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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The name that matters in this case is Cory Maples. He is set to be executed without any federal habeas review of serious constitutional claims because of a missed deadline stemming from external factors wholly beyond his control, including the State's own actions. The State acknowledges (at 55) that the default is attributable to the actions of others (not Maples), and makes no apologies for the indigent-capital-defendant-representation system that produced this result. Instead, the State grounds its case on several astounding propositions. For example, the State argues (at 27)—for the first time in this case—that a court clerk has *no* duty to notify an inmate of a dispositive post-conviction order in a capital case. The State argues (at 37) that federal courts lack the authority to excuse a procedural default when it stems from counsel's outright abandonment of an inmate. The State suggests (at 30) that, instead of undermining public confidence in the administration of capital punishment, the system actually "'worked'" in this case. And the State claims (at 2) that, instead of providing a safety-valve, "the principles underlying the Great Writ" require the federal courts to close their doors on a death-row inmate in these circumstances.

No precedent of this Court compels that unsettling result. And that includes *Coleman v. Thompson*, 501 U.S. 722 (1991)—the decision on which the State pins its case. Unlike *Coleman*, the default here is attributable to the State itself, which not only created an indigent-capital-defendant-representation system that places inordinate weight on the role of out-of-state counsel, but inexplicably did nothing when notice to Maples's out-of-state counsel was returned unclaimed

with "Left Firm" written on an envelope. Moreover, unlike *Coleman*, this case does not involve the kind of "[a]ttorney ignorance or inadvertence" that is customarily attributed to a client under agency principles. To the contrary, as the Reporter for the Restatement (Third) of Agency has explained, the attorney conduct at issue here—outright abandonment—is *not* attributable to the client under agency principles. DeMott Br. 10-22. Alabama, in other words, is not asking the Court to apply *Coleman*; it is asking for a fundamental expansion of *Coleman*.

Instead of extending *Coleman*, the Court should adhere to its precedents recognizing that cause exists when a default is attributable to external factors beyond an inmate's control. This case ought to be a textbook example for that. Alabama's notice failure—which the state amici tellingly do not try to defend—directly impeded Maples's ability to comply with the default rule. And the same goes for the actions of Maples's post-conviction counsel, who abandoned Maples at the critical juncture. The State tries to rewrite the events underlying the abandonment. But to be clear, Maples—who was confined to a cell on death-row—did not know that his *pro bono* attorneys of record had left their law firm and that he had been abandoned by counsel until the State notified him of the default. Regardless of whether the focus is on the actions of the State, post-conviction counsel, or both, the default simply is not attributable to Maples himself.

In the end, the State's position is that "federalism and finality" (at 15) trump all other considerations, even the equitable principles on which the writ of habeas corpus is grounded, and even the most basic sense of fairness and dignity in a capital case in which

the inmate has serious claims. That position is out of step not only with this Court's precedents, but with a tradition going back to Blackstone. Pet. Br. 18.[1]

ARGUMENT

The State does not seriously contest the key legal principle governing this case: cause exists to excuse a default when the default was the product of "something *external* to the petitioner, something that cannot be fairly attributed to him." *Coleman*, 501 U.S. at 753; *see* Pet. Br. 19-20. That settled rule follows "clearly" (*Coleman*, 501 U.S. at 753) from this Court's precedents and is compelled by the equitable nature of the writ of habeas corpus, Pet. Br. 18. In common-sense terms, it is difficult to conceive how the default at issue here could be "fairly attributed" to Maples given the extraordinary external events precipitating the default. The State nevertheless insists (at 55) that Maples should "lose[] his chance to assert claims in federal court." That argument should be rejected.

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[1] Alabama tries (at 3-6) to gloss over the atrocious representation that Maples received at trial and sentencing, even suggesting that defense counsel's "stumbling around in the dark" remark was just a "joke" (at 5). It was not to Maples. And while Maples does not have to show that he will prevail on his ineffective-assistance-of-counsel claim to win the right to *present* it to a federal court, that claim is compelling. Pet. App. 30a-31a & n.3 (dissent); Ala. Appellate Court Justices Br. 20-28; Const'n Project Br. 20-22. Indeed, the State does not even attempt to defend counsels' profession of guilt during closing. Pet. Br. 8.

