact-sensitive view of the constitutional protections for death-sentenced prisoners. *Id.* at 14-15 (Kennedy, J., concurring in the judgment). Because Justice Kennedy's concurrence is narrower than the plurality's reasoning, it is controlling. *See O'Dell v. Netherland*, 521 U.S. 151, 162 (1997); *Marks v. United States*, 430 U.S. 188, 193 (1977).

Declining to rely on *Finley* or to import its rationale into the capital context, Justice Kennedy agreed with the four dissenters that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death" because "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). Moreover, he recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.*

Nevertheless, Justice Kennedy determined that the constitutional "requirement of meaningful access can be satisfied in various ways." *Id.* While he recognized that "Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States," Justice Kennedy concluded that, "[o]n the facts and record *of this case*," Virginia had met its constitutional duty. *Id.* at 14-15 (emphasis added).

Two years later in *Coleman*, the Court applied *Giarratano* in the federal habeas context. A death-sentenced prisoner, also from Virginia, argued that the negligence of his state post-conviction counsel should provide cause to excuse the procedural default that occurred due to his failure to timely appeal the state post-conviction trial court's denial of his claims. *Coleman*, 501 U.S. at 752-54. The Court rejected this argument. Because *Giarratano* held that there is no constitutional right to post-conviction counsel for Virginia death-row prisoners, the Court concluded that "any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

Nothing in *Coleman* suggested any change in the facts, which were critical to Justice Kennedy's pivotal concurrence in *Giarratano*, concerning post-conviction capital representation in Virginia. Thus, it was unremarkable that *Coleman* did not reference Justice Kennedy's controlling view in *Giarratano* that the facts concerning access to the courts are determinative of the post-conviction right to counsel for death-sentenced persons.

Coleman did suggest that a serious access-to-courts problem may arise where post-conviction counsel's ineffectiveness prevented review of claims that could only be fully and fairly litigated for the first time in post-conviction proceedings. 501 U.S. at 755-56. But *Coleman* declined to decide whether there is "an exception to the rule of *Finley* and *Giarratano*" in such circumstances. *Id.* at 755. That broad question was left unresolved because Coleman did not challenge the effectiveness of his representation at the trial-court stage of post-conviction review. *Id.* at 755-57.

While this Court has subsequently cited *Coleman* and *Giarratano*, *see, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994), it has not directly revisited the scope of those two cases, despite profound changes in capital post-conviction litigation processes over the past twenty years.

II. Developments since *Giarratano* and *Coleman* have dramatically altered capital post-conviction practice.

Giarratano and *Coleman* were grounded in the legal landscape of their time. While Justice Kennedy's *Giarratano* concurrence encouraged Congress and the states to experiment with "responsible solutions" to the problem of meaningful access to state post-conviction proceedings, 492 U.S. at 14 (Kennedy, J., concurring in the judgment), they have done just the opposite. Over the past two decades, federal legislation has imposed additional barriers to federal review of state capital convictions; many of these bars are triggered by defaults in preceding state-court litigation. As a result, state post-

conviction litigation has become the primary forum for the vindication of federal constitutional rights, including the adjudication of claims of innocence. Simultaneously, state post-conviction procedures have become more complex, convoluted, and fast paced.

Furthermore, while almost all death-penalty states now provide post-conviction counsel in capital cases as a matter of state law, most have been unwilling to enforce any guarantee of minimally effective representation. Thus, the representation provided to death-sentenced prisoners in state post-conviction proceedings is all-too-often woefully inadequate.

A. Significant changes in federal habeas procedure have magnified the importance of state post-conviction proceedings.

In the twenty years since *Giarratano* and *Coleman*, substantive revisions to federal habeas procedure have made state post-conviction proceedings the primary forum for the presentation and adjudication of federal constitutional claims. In particular, the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, "dramatically altered the landscape for federal habeas corpus petitions." *Rhines v. Weber*, 544 U.S. 269, 274 (2005).[2]

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[2] Pre-AEDPA, this Court's "death penalty jurisprudence unquestionably [was] difficult even for a trained lawyer to master." *McFarland*, 512 U.S. at 856 (citation and quotation marks omitted). But many pre-AEDPA obstacles emerged in decisions

First, AEDPA imposed a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (citation and internal quotation marks omitted). Federal courts may grant habeas relief only when a state-court "merits" determination "was contrary to" or "involved an unreasonable application of" this Court's precedents, or when the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Even state-court decisions that "applied clearly established federal law erroneously or incorrectly" are irremediable unless the error is "also . . . unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

Second, AEDPA made it even more critical for petitioners to develop the factual basis for all known claims in state court. Not only is federal habeas review of certain claims "limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 563 U.S. __, 131 S. Ct. 1388, 1398 (2011), but AEDPA also imposes a restrictive standard for evidentiary hearings in federal habeas proceedings, 28 U.S.C. § 2254(e)(2). As a result, "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Cullen*, 131 S. Ct. at 1401.

Third, AEDPA's imposition of a one-year filing deadline for federal habeas petitions has exacerbated the plight of indigent death-row prisoners. *See* 28

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that post-dated *Giarratano*. *See, e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

U.S.C. § 2244(d)(1). Although this statute of limitations is tolled while state post-conviction proceedings are pending, it runs throughout the time that the state post-conviction petition is prepared for filing, and it starts running again immediately upon entry of a final state-court judgment. *See id*. § 2244(d)(2). These time limitations make it even more critical for death-sentenced prisoners to have assistance from qualified counsel who can efficiently and effectively research, investigate, and draft a state post-conviction pleading. Otherwise, the petitioner will be in danger of defaulting claims under state pleading requirements or of filing the state pleading so late in AEDPA's one-year limitation period that the time remaining to prepare a federal habeas petition after a final state-court judgment is inadequate. *See, e.g.*, *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (post-conviction attorneys "waited until the eleventh hour to file [their client's] state habeas petition," thereby leaving only one business day to file a federal habeas petition).[3]

Finally, AEDPA generally prohibits the successive litigation of federal habeas petitions. 28 U.S.C. § 2244(b). These restrictions are far more stringent than those applied pre-AEDPA or, indeed, at the time that *Giarratano* and *Coleman* were decided. *See McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991). Thus, except in extremely limited circumstances, a death-sentenced prisoner now has only one opportunity to seek federal habeas review.

