No. 10-63

In the
Supreme Court of the United States

CORY R. MAPLES,
Petitioner,
v.
KIM T. THOMAS,
COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF OF RESPONDENT

Luther Strange
Attorney General

John C. Neiman, Jr.
Solicitor General
*Counsel of Record

Nicholas Q. Rosenkranz
Deputy Attorney General

600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-4026

William G. Parker, Jr.
Assistant Attorney General

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

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CAPITAL CASE

QUESTION PRESENTED

In *Coleman v. Thompson*, this Court held that a lawyer's error in failing to properly appeal in state habeas proceedings could not constitute "cause" excusing the default. 501 U.S. 722, 757 (1991). Here, Cory Maples failed to properly appeal an adverse order in Alabama state habeas proceedings. This case presents the following question:

Whether the Eleventh Circuit properly held that Maples had not established cause to excuse his procedural default where Maples's team of attorneys was actively representing him at the time of the default, where the clerk delivered a copy of the court's order to one of Maples's attorneys of record, and where the mistakes of Maples's attorneys caused the default.

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INTRODUCTION

The two most important names in this case are De Leeuw and *Coleman*. Maples fails to mention the first and ignores the significance of the second.

Marc De Leeuw is the Sullivan & Cromwell partner who worked on Maples's postconviction case from its inception in state court through the proceedings in the Eleventh Circuit. When former S&C associates Clara Ingen-Housz and Jaasi Munanka left the firm, they hardly slipped off in the middle of the night, cold-heartedly abandoning their client and leaving him without a lawyer. Instead, as De Leeuw told both the District Court and the Eleventh Circuit, he continued to work on Maples's case at that time, assuming responsibility for the matter within the firm, long before the state court issued its order. And as De Leeuw told the District Court, Maples was represented by S&C itself throughout the state-court litigation. Maples missed his deadline because De Leeuw and other S&C lawyers mistakenly failed to file notices of appearance in the Alabama litigation, and mistakenly assumed that Ingen-Housz's and Munanka's mail would simply be forwarded to them.

Coleman v. Thompson, meanwhile, is the decision that controls this case. *Coleman* held that a postconviction lawyer's "fail[ure] to act, in furtherance of the litigation," by filing a timely appeal of an adverse trial-court order cannot be grounds for excusing the petitioner's resulting state-court default. 501 U.S. 722, 753 (1991). In these circumstances, "the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation." *Id.* at 754. *Coleman* concluded that in the absence of a showing that the

petitioner is actually innocent, the principles underlying our system of federal habeas review—including its interests not only in vindicating the innocent, but also in protecting the finality of state-court criminal judgments—are best served by not excusing a petitioner from this sort of default.

Maples makes no claim of actual innocence, and does not question *Coleman* or ask this Court to overrule it. He instead seeks two ways past it, but neither is tenable.

First, in light of local counsel John Butler's actual receipt of the order, Maples has no viable claim that the trial-court clerk violated due process. Actual notice to a litigant's attorney is more than the Due Process Clause requires, and because Butler received the order, the clerk had no reason to issue further notice.

Second, in light of the role De Leeuw and others played throughout the case, Maples has no viable argument that any of his lawyers "abandoned" him, temporarily or otherwise. When Maples missed his deadline, he was represented by a team of lawyers. Maples defaulted not because they abandoned him, but simply because they made mistakes.

Maples is unquestionably guilty of murdering two people, and his conviction is now 15 years old. He has received some form of judicial review of every claim he has made. *Coleman* was correct to hold that in light of the principles underlying the Great Writ, these sorts of attorney mistakes are not cause to excuse a state procedural default.

STATEMENT OF THE CASE

A. Proceedings on direct review

No one disputes that after a late night 15 years ago, Cory Maples shot two friends in what the Eleventh Circuit called "an execution-style killing." Pet. App. 2a. The police apprehended him two weeks later in Tennessee, where he fled in a car stolen from one of his victims. Maples then confessed in writing that "[s]ometime around midnight on the night of Friday, July 8, 1995, I shot and killed two boys while they sat in a car in the driveway of my home." JA 289. He claimed he didn't "know why" he "did all this." JA 291. Although he had consumed six or seven beers by about 8 p.m., he "didn't feel very drunk," and he had pulled the trigger some four hours later. JA 290. Maples later gave a videotaped confession that the jury watched at trial. R. 2705-07.[1]

1. Guilt phase

Maples's trial lawyers provided him with effective assistance. Alabama law required any team of appointed capital-defense attorneys to have one member with at least five years in the active practice of criminal law, *see* ALA. CODE §13A-5-54 (1975), and at least one of Maples's attorneys had "been in capital cases before," R. 3081. In light of their client's confessions and the wall of evidence against him, they sensibly opted for what the Alabama Court of

[1] For record materials from Maples's trial, this brief uses Maples's citation format. *See* Blue Br. 7 n.1; *see also* Doc 30 (placing these materials in the record before the District Court).