I. THE STATE'S OWN CONDUCT ESTABLISHES CAUSE

A. The State Interfered With Maples's Ability To Comply With The Default Rule

The State acknowledges (at 20) that "'interference by officials'" with a petitioner's ability to comply with a default rule is a "paradigmatic example" of cause. But the State argues that it did not interfere with Maples's ability to meet the deadline for appeal because Butler—the local counsel whose "sole" (JA 228-29) role was to facilitate the admission of Maples's *pro bono* attorneys of record—received a copy of the Rule 32 order. *See* Ala. Br. 16, 24, 28, 30, 32. For two overriding reasons, that argument is unavailing.

First, the State established an indigent-capital-defendant-representation system in which it was highly unlikely that local counsel would convey notice in this situation. As the State has touted to this Court, Alabama's system relies heavily on out-of-state volunteer counsel. Pet. Br. 30. Before 2006, the State required such counsel to "associate" a local counsel in the matter. JA 365-66; *see* Pet. Br. 5. But it was well-known that (as indisputably happened here, Ala. Br. 11) local counsel "most often do nothing other than provide the mechanism for foreign attorneys to be admitted." Ala. Appellate Court Justices Br. 36; *see* ACDL Br. 8 (such a role was "commonplace").[2]

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[2] That fact presumably explains why the State did not even bother to serve Butler with a copy of its Rule 32 response, JA 26, or try to contact him after the default, Pet. App. 253a. The State's only response is to say (at 31) that some "Alabama law firms" have represented death-row inmates in Alabama. But it is referring to situations where Alabama firms acted as *lead* counsel, not local

Remarkably, instead of decrying that conduct, the State *defends* it as simply a way in which lawyers may "divide up responsibility for a case." Ala. Br. 43; *see id.* at 17, 50. But by establishing that system and then doing nothing when it learned that Maples's out-of-state attorneys lacked notice of the Rule 32 order, the State interfered with Maples's ability to appeal.

Second, the State's own actions greatly increased the likelihood that local counsel would do nothing here. The Rule 32 order stated that *all* counsel of record would be served (by way of a "cc," JA 225). Where (as here) out-of-state lawyers have assumed responsibility for a matter and local counsel's role is subsidiary or non-existent, such an order can only create confusion among counsel when notice is not received by out-of-state counsel—and local counsel does not know that. The State itself argues (at 17, 43, 50) that counsel may divvy up responsibilities in this fashion, yet it fails to account for the confusion that inevitably may ensue. As Maples has explained (at 32), in analogous though less dire circumstances, courts have held that a missed deadline is attributable to confusion created by the State itself, even though local counsel received notice. *See, e.g.*, *Babich v. Clower*, 528 F.2d 293, 295 & n.2 (4th Cir. 1975); Const'n Project Br. 10-11. Alabama does not mention, much less address, *Babich*. And the State is even more responsible for the default here because,

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counsel. As noted, Alabama eliminated the local-counsel requirement for post-conviction actions in 2006, effectively acknowledging that the rule had undermined the representation provided to indigent criminal defendants. Pet. Br. 5, 31 n.4.

unlike in *Babich*, the court clerk *knew* that out-of-state counsel did not receive notice—yet did nothing.[3]

Against all of this, the State's response seems to be that Butler got the order, so "no harm, no foul." But even assuming that service on "any one" counsel would be sufficient in the typical circumstances, Ala. Br. 15, it was not sufficient given the practicalities here. And regardless of the fact that Butler received the order, the State's actions impeded the receipt of notice *by Maples*, and thus impeded his ability to appeal. There was, in other words, both a foul *and* a harm.[4]