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[3] Even shorter post-conviction deadlines in many states increase the time pressure to adequately investigate and plead all constitutional claims. *See infra* at 12-13 & nn.5, 6.

The changes outlined above fundamentally altered the relationship between state and federal post-conviction proceedings. Post-AEDPA, a condemned prisoner's ability to properly present a federal claim in a state post-conviction forum is literally a matter of life and death. Federal habeas review is far more limited and no longer serves as the cure-all for mistakes of law and fact which occur in state post-conviction proceedings, as it did when *Giarratano* was decided. Instead, "state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding," *Harrington v. Richter*, 562 U.S. __, 131 S. Ct. 770, 787 (2011), and state courts' pronouncements on questions of guilt and punishment routinely become authoritative.

Nevertheless, this Court recently explained that "[w]hen Congress [in AEDPA] codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland v. Florida*, 560 U.S. __, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Indeed, Congress considered and rejected proposals that would have effectively eliminated federal habeas review for any claim that had been litigated in state court. *See, e.g.*, 141 Cong. Rec. 15,016, 15,044-45, 15,066 (1995).

B. State post-conviction practice has become far more complex, reinforcing the need for effective counsel.

The two decades since *Giarratano* and *Coleman* have also seen sweeping changes in state post-conviction rules. Many states have imposed rigid

deadlines and procedural restrictions on access to their own post-conviction forums. As a result, state post-conviction procedure, like the appellate review process at issue in *Halbert v. Michigan*, is an increasingly "perilous endeavor for a layperson" to navigate without the benefit of counsel, and it goes "well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments" — a profile all too common among death-row prisoners. 545 U.S. 605, 621 (2005).

Since *Giarratano*, many death-penalty states have tightened pleading requirements and other rules governing presentation of federal claims in state post-conviction proceedings. For instance, legislative changes, adopted by Tennessee in 1995, require petitioners seeking post-conviction relief to plead "a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Post-Conviction Procedure Act, 1995 Tenn. Pub. Acts ch. 207, § 1 (codified at Tenn. Code Ann. § 40-30-106(d)). Tennessee also provides that "bare allegation[s] that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further [post-conviction] proceedings." *Id.*[4]

Similarly, as a result of post-*Giarratano* revisions to Florida rules, petitioners must now meet specific pleading requirements, including, *inter alia*, "de-

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[4] Not all such changes have occurred since *Giarratano*. This Tennessee provision is almost identical to a long-standing pleading requirement imposed by neighboring Alabama. *See* Ala. R. Crim. P. 32.6(b); *Brooks v. State*, 555 So. 2d 337, 337 (Ala. Crim. App. 1989).

tailed allegation[s] of the factual basis for any claim for which an evidentiary hearing is sought," and of "any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been or was not raised on direct appeal." Fla. R. Crim. P. 3.851(e)(1); *Amendments to Fla. Rules of Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213, 1218-19, 1228-29 (Fla. 2001). Such heightened pleading standards increase the necessity of developing specific factual support for every claim at the initial stage of state post-conviction proceedings, thereby creating a threshold obstacle that is particularly difficult for a death-sentenced individual to surmount while confined in prison without competent counsel.

Further, many death-penalty states have adopted stringent post-conviction filing deadlines.[5] Others have created "unitary" systems, in which death-sentenced prisoners must prepare for both direct appeal and state post-conviction proceedings simulta-

[5] For instance, Mississippi rule amendments, adopted in 1996, provide that a capital post-conviction petition generally must be filed within 30 days following the Mississippi Supreme Court's grant of permission to file, and such permission must be requested no later than 180 days after post-conviction counsel is appointed or 60 days following denial of rehearing on direct appeal, whichever is later. Miss. R. App. P. 22(c)(5)(i), (6); *see also, e.g.*, N.C. Gen. Stat. § 15A-1415(a) (120-day deadline for most post-conviction capital petitions, adopted in 1996); Va. Code Ann. §§ 8.01-654.1, 19.2-163.7 (120-day deadline, adopted in 1998, from the appointment of post-conviction capital counsel, which must occur within 30 days of the Virginia Supreme Court's decision affirming a death sentence; otherwise a 60-day deadline, adopted in 1995, applies).

neously, shortly after the conclusion of trial.[6]

Also as a result of changes over the past twenty years, most death-penalty states now preclude the filing of successive state post-conviction petitions, except in very limited circumstances.[7] Additionally, many states have narrowed the scope of relief available in post-conviction proceedings by adopting non-retroactivity rules modeled on those announced by this Court in *Teague v. Lane*, 489 U.S. 288 (1989).[8]

Finally, in Alabama and elsewhere, it has become prevailing practice for state courts to dismiss capital post-conviction petitions by adopting verbatim orders drafted by state prosecutors, without any judicial review of the content of those orders. *See* Petition for Writ of Certiorari, *Barbour v. Allen*, 551 U.S. 1134 (2007) (No. 06-10605), at 17-18.[9] In a recent

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[6] Since *Giarratano*, unitary systems have been adopted in states such as Colorado, Ohio, Oklahoma, and Texas. *See* Colo. Rev. Stat. §§ 16-12-201 *et seq*. (adopted in 1997); Ohio Rev. Code Ann. § 2953.21(A)(2) (adopted in 1995); Okla. Stat. tit. 22, § 1089(D)(1) (adopted in 1995); Tex. Code Crim. Proc. Ann. art 11.071 § 4 (adopted in 1995).

[7] For instance, Ohio, Tennessee, and Texas adopted restrictions on successive petitions in 1995. *See* Ohio Rev. Code. Ann. § 2953.23; Tenn. Code Ann. § 40-30-102(c); Tex. Code Crim. Proc. Ann. art. 11.071 § 5; *see also, e.g.*, *In re Clark*, 855 P.2d 729, 740-45 (Cal. 1993).

[8] *See, e.g.*, *Manning v. State*, 929 So. 2d 885, 900 (Miss. 2006); *State v. Zuniga*, 444 S.E.2d 443, 446 (N.C. 1994); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App. 1994); *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296-97 (La. 1992); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990).

[9] *See also* Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 Am. J. Crim. L. 207, 225 (2007) (hereinafter Keilen & Levin,

capital case, the Court "criticized that practice." *Jefferson v. Upton*, 560 U.S. __, 130 S. Ct. 2217, 2223 (2010) (per curiam). The need for adequate legal representation is magnified where state judges fail to play an independent role in protecting petitioners' rights and, instead, simply countersign orders that contain unsupported factual findings, nonexistent procedural defaults, and tenuous legal conclusions drafted by state prosecutors seeking to invoke every possible legal ground for rejecting the petitioners' claims and insulating the case from federal habeas review.

By tightening deadlines and adopting AEDPA-like procedural restrictions, states have substantially complicated the maze of complex rules that death-sentenced prisoners must navigate during state post-conviction proceedings. The most immediate effect of these changes is to limit condemned individuals' right of meaningful access to a state post-conviction forum to litigate constitutional challenges to their convictions and sentences. There is,

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Moving Forward) (finding that, in 90% of Texas capital post-conviction proceedings between 1995 and 2006, the trial court's findings were virtually identical to those submitted by state prosecutors); *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001) (observing that "[i]t is not uncommon" for Indiana courts "to enter findings that are verbatim reproductions of submissions by the prevailing party"); Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report* 264-65 (Sept. 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/ohio/finalreport.authcheckdam.pdf (surveying Ohio post-conviction courts' practice of "wholesale adoption of the State's proposed finds of fact and conclusions of law").

however, a still more drastic secondary effect. Because the exhaustion of state remedies is generally a precondition for federal habeas review, 28 U.S.C. § 2254(b)(1), states' purported post-conviction "remedies" ensnare prisoners in procedural defaults that bar their claims in federal court.

C. While almost all states now require appointment of capital post-conviction counsel, this right is severely limited by law and practice.

Over the past twenty years, states have increasingly recognized that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death" and therefore "the assistance of persons learned in the law" is necessary to navigate the "complexity" of these proceedings. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). When *Giarratano* was decided, eighteen of the thirty-seven death-penalty states guaranteed appointment of state post-conviction counsel for indigent death-sentenced individuals. *Id.* at 10 n.5 (plurality opinion); *id.* at 30 & n.26 (Stevens, J., dissenting). Today, by contrast, almost all of the thirty-four states that permit imposition of the death penalty provide such a right to counsel — and Alabama is a distinct outlier among the few that do not.[10]

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[10] The appendix to this brief compiles the rules for appointment of capital post-conviction counsel in death-penalty states. Thirty-one states provide a right to counsel. Of the three remaining states, New Hampshire has sentenced only one individual to death since it revised its death-penalty statute in 1977, and his conviction and sentence are still pending on direct review. *See State v. Addison*, 7 A.3d 1225, 1256 (N.H. 2010). While Georgia does not guarantee capital post-

Notwithstanding this positive trend, most states severely limit the substance of the right to post-conviction counsel by law or in practice. For instance, in eleven death-penalty states, the appointment of post-conviction counsel occurs only after a post-conviction petition is timely filed *pro se*. *See* Appendix. Even if appointed counsel is permitted to amend the petition, requiring *pro se* initiation of post-conviction procedures can have a substantial chilling effect. *Cf. McFarland*, 512 U.S. at 856 ("Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel . . . would expose him to the substantial risk that his habeas claims never would be heard on the merits.").

Moreover, a paper guarantee of post-conviction counsel does not ensure quality, or even minimally adequate, representation, especially in light of the technical complexity of capital post-conviction review. In Texas, for instance, "competent" counsel is required by statute in capital post-conviction proceedings. Tex. Code Crim. Proc. Ann. art. 11.071 § 2(a). The Texas Court of Criminal Appeals, however, has interpreted this competency requirement as measuring only counsel's "qualifications, experience, and abilities at the time of his appointment," regardless of performance. *Ex parte Graves*, 70

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conviction counsel, it provides some funding to the Georgia Appellate and Educational Resource Center, which represents some death-sentenced individuals in state habeas appeals. *See Gibson v. Turpin*, 513 S.E.2d 186, 187-88, 191 (Ga. 1999); Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report* 196-97 & n.113 (Jan. 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf.

S.W.3d 103, 113-14 (Tex. Crim. App. 2002). Accordingly, the Court of Criminal Appeals has refused to permit a claim of ineffective assistance of post-conviction counsel to be heard in a successive petition. *Id.* at 117-18.[11] The inadequacies of Texas's approach are evident in multiple stories of appointed post-conviction counsel who failed to raise any cognizable or extra-record claims, cut and pasted their client's letters into their pleadings instead of writing a legal claim for relief, used boilerplate pleadings that failed to change the client name or the facts of the crime, never visited their client, and failed to conduct any investigation whatsoever.[12]

Like Texas, at least ten other death-penalty states that guarantee a right to post-conviction capital counsel refuse to provide any relief when attorneys provide ineffective assistance, at least so long as those attorneys met state qualification standards

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[11] *Ex parte Graves* has been called into question by the petitioner's subsequent exoneration, as well as documented examples of extraordinary incompetence by appointed post-conviction counsel in other Texas cases. *See Ex parte Kerr*, No. WR 62,402-03, 2011 WL 1644141 (Tex. Crim. App. Apr. 28, 2011) (Price, J., dissenting); *Ex parte Foster*, No. WR 65,799-02, 2010 WL 5600129, at *2 (Tex. Crim. App. Dec. 30, 2010) (Price, J., dissenting).