B. The Notice Failure Violated Due Process

The State's response on notice is also built around the far-reaching proposition that Alabama had no constitutional obligation to provide Maples *any* notice of the Rule 32 order. Ala. Br. 27; *see id.* at 32-34. The Court need not resolve that issue because it is undisputed that the State's own interference with an inmate's ability to meet a default rule establishes cause

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[3] Contrary to the State's suggestion (at 36), the fact that Butler had abandoned Maples by the time of the default does not mean that he would have taken no action to prevent the default if he had learned that Maples's *pro bono* attorneys of record had left Maples without *any* functioning attorney of record in his Rule 32 proceeding. Maples does not have to show that his attorneys were "cold-hearted[]" (Ala. Br. 1) to establish that he was abandoned.

[4] Butler's receipt of notice is irrelevant for another reason. Because he was not serving as Maples's agent in any meaningful sense (or was at most a sub-agent whose authority had expired, Pet. Br. 50), that notice cannot be "'charged upon'" Maples. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962); *see* Pet. Br. 40-41, 49; DeMott Br. 15-19. For this reason, as well as the different context here, the State's reliance on *Link* and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is fundamentally misplaced.

(regardless of whether the Constitution is violated). *See id.* at 20. But in any event, the State is wrong.

Maples had a due-process interest in receiving adequate notice of the Rule 32 order. A post-conviction action concerns the validity of a conviction and sentence and thus a liberty interest. And in a capital case such as this, a life interest is implicated as well. Moreover, although States are not required to establish mechanisms for post-conviction relief, when they do (as all States have, including Alabama) the procedures must comport with due process. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1302 (2011) (Thomas, J., joined by Kennedy & Alito, JJ., dissenting). And "the need for notice" is especially pronounced "[i]n the capital context, in which the threatened loss is so severe." *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991).

The State argues (at 32) that due-process notice protections apply only to the *initiation* of an action. But this Court has not cut-off due process in that extreme fashion. In *Lankford*, for example, the Court held that due process entitles a defendant to adequate notice at a sentencing hearing—which (much like an appeal) represents a new phase of an already commenced action. While the scope of the notice required varies with the circumstances, Pet. Br. 25, the issuance of a dispositive post-conviction order that can affect an inmate's ability to challenge the constitutionality of his conviction and death sentence in federal court warrants notice that is—at least—"reasonably calculated" to reach the inmate. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Indeed, the Alabama courts themselves have recognized that an inmate has a due-process right

to notice of Rule 32 orders. *See, e.g.*, *Presley v. State*, 978 So. 2d 63, 66-68 (Ala. Crim. App. 2005).[5]

Mullane establishes that "when notice is a person's due, process which is a mere gesture is not due process"; instead, the process must be that of "one desirous of actually informing the [intended recipient]." 339 U.S. at 315. *Jones v. Flowers*, 547 U.S. 220, 229 (2006), recognizes that someone who actually wants to provide notice would do *something* when a notice is returned unopened and unclaimed. The State suggests (at 30) that, since only *two* of the three notices were returned here, it was reasonable for the clerk to sit back and say, "It worked" (when the clerk did not know whether the third letter was received). That response defies credibility, is incompatible with the reasoning of *Jones*, and fails to account for the fact that the two returned notices were to out-of-state counsel, who (as the clerk should have known) play a critical role under Alabama's post-conviction representation system. *Supra* at 4-5. And saying that the system "worked" in this case denigrates the invaluable role played by clerks in the administration of justice across America.

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[5] Alabama erroneously suggests (at 27, 33) that recognizing a due-process interest in receiving reasonably calculated notice of a dispositive post-conviction order in a capital case would cast doubt on the constitutionality of federal rules of procedure. The rules it cites require courts to serve notice "[i]mmediately after entering an order or judgment." Fed. R. Civ. P. 77(d)(1). More important, the rules are subject to safety valves that allow courts to extend the time to file for "excusable neglect or good cause." Fed. R. App. P. 4(b)(4), 4(a)(5); *see also Link*, 370 U.S. at 632 (noting protections); *Ashby Enters., Ltd. v. Weitzman, Dym & Assocs.*, 780 F.2d 1043, 1046 (D.C. Cir. 1986) (Wright, J.) (same).