[12] *See* Keilen & Levin, *Moving Forward*, at 225-32, 239-43, 248-49. Of state post-conviction petitions filed in Texas capital cases between 1995 and 2006, 12% were less than fifteen pages, 27% contained no extra-record claims, and 38% did not attach any extra record materials. *Id.* at 225; *see also generally* Texas Defender Service, *Lethal Indifference*: *The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), *available at* http://www.texasdefender.org/publications#.

at the time of their appointment.[13] Among these states is Florida, where there are numerous recent examples of attorneys appointed to represent death-sentenced prisoners in state post-conviction proceedings who failed to file a federal habeas petition within AEDPA's one-year statute of limitations. 28 U.S.C. § 2244(d)(1). In some instances, this was because of their failure to file a timely state petition, in others because counsel was ignorant of the applicable federal laws.[14]

Even among death-penalty states that do provide some remedy for ineffective assistance of capital post-conviction counsel, only a few have adopted the standard set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), for determining whether an attorney is minimally competent.[15] Elsewhere, relief appears limited to circumstances where post-conviction counsel effectively abandoned

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[13] *See, e.g.*, *Gore v. State*, 24 So. 3d 1, 16 (Fla. 2009); *State v. Hunt*, 634 N.W.2d 475, 479-80 (Neb. 2001); *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996); *House v. State*, 911 S.W.2d 705, 712-13 (Tenn. 1995); *Miller v. Maass*, 845 P.2d 933, 934 (Or. Ct. App. 1993); Colo. Rev. Stat. § 16-12-205(5); Mont. Code Ann. § 46-21-105(2); N.C. Gen. Stat. § 15A-1419(c); Ohio Rev. Code Ann. § 2953.21(I)(2); Va. Code Ann. § 19.2-163.8(D).

[14] *See, e.g.*, *Hamilton v. Secretary, DOC*, No. 08-14836, 2010 WL 5095880, at *1-2 (11th Cir. Dec. 15, 2010); *Howell v. Crosby*, 415 F.3d 1250, 1251 (11th Cir. 2005); *Damren v. McNeil*, No. 3:03-cv-397, 2009 WL 129612, at *1-2 (M.D. Fla. Jan. 20, 2009); *Banks v. Crosby*, No. 4:03-cv-328, 2005 WL 5899837, at *3 (N.D. Fla. July 29, 2005).

[15] *See, e.g.*, *Jackson v. Weber*, 637 N.W.2d 19, 22-24 (S.D. 2001); *Crump v. Warden*, 934 P.2d 247, 303-04 (Nev. 1997); *Hale v. State*, 934 P.2d 1100, 1102-03 (Okla. Crim. App. 1997); *Lozada v. Warden*, 613 A.2d 818, 842-43 (Conn. 1992).

a death-sentenced prisoner.[16]

In addition, many death-penalty states constrain counsel in state post-conviction proceedings by limiting compensation for legal work, as well as investigative and expert assistance. For instance, in the rare circumstances where Alabama courts appoint state post-conviction counsel, there is an extremely low fee cap of $1,000. Ala. Code § 15-12-23(d).[17] Lawyers subjected to such a fee cap are prone to do no more than re-argue the claims raised on direct review or in their client's initial *pro se* post-conviction pleading. Counsel lack the resources or incentive to develop additional claims, however meritorious.

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[16] *See, e.g.*, *Waters v. State*, 574 N.E.2d 911, 911-12 (Ind. 2004) (refusing to follow *Strickland* but allowing a death-sentenced prisoner "to begin anew his quest for post-conviction relief" where "[c]ounsel, in essence, abandoned [him]"); *In re Sanders*, 981 P.2d 1038, 1041 n.1, 1055 (Cal. 1999) (holding that "abandonment" by post-conviction capital counsel "is a relevant factor in determining whether a petition has shown good cause to justify a delay in presentation of claims").

[17] *See also, e.g.*, Ariz. Rev. Stat. Ann. § 13-4041(F), (G) (capping attorneys' fees at $100 per hour for up to 200 hours, but allowing additional compensation for "good cause"); Fla. Stat. § 27.711(4) (capping investigative expenses at $15,000 absent "extraordinary circumstances" and attorneys' fees at $84,000); S.C. Code Ann. §§ 16-3-26(B)(2), 17-27-160(B) (capping attorneys' fees at $25,000); Tex. Code Crim. Proc. Ann. art. 11.071 § 2A(a) (capping state reimbursement for attorneys' fees and expenses at $25,000, but providing counties with discretion to exceed this cap); Cal. Sup. Ct., *Sup. Ct. Policies Regarding Cases Arising From Judgments of Death*, § 2-2.1, *available at* http://www.courtinfo.ca.gov/courts/supreme/aa02f.pdf (capping investigation expenses at $25,000 in some cases and $50,000 in others).

The combination of funding limitations and the consequent reluctance of qualified lawyers to accept appointment are particularly worrisome because exculpatory evidence tends to emerge at a relatively late stage in capital cases and often is revealed only by advances in DNA technology and growing concerns over the reliability of other forensic techniques. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 540-54 (2006); Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 40-44 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

Thus, even more so than at the time *Giarratano* was decided, courts (and the general public) have come to appreciate that post-conviction proceedings provide the primary forum for exposing the constitutional violations that all too often pervade the investigation, prosecution, conviction, and sentencing of capital defendants. *Cf.* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 531-33 (2005) (finding that erroneous convictions occur disproportionately in capital cases due to special circumstances that affect the investigation and prosecution of those cases).

D. State interests are now more aggressively asserted in capital cases.

States have increasingly recognized that attorneys who are experienced in all aspects of state and federal post-conviction work will achieve better results than less experienced lawyers. While some death-penalty states fund specialized defender of-

fices specifically to handle post-conviction proceedings,[18] almost all states have specialized capital habeas teams to defend their interests in state and federal post-conviction proceedings. *See* Mark E. Olive, *Capital Post-Conviction Representation Models: Lessons From Florida*, 34 Am. J. Crim. L. 277, 283 (2007); *cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.").