The State incredibly suggests (at 34) that no "'additional steps'" were reasonable in this case. But the State does not deny that the clerk had Ingen-Housz and Munanka's personal contact information. Pet. Br. 28. The State itself promptly reached out to Maples in prison *after* the default. Pet. App. 253a. And calling Butler would have made perfect—not "little," Ala. Br. 34—sense, since the clerk did not know that Butler had received the order and it was well-known in any event that local counsel usually did nothing in Rule 32 cases after facilitating the admission of out-of-state counsel (creating a grave risk that Butler would just ignore the order). One thing is clear: if the clerk *had* picked up the phone or put the order in the mail to Maples, the default almost certainly would have been avoided.[6]

Anyone who cared an iota about whether Maples in fact received notice would have followed up. And no matter what standard of due process applies in this situation, the State's conduct flunks the test.[7]

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[6] Contrary to Alabama's contention (at 25-26), Maples's position is that the clerk *followed*—not violated—state law by sending notices to Maples's attorneys of record. As Alabama has itself stated (Opp. 32), Rule 34.4 "required" service on "all three of Maples' attorneys of record." *See* Pet. Br. 23. That is what the Alabama Rule 32 court said. Pet. App. 224a, 234a. And it is, in all events, what the Rule 32 order directed. JA 225. The State has waived its argument (at 26) based on Rule 34.5. But in any event, Rule 34.5 does not supersede the service requirement in Rule 34.4.

[7] The State briefly suggests (at 27) that the state court's ruling on whether to excuse the default is entitled to deference under 28 U.S.C. § 2254(d). But § 2254(d) by its terms applies only to a "*claim* that was adjudicated on the merits," and thus not a motion for leave to file an out-of-time appeal. (Emphasis added.)

C. There Was No Waiver

The State's suggestion of waiver (at 24) fails for the same reasons it did at the certiorari stage. Maples indisputably briefed this argument below. Cert. Reply 8-9; Cert. Reply Add. 2a-6a; *see also* JA 266-67. The State claims (at 24) that Maples's counsel below *relinquished* the argument at oral argument before the Eleventh Circuit. Not so. In the passage on which the State relies, counsel stated that Maples did not "blam[e]" the clerk for the fact that the letters were "sent … back" by the New York mail room. JA 302. Counsel in no way relinquished the different argument (briefed by Maples) that the clerk's failure to do anything once he received the unclaimed letters in the return mail established cause. That conclusion is underscored by the fact that, when he affirmatively raised "cause and prejudice" during the argument, counsel specifically invoked (JA 327) two Eleventh Circuit cases cited in Maples's brief for the proposition that "[c]ause exists when a court fails to properly deliver the required documents so that a petitioner may timely effect an appeal." JA 275 (citing cases).

II. THE CONDUCT OF POST-CONVICTION COUNSEL ESTABLISHES CAUSE

Alabama does not deny that Maples's attorneys impeded Maples's ability to comply with the default rule. *See* Ala. Br. 36. Instead, the State argues (at 1-2, 15, 18-23, 37) that *Coleman* categorically cuts off any inquiry into cause based on attorney conduct, even as to abandonment. That argument is unavailing.

A. *Coleman* Is By No Means Controlling

No matter how many times the State says (at 1) that *Coleman* "controls this case," the State cannot

make it so. *See id.* at 15 ("This case is indistinguishable from *Coleman*."); *id.* at 18 ("exactly like *Coleman*"); *id.* ("virtual replay"); *id.* at 21 ("*Coleman* all over again"). *Coleman* differs in crucial respects—even apart from the fact that the default there was not attributable to the State's own conduct. Coleman's attorneys were functioning as his agents at the time of the default, yet missed the deadline for appeal because of a computational error. *See Coleman*, No. 89-7662, JA 28a-34a. The Court characterized that error as "[a]ttorney ignorance or inadvertence." 501 U.S. at 753. The kind of attorney conduct at issue here—outright abandonment—is fundamentally different under agency law and other principles. Pet. Br. 39-43.