In addition, there has been a substantial increase in the appointment of state solicitors general to supervise appellate litigation on behalf of their state. Currently, at least thirty-seven states have solicitors general or someone with similar responsibilities — up from approximately eight at the time *Giarratano* was decided. *See* Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, Nat'l L.J., Aug. 18, 2008, at 1; James R. Layton, *The Evolving Role of the State Solicitor General: Toward the Federal Model?*, 3 J. App. Prac. & Process 533, 534 (2001). In many states, a key function of the solicitor general is to oversee capital appellate proceedings, especially before this Court. *See, e.g.*, James C. Ho, *Defending Texas: The Office of the Solicitor General*, 29 Rev. Litig. 471, 473-74, 487-93 (2010).

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[18] Texas did so most recently, establishing the state-funded Office of Capital Writs to represent in state post-conviction proceedings all prisoners sentenced to death after September 1, 2009. *See* Tex. Code Crim. Proc. Ann. art. 11.071 § 2(b).

Thus, what was already an unlevel playing field has become even more tilted, increasing the importance of effective state post-conviction counsel in capital cases.[19]

III. In light of subsequent developments, *Giarratano* and *Coleman* should be reconsidered or at least not extended.

The developments of the past twenty years render the assumptions underlying *Giarratano* and *Coleman* worthy of reconsideration. At a minimum, these developments make it inappropriate to extend *Giarratano* and *Coleman* to the factual circumstances of Maples's case. Below, amicus sets out a graduated series of protections that this Court could adopt — either as a matter of constitutional right or through the equitable principles underlying federal habeas review — to ensure that Maples and other death-sentenced individuals are not unfairly penalized for attorney conduct in post-conviction proceedings that would call for constitutional relief if committed by trial or direct appeal counsel.

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[19] While federal law requires appointment of counsel for indigent capital offenders in federal habeas proceedings, 18 U.S.C. § 3599, representation at that stage is insufficient by itself, given that developments since *Giarratano* and *Coleman* have magnified the importance of state post-conviction proceedings for the adjudication of federal claims, *see* Section II.B *supra*, and substantive federal habeas review is generally dependent upon adequate presentation of those claims to the state court, *see* Section II.A *supra*.

A. This Court should recognize a constitutional guarantee of competent state post-conviction counsel in capital cases.

In *Giarratano*, it was undisputed that the Constitution mandates "meaningful access" to state post-conviction procedures which allow for litigation of constitutional challenges to capital convictions and sentences. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). The only outstanding question was the scope of that mandate.

The meaningful-access right recognized in *Giarratano* is rooted in the requirements of the Sixth Amendment right to counsel as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Halbert*, 545 U.S. at 610; *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996); *Evitts v. Lucey*, 469 U.S. 387, 403-05 (1985). Additionally, the Eighth Amendment's demand of heightened reliability in capital cases implies the need for special attention to procedural protections when the death penalty is involved. *See Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). These constitutional safeguards evolve as times and conditions change.[20] And so much has changed since *Giarratano* was decided that it is now time for this Court to recognize a constitutional right to competent state post-conviction counsel in capital cases.

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[20] *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (Eighth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 149-50 & n.14 (1968) (Sixth and Fourteenth Amendments); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (Fourteenth Amendment); *cf. Missouri v. Holland*, 252 U.S. 416, 433-34 (1920) (treaty power).

As detailed in Section II.A *supra*, state post-conviction proceedings often serve as the only forum for developing and adjudicating the facts necessary to establish federal constitutional claims, including claims of actual innocence, and are the "principal forum" for legal consideration of such claims. *See Harrington*, 131 S. Ct. at 787. At the same time, state post-conviction procedures have become increasingly governed by complex and time-sensitive rules, which are aggressively invoked by expert state prosecutors to foreclose further consideration of claims, including through submission of draft orders that state judges often adopt verbatim. *See* Section II.B *supra*. These developments have combined to greatly increase the perils facing death-sentenced individuals who are forced to initiate the state post-conviction process without assistance of counsel.

Putting aside Alabama and a few other states, a national consensus has recognized these perils and responded to them by providing counsel for indigent condemned prisoners at the critical stage of investigating, researching, drafting, and filing state post-conviction pleadings. *See* Section II.C *supra*. This Court has regarded such emergent consensus as a key indicator of "'the evolving standards of decency that mark the progress of a maturing society'" for Eighth Amendment purposes. *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).[21]

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[21] Evolving standards regarding appropriate *procedures* call for constitutional recognition no less than evolving substantive norms. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 289-94, 301 (1976) (lead opinion). Here, the evolution since *Giarratano* is at least as dramatic — in its volume, rapidity, and

Yet, without a federal constitutional guarantee of minimally effective counsel in state post-conviction proceedings, the actual performance of appointed attorneys for death-row prisoners in most states will likely remain "fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. __, 129 S. Ct. 2308, 2320 (2009). The absence of any system for the appointment of state post-conviction lawyers in Alabama and a few other jurisdictions, and the inadequacies and underfunding of appointed counsel in many other death-penalty states, mean that the necessary preparation for timely filing adequate state and federal post-conviction petitions is simply not done. As a result, it is virtually certain in places like Alabama, and not at all unlikely in other states, that valid claims of federal constitutional error will go unidentified, undeveloped, or unpresented. In other cases, *all* post-conviction review is forfeited as a result of missed state or federal deadlines. *See* Section II.C *supra*.

Accordingly, this Court should reexamine *Giarratano* in light of the significant developments that have occurred in the intervening years and recognize that death-sentenced prisoners cannot fairly litigate constitutional claims raised in state post-conviction proceedings without a federal constitutional guarantee of minimally competent counsel. *Cf. Evitts*, 469 U.S. at 396 ("[A] party whose counsel is unable to

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consistent direction of change — as it was in recent Eighth Amendment cases where this Court has found a national consensus. *Compare Roper*, 543 U.S. at 564-65, *and Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002), *with* Section II.C *supra*.

provide effective representation is in no better position than one who has no counsel at all.").[22]

B. Short of reconsidering *Giarratano*, the Court should recognize a right to state post-conviction counsel for claims that could not be pursued in prior litigation.