That distinction is critical because the crux of this Court's conclusion in *Coleman* that the attorney error at issue was *not* "external" to the petitioner was the Court's determination that "[i]n a case, such as [*Coleman*], where the alleged attorney error is inadvertence in failing to file a timely notice, [excusing the client] would be contrary to well-settled principles of agency law." 501 U.S. at 754 (citing Restatement (Second) of Agency § 242 (1958)). As members of this Court have observed, "*Coleman* did not invent, but merely applied," established agency law. *Holland v. Florida*, 130 S. Ct. 2549, 2571 n.4 (2010) (Scalia, J., joined by Thomas, J., dissenting). Critically, agency law points to the opposite conclusion in a case, like this one, where the attorney conduct at issue is abandonment. Pet. Br. 37-50; DeMott Br. 13-14.

Holland v. Florida strongly reinforces that conclusion. In *Holland*, at least seven Justices recognized that attorney conduct amounting to abandonment is *not* fairly attributable to a client for

purposes of equitable tolling. *See* 130 S. Ct. at 2564; *id.* at 2568 (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting) (seeming to recognize the same principle). Although this Court acknowledged that *Coleman* arose in a different context (procedural default), *id.* at 2563, the "same analysis applies" in determining whether attorney conduct is external, *id.* at 2567 (Alito, J.). If attorney conduct is "beyond [a client's] control" (*id.* at 2568 (same)) in one context, then logically the conduct must be beyond the client's control in the other context. Pet. Br. 42.[8]

This Court's cause doctrine is predicated on the common-sense proposition that it would be grossly inequitable to hold an inmate responsible for a default stemming from *external* factors. Yet Alabama and its amici ask this Court to hold that *Coleman* always precludes cause based on attorney conduct—even where "a petitioner had been truly abandoned and left without counsel during his state habeas proceedings." Texas Br. 3; *see* Ala. Br. 1, 15, 22-23, 37. That holding would require a fundamental expansion of *Coleman*, not to mention a complete disregard for the equitable principles on which habeas has always been grounded. Alabama has provided no sound basis to take that step.

Holding that *Coleman* does not extend to attorney abandonment will neither "blast a hole" (Ala. Br. 37) through *Coleman* nor "prove unworkable" (Texas Br.

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[8] In *Holland*, the Court observed that procedural defaults implicate federalism concerns not present in equitable-tolling cases. 130 S. Ct. at 2563. But respect for federalism does not warrant a whole separate jurisprudence of when attorney conduct is external from the client—and does not warrant holding inmates responsible for defaults stemming from external factors.

1). *Coleman* will (as it always has) govern the mine run of attorney misconduct—like "ignorance or inadvertence"—that *is* constructively attributable to a client. 501 U.S. at 753-54. Moreover, the traditional law of agency and principles governing the attorney-client relationship provide ready and time-tested guideposts for determining what attorney conduct is external. *See Holland*, 130 S. Ct. at 2564-65; *Coleman*, 501 U.S. at 754; DeMott Br. 6-8. Those principles are just as workable here as they were in *Holland*.

B. Maples Was Abandoned By Counsel

Alabama's attempt to belittle the predicament that Maples faced should be rejected. Maples sat on death row awaiting a ruling in his Rule 32 proceeding under the reasonable belief that he was represented by counsel in that proceeding. To his shock and horror, he learned (for the first time) in August 2003 that this was not so when *the State's* attorney notified him that his Rule 32 petition had been denied and that he had defaulted on his appeal. Pet. App. 253a-54a.[9] Maples responded immediately and learned that his *pro bono*

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[9] The State repeatedly cites a statement in Maples's Amended Rule 32 Petition that "Maples periodically met with his lawyers" (JA 257) and erroneously assumes that these meetings took place during the default period. Ala. Br. 9, 10, 17, 50, 53. The statement does not support that conclusion. And to be clear, Maples has advised counsel that the meetings referred to on JA 257 occurred *before* Ingen-Housz and Munanka left their law firm in 2002; Maples was never told that those attorneys had left their firm; and Maples was instead advised before the attorneys left that all they could do was await a decision and that such decisions frequently took time. So Maples waited for a decision (as many inmates do, *see* Ala. Appellate Court Justices Br. 30-31)—only to find out in August 2003 that he had been abandoned by counsel.

attorneys of record had left their firm without substituting counsel and that he had been left unrepresented in his Rule 32 proceeding by any functioning attorney. The State's position (at 18) is that Maples's counsel "did not abandon their client, temporarily or otherwise." That position defies common sense and fails as a matter of law and fact.

1. Abandonment is an act of disloyalty or renunciation that terminates the agency relationship. Pet. Br. 39-43; DeMott Br. 13-15. The State's principal response on abandonment is to try to shift the focus away from Maples's attorneys of record in his Rule 32 action—who obviously abandoned Maples—and argue (at 38) that Maples was represented by a "team of lawyers" who stayed on. The State likewise tries to shift the focus from what was happening at the time of the default to the alleged acts of attorneys months or years before—and even after—the default. *See* Ala. Br. 40-41. And the State even goes so far as at to claim (at 17, 46 (heading)) that the departure of Ingen-Housz and Munanka without substituting counsel or notifying Maples is "irrelevant." These arguments fail.

a. As the Alabama Rule 32 court found, the only attorneys who represented Maples in his Rule 32 proceeding were his *pro bono* attorneys of record (Ingen-Housz and Munanka) and local counsel (Butler). Pet. App. 223a; *id.* at 234a. The court specifically found that Marc DeLeeuw—on whom the State now focuses—did not represent Maples in that proceeding. *Id.* at 223a. Nor did any other attorney named by the State in its brief. Indeed, at all times relevant to the default, it would have been "unlawful" for them to act in that proceeding because they were not admitted to practice in Alabama. JA 372; *see* Pet. App. 223a. Thus,

as the Rule 32 court found, at the time of the default, Ingen-Housz and Munanka were *still* Maples's attorneys as a matter of Alabama law. Pet. App. 223a. Alabama is quite insistent that this Court should defer to its courts when it suits its interests. Ala. Br. 27. There is no basis to ignore the Alabama court's findings on who represented Maples in his Rule 32 proceeding.

The same conclusion follows as a matter of well-settled agency law. Alabama's position is that Maples was bound by the conduct of DeLeeuw and any other lawyer involved in his case in any way. But it is settled that an agent is powerless to bind a principal if he "fail[s] to acquire a qualification … without which it is illegal to do an authorized act." Restatement (Second) of Agency § 111; *see* Pet. Br. 42. Alabama suggests (at 42) that § 111 is inapposite because it was not "impossible" for these lawyers to secure "admission *pro hoc*." But the underlying—and perfectly sensible—premise of § 111 is that "a principal does not intend an agent to do an illegal act." Restatement (Second) of Agency § 111 cmt. b. That principle applies whether an attorney lacks a license because he has not obtained it or has lost it. DeMott Br. 20. Not surprisingly, the State has failed to unearth a single case establishing that someone may be held responsible in a legal proceeding for the acts of a lawyer who never appeared on his behalf—and lacked authorization to do so.

b. Although the record is largely undeveloped on the role of attorneys other than Maples's counsel of record (*see* Pet. Br. 46), the record evidence is that Ingen-Housz and Munanka "performed all of the substantive work on Maples's Rule 32 case." Pet. App. 3a. DeLeeuw has said that he "agreed to handle the matter" after Ingen-Housz and Munanka had left

Sullivan & Cromwell (S&C) in 2002, JA 299, but the record is silent on what DeLeeuw actually did, and he also said that at that point they were simply "waiting for any further proceedings," JA 301; *see* JA 273. The State says (at 18, 54)—without record support—that Maples "consent[ed]" to DeLeeuw's asserted new role. But Maples was not even told that Ingen-Housz and Munanka had left S&C and he was not asked to (nor did) consent to DeLeeuw or any other lawyer taking the lead for his departed counsel of record.