As discussed in Section I *supra*, *Coleman* left open the question of whether there is "an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. Short of overruling *Giarratano*, this Court should recognize the exception sought by the petitioner in *Coleman* and hold that death-sentenced prisoners have a constitutional right to competent counsel to litigate claims that can be fully and fairly litigated for the first time only in state post-conviction proceedings (practically or as a matter of state law).[23]

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[22] As applied in this case, neither this remedial option nor any other discussed below would implicate 28 U.S.C. § 2254(i). Maples has not alleged that the ineffectiveness of his post-conviction counsel is a "ground" for federal habeas relief in this case. *Id.*; Pet. Br. 13-14. Rather, he has alleged that the misconduct of post-conviction counsel (among other things) is "cause" to excuse the procedural default and *reach* the merits of his underlying grounds for relief.

[23] Amicus further submits that *Coleman* should be reconsidered to the extent it suggests that any such constitutional right extends only to the initial, or trial, stage of post-conviction proceedings and not to subsequent appeals. *See Coleman*, 501 U.S. at 755-56. But reconsideration is unnecessary in this case because effective assistance at the trial stage of post-conviction proceedings should unquestionably require counsel to notify their client of the outcome of that proceeding.

Among those claims are alleged ineffective assistance of trial and direct appeal counsel. As this Court has recognized, post-conviction proceedings are "preferable to direct appeal for deciding claims of ineffective-assistance" because such claims typically require investigation and development of a factual predicate beyond that which is contained in the trial record. *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). It is for this reason that "[a] growing majority of states" require or encourage defendants to raise claims of trial and appellate counsel ineffectiveness in state post-conviction proceedings. *Id.* at 508.[24]

In addition, state post-conviction proceedings are often the first forum for judicial review of constitutional claims based on prosecutorial misconduct, such as withholding exculpatory or impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Such claims, by their very nature, tend to surface only after a defendant's trial and conviction and require development of predicate facts that are not part of the trial record. *See, e.g.*, *Cone v. Bell*,

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See Smith v. Ohio Dep't of Rehab. & Corr., 463 F.3d 426, 433-34 (6th Cir. 2006) (holding that a "court's ultimate decision regarding a particular legal proceeding is *part of that legal proceeding*, and appointed counsel's duties . . . include the duty of informing her client of the outcome of the proceeding . . . in a timely fashion so that the accused retains his control over the decision to appeal"). In a capital case where "there are non-frivolous grounds for appeal," this duty follows *a fortiori* from *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

[24] *See, e.g.*, *State ex rel. Thomas v. Rayes*, 153 P.3d 1040, 1043-44 (Ariz. 2007); *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003); *Commonwealth v. Grant*, 813 A.2d 726, 735-38 (Pa. 2002) (cataloging cases).

556 U.S. __, 129 S. Ct. 1769, 1786 (2009); *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

For such claims, the *Giarratano* plurality's reasoning that "direct appeal is the primary avenue for review of capital cases," and that state post-conviction "serve[s] a different and more limited purpose," no longer applies. 492 U.S. at 10, 11 (plurality opinion). Rather, just as this Court concluded with respect to the procedures at issue in *Halbert*, state post-conviction review of a claim that could not have been litigated on direct appeal "ranks as a first-tier appellate proceeding requiring appointment of counsel" under the Due Process and Equal Protection Clauses. 545 U.S. at 609-10.

C. In the alternative, the Court should hold that a federal habeas petitioner has cause to excuse procedural default resulting from state post-conviction counsel's errors that would rise to the level of a constitutional violation if committed at trial or on direct appeal.

Normally, federal habeas courts will not adjudicate claims that are procedurally defaulted by an independent and adequate state rule. This important practice "is grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 730. Yet the cause-and-prejudice standard that sometimes excuses procedural default recognizes that — to ensure the "ends of justice" and vindicate constitutional rights — federal courts, under some circumstances, must reach the merits of constitutional claims that were denied for procedural reasons in state court. *See Schlup v. Delo*, 513 U.S. 298, 319-21 (1995). The

cause-and-prejudice test is grounded in "'equitable principles' [that] have traditionally 'governed' the substantive law of habeas corpus." *Holland*, 130 S. Ct. at 2560 (quoting *Munaf v. Geren*, 553 U.S. 674, 693 (2008)); *Schlup*, 513 U.S. at 319 ("[T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy."). In applying these equitable principles, this Court has latitude to determine and reevaluate, when necessary, the contours of cause and prejudice.

In light of the developments since *Giarratano* and *Coleman* described in Section II *supra*, competent state post-conviction counsel is now necessary for the proper litigation of constitutional claims that go to the fundamental fairness of a capital conviction and sentence. But even if this Court declines to use this case as a opportunity to recognize a federal constitutional right to state post-conviction counsel along the lines proposed in either Section III.A or III.B *supra*, it flouts fundamental equitable principles for the federal courts to refuse to consider the merits of defaulted claims in a capital case where state post-conviction counsel presents a federal constitutional claim to the state post-conviction court in a manner that is so procedurally improper that the conduct would violate *Strickland*, 466 U.S. 668, if committed by trial or direct appeal counsel. That is not to say that all errors by state post-conviction counsel should provide cause to excuse a state procedural default. *Cf. Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). But where, as in this case, state post-conviction counsel failed to act in a minimally competent manner in a capital case, their deficient per-

formance should satisfy the first prong of the cause-and-prejudice test.