Alabama says (at 1) that "Maples was represented by S&C itself." That is incorrect.[10] But even if S&C—in addition to Ingen-Housz and Munanka—had represented Maples, it would not change the analysis. It is settled that when a lawyer leaves her law firm, the ball shifts to *the client* to "choose whether to be represented by [the departing] lawyer, by lawyers

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[10] The State omits key text of the very paragraph it cites for this argument, which qualifies the reference to S&C by referring to "the *two* Sullivan lawyers handling the matter"—Ingen-Housz and Munanka. JA 257 & n.2 (emphasis added). This argument is also contradicted by the Alabama court's findings (which did not identify S&C as counsel for Maples), Pet. App. 223a; the sworn testimony of DeLeeuw (who explained that S&C lawyers "handle *pro bono* cases on an individual basis"), *id.* at 257a; and the fact that S&C's name was generally omitted from court filings and correspondence. While it may be more typical for a firm to assume the representation, the firm is not required to do so. *See, e.g.*, Restatement (Third) of The Law Governing Lawyers § 14, cmt. h (2000) (law firm usually undertakes representation "*unless* the circumstances indicate otherwise") (emphasis added); N.Y.C. Bar Ass'n Pro Bono & Legal Service Comm., *International Pro Bono Representations: Tips for Volunteer Lawyers* at 2 (2007), *available at* http://www.nycbar.org/pdf/report/Lawyers'%20Guide.pdf (recognizing that law-firm attorneys may undertake *pro bono* cases in "individual capacity" or on behalf of law firm).

remaining at the firm, by neither, or both." Restatement (Third) of the Law Governing Lawyers § 31 cmt. f (2000); *see id.* § 14 cmt. h (same). Maples never made that determination and, indeed, was not even told that Ingen-Housz and Munanka had left S&C.

c. In any event, to the extent that other attorneys (or S&C itself) did represent Maples in his Rule 32 proceeding, it underscores—rather than undermines—the conclusion that Maples was abandoned. Under the State's theory of the case, other attorneys knew that Maples's attorneys of record had left without substituting counsel and thus knew that Maples was left without an attorney authorized to act on his behalf in his Rule 32 proceeding—and yet did nothing. That is, if anything, an even more stark act of abandonment than the departure of his attorneys of record without substituting counsel (if they assumed that someone else would step into their shoes). DeMott Br. 20-21; Legal Ethics Br. 15-18. Maples does not question the sincerity or intentions of those who have sought to assist him. But whatever their intentions or assumptions, the bottom line is that he was abandoned by counsel in his Rule 32 proceeding.[11]

2. The State does not devote much attention in its brief to the attorneys that, according to the Alabama courts, actually represented Maples in his Rule 32 proceeding. But what it does say in no way alters the conclusion that Maples was abandoned. Astonishingly,

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[11] Alabama suggests (at 51-53) that Maples was not abandoned because he "made no attempt to terminate counsel." But Maples reasonably believed he was represented by counsel. The fact that his attorneys of record left him without notifying him underscores that this is a case of abandonment pure and simple.

the State argues (at 46) that Ingen-Housz and Munanka "discharged … in full" their duty to "'protect [their] client's interests.'" But ultimately even the State acknowledges (at 47) that they "did do one thing wrong"—they failed to obtain the court's approval to withdraw, as required by Alabama law. That is like saying that Edward Smith fully discharged his duty as captain of the Titanic, he just did one thing wrong—he forgot to look for icebergs. Whatever their intentions for not doing so, the Alabama rules undeniably place the duty on *departing counsel* to obtain court approval before withdrawing. Ala. R. Crim. P. 6.2(c); *see* Ala. Br. 47. The very purpose of that rule is "to protect the interests of the defendant." Ala. R. Crim. P. 6.2(c) cmt. By leaving without substituting counsel, Ingen-Housz and Munanka—who remained Maples's attorneys as far as the Rule 32 court was concerned, Pet. App. 223a—abandoned Maples. Pet. Br. 43-47; DeMott Br. 11-15.