Although the Court in *Coleman* was unwilling to excuse a state procedural default under this line of reasoning, 501 U.S. at 753-56, the equitable principles underlying federal habeas review allow the Court to respond to new circumstances where, as here, there is no statutory provision directly applicable. *Cf. Holland*, 130 S. Ct. at 2563 ("'The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices.'") (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (alterations omitted)). The "equitable inquiry required by the ends of justice," *Schlup*, 513 U.S. at 320, mandates such a reexamination in light of the developments in post-conviction practice discussed above.

D. Another option would be to find cause to excuse procedural default in a state such as Alabama that fails to provide the minimum constitutional safeguards that *Giarratano* requires.

Justice Kennedy's controlling concurrence in *Giarratano* adopted a fact-sensitive approach to determining whether the constitutional right of meaningful access to the courts requires recognition of an ancillary right to appointment of counsel in state post-conviction proceedings for capital cases. *See* 492 U.S. at 14-15 (Kennedy, J., concurring in the judgment).

Under this fact-sensitive approach, the present case stands in stark contrast to *Giarratano*. Neither of the two circumstances that Justice Kennedy identified in his concurrence as crucial to the outcome is true in Alabama today.

First, Virginia's "prison system [was] staffed with institutional lawyers to assist in preparing petitions for post-conviction relief." *Id*. at 14-15. Conversely, Alabama provides neither institutional lawyers nor any other form of state-funded assistance to help condemned prisoners prepare petitions for state post-conviction relief. *See* Equal Justice Initiative, *The Death Penalty in Alabama* 2 (Jan. 2011), *available at* http://eji.org/eji/files/02.03.11%20Death% 20Penalty% 20in%20Alabama%20Fact%20Sheet.pdf.

Second, at the time of *Giarratano*, "no prisoner on death row in Virginia [was] unable to obtain counsel to represent him in postconviction proceedings." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). By contrast, some Alabama death-sentenced prisoners have been unable to secure representation for all or a significant portion of their post-conviction proceedings. *See* Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 159 (June 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf. That number would be far greater were it not for the support of mostly out-of-state *pro bono* resources which, as this case reveals, are not always a reliable alternative to a state-funded, coordinated program.

In light of these and other serious flaws in Alabama's procedures for capital cases, *see* Pet. Br. 3-6, the state fails to provide the minimal constitutional safeguards required by Justice Kennedy's controlling concurrence in *Giarratano*. Indeed, Alabama is a distinct outlier in comparison to the vast majority of death-penalty states that provide at least some level of access to counsel in capital post-conviction proceedings. *See* Section II.C *supra*. Neither *Giarratano* nor *Coleman* justifies rigid application of procedural default rules to death-sentenced prisoners who are compelled to run the gauntlet of a post-conviction process like Alabama's. Accordingly, this Court should hold that, at least in Alabama capital cases, a federal habeas petitioner can demonstrate cause to excuse procedural default resulting from deficient performance by state post-conviction counsel.

E. *Coleman* and *Giarratano* should not be extended to preclude federal habeas review for a death-sentenced prisoner abandoned by state post-conviction counsel.

Even if the Court does not take any of the foregoing steps to safeguard the constitutional rights of death-sentenced prisoners who do not receive minimally competent assistance of counsel in state post-conviction proceedings, it should not extend the reasoning of *Giarratano* and *Coleman* to the distinctive facts at issue here. Relying on the plurality's reasoning in *Giarratano*, *Coleman* held that, on federal habeas review, attorney ineffectiveness in state post-conviction proceedings is not normally sufficient to establish cause for noncompliance with a state procedural rule. That holding was premised on the

notion that "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation," and, therefore, except in circumstances where the Constitution gives a litigant a right to counsel, "the petitioner must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Yet, as Justice Alito recently pointed out, "[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 the word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment). Where an attorney's misconduct amounts to abandonment of his client and that attorney's abandonment is responsible for a procedural default in state post-conviction proceedings, that default "cannot fairly be attributed" to the client. *Coleman*, 501 U.S. at 753. In these circumstances, the Court should hold that a death-sentenced petitioner has cause to excuse the default and obtain federal habeas review of the merits of his claims. *See* Pet. Br. 35-52. To hold otherwise would amount to a significant extension of *Coleman* and *Giarratano* in complete disregard for the agency law principles upon which those decisions were premised. *See Holland*, 130 S. Ct. at 2564-65; *see also id.* at 2566-68 (Alito, J., concurring in part and concurring in the judgment) (distinguishing the circumstances in *Coleman* from the kind of abandonment which, under "'well-settled principles of agency law,'" prevents counsel's actions from being constructively attributable to the client) (quoting *Coleman*, 501 U.S. at 754).

As this Court recently held, attorney misconduct that amounts to abandonment under agency law principles warrants equitable tolling of AEDPA's statute of limitations. *See Holland*, 130 S. Ct. at 2564-65. The same type of attorney misconduct should also generally establish a break in the agency relationship sufficient for a capital petitioner to establish cause to excuse a procedural default.[25]

Here, the evidence of attorney abandonment was at least as clear as it was in *Holland*. Maples's two lead attorneys of record left their law firm and accepted new employment that prevented them from continuing to represent their client — and they did so without seeking permission to withdraw from the court or substituting alternate counsel. *See* Pet. Br. 9-11. As a result, they ceased "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 thus provided sufficient cause to excuse any resulting procedural default. *See* Pet. Br. 39-52.

F. Extension of *Coleman* and *Giarratano* is particularly inappropriate where the state is aware of, and takes inadequate steps to address, abandonment by post-conviction counsel.

The narrowest ground for deciding this case turns on the state's own complicity in Maples's procedural default. It is axiomatic that where the acts or know-

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[25] As noted *supra* at 18-19 & n.16, some states take a similar approach in providing relief under state law when post-conviction counsel effectively abandons a death-sentenced prisoner.

ing omissions of state officials are responsible for a petitioner's noncompliance with a state procedural rule, that petitioner has cause to excuse the default on federal habeas review. *See*, *e.g.*, *Banks*, 540 U.S. at 692-96; *Strickler v. Greene*, 527 U.S. 263, 283-84, 288 (1999); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). In such circumstances, the default results from "something *external* to the petitioner, something that cannot fairly be attributed to him," and thus it would be inequitable to require a blameless petitioner to bear the consequences of that default. *Coleman*, 501 U.S. at 753; *see also Carrier*, 477 U.S. at 488; Pet. Br. 22-34.

Here, Maples's default was fairly attributable to the state. When copies of the post-conviction court's order mailed to Maples's two lead attorneys of record were returned unopened with "Return to Sender — Left Firm" written on the envelope, the court clerk's office did nothing; it made no effort to contact the two attorneys, anyone else at their former firm, local counsel, or even Maples himself before the appeal deadline passed. *See* Pet. Br. 10-12.

The Court's decision in *Jones v. Flowers*, 547 U.S. 220, 229 (2006), makes clear that it is particularly inappropriate to extend *Coleman* and *Giarratano* to prohibit federal habeas review under the circumstances of this case. In *Jones*, the Court held that, when the loss of a home is at stake, the Due Process Clause prohibits state officials from sitting on their hands after an important state-issued notice is returned unopened and unclaimed; instead, those officials must make further efforts to ensure adequate notice. 547 U.S. at 234. Similarly, where the "important and irreversible prospect" of a death sen-

tence is at stake, *id.* at 230, the Constitution cannot permit the state to merely "shrug [its] shoulders . . . and say 'I tried,'" *id.* at 229.[26] Although not always necessary, *see* Sections III.C and III.E *supra*, a constitutional violation is certainly sufficient to establish cause to excuse a state-court procedural default. *See Coleman*, 501 U.S. at 752-55; *Carrier*, 477 U.S. at 488.

CONCLUSION

For the foregoing reasons and those outlined by petitioner, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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[26] This constitutional violation is not cured by the fact that Maples's local counsel received notice. It is unreasonable for Alabama to rely solely on notice to local counsel when the state is aware that, as a result of its failure to support an adequate system of post-conviction counsel, out-of-state firms working *pro bono* and public interest groups serve as primary counsel for its death-row population. *See* Pet. Br. 29-33.

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APPENDIX

Appendix

Survey of State Provision of Counsel for Indigent Death-Sentenced Prisoners in State Post-Conviction Proceedings

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
Alabama	No	No (but courts have discretion to appoint counsel after the petition is filed) Ala. Code § 15-12-23(a); Ala. R. Crim. P. 32.7(c)
Arizona	Yes Ariz. Rev. Stat. Ann. § 13-4041(B)	n/a
Arkansas	Yes Ark. R. Crim. P. 37.5(b)	n/a
California	Yes Cal. Gov't Code § 68662; *In re Anderson*, 447 P.2d 117, 131 (Cal. 1968)	n/a
Colorado	Yes Colo. Rev. Stat. § 16-12-205(1)	n/a
Connecticut	Yes Conn. Gen. Stat. § 51-296	n/a
Delaware	Yes Del. Super. Ct. R. Crim. P. 61(l)(3)	n/a
Florida	Yes Fla. R. Crim. P. 3.851(b)	n/a
Georgia	No *Gibson v. Turpin*, 513 S.E.2d 186, 188 (Ga. 1999)	No

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
Idaho	Yes Idaho Crim. R. 44.2(1)	n/a
Indiana	No	Yes (as long as the public defender "determines the proceedings are meritorious and in the interests of justice") Ind. R. of P. for Post-Conviction Remedies 1, § 9
Kansas	No	Yes Kan. Stat. Ann. § 22-4506(d)(2)
Kentucky	No (but the Kentucky Department of Public Advocacy may assign counsel pursuant to Ky. Rev. Stat. § 31.110(2)(c); *see also Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001))	Yes (as long as the petition raises material issues of fact) Ky. R. Crim. P. 11.42(5)
Louisiana	Yes La. Rev. Stat. Ann. § 15:178	n/a
Maryland	No	Yes Md. Code Ann. Crim. Proc. § 7-108(a); Md. Rule 4-401
Mississippi	Yes Miss. Code Ann. § 99-39-23(9)	n/a
Missouri	No	Yes Mo. Rev. Stat. §§ 547.360(5), 547.370
Montana	Yes Mont. Code Ann. § 46-21-201(3)	n/a

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
Nebraska	Yes (provided that the public defender considers the proceedings "meritorious and in the interest of justice") Neb. Rev. Stat. § 23-3402(1)	n/a
Nevada	No	Yes Nev. Rev. Stat. § 34.820(1)(a)
New Hampshire *	No	No (but the trial court has discretion to appoint counsel to assist post-conviction petitioners in "complicated" cases) *State v. Hall*, 908 A.2d 766, 770 (N.H. 2006)
North Carolina	Yes N.C. Gen. Stat. § 7A-451(c)	n/a
Ohio	Yes Ohio Rev. Code Ann. § 2953.21(I)(1)	n/a
Oklahoma	Yes Okla. Stat. tit. 22, § 1089(B)	n/a
Oregon	No	Yes Or. Rev. Stat. § 138.590
Pennsylvania	Yes Pa. R. Crim. P. 904(H)(1)	n/a
South Carolina	No	Yes S.C. Code Ann. § 17-27-160(B)

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
South Dakota	No	Yes S.D. Codified Laws § 21-27-4
Tennessee	No	Yes Tenn. Code Ann. § 40-30-107(b)(1)
Texas	Yes Tex. Code Crim. Proc. Ann. art. 11.071(2)	n/a
Utah	Yes Utah Code Ann. § 78B-9-202	n/a
Virginia	Yes Va. Code Ann. § 19.2-163.7	n/a
Washington	Yes Wash. Rev. Code § 10.73.150(3)	n/a
Wyoming	No	Yes Wyo. Stat. Ann. § 7-6-104(c)(ii)

* Under the current statutory regime in New Hampshire, there has been only one death sentence, and it is still pending on direct review. *See State v. Addison*, 7 A.3d 1225, 1256 (N.H. 2010).