Alabama's response is no less startling when it comes to Butler. The State acknowledges (at 11) that Butler intentionally assumed no role other than facilitating the *pro hac* admission of Maples's out-of-state attorneys. Pet. Br. 48; JA 228-29, 257-58. But the State argues (at 43-44) that this arrangement was just fine, and that Butler's actions "after" the default show that Butler did not abandon Maples. But what Butler did *after* the default cannot enlarge (or rehabilitate) his conduct before the default. And given that Alabama has essentially conceded that Butler played "no … role" (Pet. App. 257a) but to allow the admission of Ingen-Housz and Munanka, the State can no longer seriously deny that—at the time of the default—Butler "was not operating as [Maples's] agent in any

meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J.). *See* Pet. Br. 48-50; ACDL Br. 8.

The State stresses (at 31) local counsel's "joint and several responsibility" under Alabama law. But the fact that Butler's conduct violated his professional responsibilities does not undo the abandonment, as Alabama perversely seems to argue (at 42-43). If it did, then no client could *ever* be abandoned simply by virtue of the fact that abandonment violates bar rules. And the fact that—according to Alabama (at 43)—local counsel could be subjected to bar discipline or the like "if something went wrong" does not mean that Butler was acting as Maples's agent at the time of the default.

C. At A Minimum, The Court Should Remand

As a matter of law, the record before the Court supports a finding of cause. But if this Court disagrees and believes that any of the factual issues raised by Alabama are relevant, it should at least reverse and remand for an evidentiary hearing. *See Holland*, 130 S. Ct. at 2565. As discussed, the State's position is based on an erroneous, incomplete, and misleading view of pertinent events and relationships. Maples's recollection of events, along with attorney correspondence in his possession, contradicts the State's characterization of pertinent events in material respects. But because there has never been an evidentiary hearing into these matters, the record is not fully developed on these matters (and thus, Maples in no way suggests that the State has intentionally misstated any facts). At a minimum, the Court should

remand for such a hearing if it concludes that any factual issues raised by the State are relevant.[12]

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"It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O'Connor, J., concurring in the judgment). The Alabama system for post-conviction review in capital cases is plagued by major structural flaws. Pet. Br. 3-6; Ala. Appellate Court Justices Br. 4-28; NACDL Br. 17-22. In this case, that system facilitated a series of external events beyond Maples's control that the State now says cut off federal habeas review of serious constitutional claims. Under this Court's precedents, Maples has shown cause to excuse that default. Any other conclusion would deprive Maples of the meaningful access to the judicial process that the Constitution requires. *See* Pet. Br. 30 n.4; Const'n Project Br. 11-15.[13]

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[12] Alabama's suggestion of waiver (at 13) is unfounded. *See* Cert. Reply 9-10. Maples argued below that attorney conduct established cause, *e.g.*, 11th Cir. Br. 17, and the Eleventh Circuit passed on that argument, Pet. App. 17a. To the extent that the State objects to the "precise arguments" made below, it is settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim [in this Court]." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Maples's arguments also are undeniably within the scope of the question on which this Court granted certiorari. *See also* Legal Ethics Br. 29-30.

[13] If this Court concludes that Maples has not shown cause, it should hold this case for *Martinez v. Ryan*, No. 10-1001. Maples has raised the question whether his post-conviction representation violated the Constitution. *See, e.g.*, Pet. Br. 36; 11th Cir. Reh'g

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Pet. 14 n.3. And because the Alabama court requested Maples's trial counsel to "stay in the case for purposes of post trial motions" (R. 3390), and new appellate counsel was not appointed until later, a Rule 32 petition was Maples's first opportunity to challenge the assistance he received from trial-level counsel. Pet. Br. 9.