Criminal Appeals would later call a "defense strategy" of not trying to win his acquittal outright, but instead trying to take the death penalty off the table. JA 20.

They did so by arguing that the prosecution could not prove either of the proffered grounds for treating the murders as capital offenses.

- First, to rebut the prosecution's claim that Maples killed two people "pursuant to one scheme or course of conduct," ALA. CODE §13A-5-40 (1975), the lawyers argued that because the bodies were found separately, the victims might have been killed at "separate and distinct times" and that one of them might have been killed by someone else. R. 2937.
- Second, to rebut the prosecution's claim that Maples's offense was part of a premeditated car robbery, *see* ALA. CODE §13A-5-40(2), they argued that the murders, though committed at distinct times, had been the result of an "instantaneous rush" instead of a plan to steal a car. R. 2918, 2926; JA 33. Fearing that the jury might conclude that the killings were part of a scheme to sell the car for drug money, they argued that Maples had not been using drugs at the time of the murders. JA 293-96.

By arguing that Maples had not been using drugs at the time of the killings, counsel did effectively foreclose any argument that Maples was guilty of no more than manslaughter because he had been intoxicated on drugs when he killed the two victims.

But this was an eminently sensible strategic choice in light of his confessions and the standard for the intoxication defense in Alabama. Under Alabama law, only intoxication "so extreme" as to "amount[] to insanity" may render a defendant incapable of forming the requisite intent to commit murder. *Williams v. State*, 710 So. 2d 1276, 1332 (Ala. Crim. App. 1996) (citing ALA. CODE §§13A-3-1 & -2). Maples's own statements to the police—in which he denied drug use and said he had not been drunk, JA 290, 293—would have demolished any intoxication defense. And there was no evidence that he was sufficiently under the influence by the time of the murders, four hours after he took his last drink, to make the intoxication argument work. JA 290.

2. Penalty phase

Maples received effective assistance at the penalty phase as well. Maples's lawyer did joke with the jury during opening statements that he might later "appear to be stumbling around in the dark." R. 3082. But he told them the *reason* was that although he had "been in capital cases before," he and his clients had never been "at this part." *Id.* at 3081. In other words, the jurors were to surmise, his clients had always been acquitted. The message, then, was that he represented clients he believed in, that he was credible, and that he knew how to win.

The presentation he and co-counsel made was consistent with that message. They offered the testimony of a clinical psychologist, who opined that Maples's personality was consistent with "passive aggressive personality disorder." R. 3094, 3137-39, 3149-50, 3172-73. Family members also testified to

points Maples now criticizes counsel for failing to investigate: his previous problems with drugs and alcohol (R. 3174, 3182-83, 3191-92, 3198-99); his voluntary admission to drug rehab (R. 3183-84, 3199-3200); his abuse and abandonment by a mentally troubled mother (R. 3178, 3180-82, 3191, 3194-98); and his general character (R. 3186, 3192, 3200).

Counsel's presentation swayed two jurors. But ten others saw things differently. The court, exercising its independent judgment, accepted the jury's advisory recommendation and sentenced Maples to death.

3. Direct appeal

If Maples is asserting that Alabama law foreclosed a criminal defendant from "challeng[ing]" on direct appeal "the effectiveness of the assistance that he received from counsel at trial," Blue Br. 9, then he is mistaken about that. Alabama law provided that "newly appointed appellate counsel" may raise ineffective-assistance claims by filing a motion for a new trial within 30 days of the trial court's judgment. *Ex parte Ingram*, 675 So. 2d 863, 864 (Ala. 1996). Any defendant who filed such a motion could pursue those claims, through state-appointed counsel, on direct appeal.

Here, Maples retained new counsel for the appeal—but not until after his trial counsel, at the court's request, R. 3390, filed his new-trial motion. He thus did not assert any ineffective-assistance claims at that point. His appellate lawyers did, however, argue that the trial court should have instructed the jury *sua sponte* on intoxication and

manslaughter. The Alabama Court of Criminal Appeals rejected that argument, finding that "[t]he testimony at trial did not establish that the appellant was intoxicated at the time of the murders," and "instructions on intoxication and manslaughter would have been inconsistent with his defense strategy." JA 20. The Alabama Supreme Court affirmed, *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999), and this Court denied certiorari, *Maples v. Alabama*, 531 U.S. 830 (2000).

B. State habeas proceedings

A team of lawyers—several from a firm in New York, and one from a firm in Alabama—agreed to represent Maples in his state postconviction proceedings. It was these lawyers' mistakes that led to the procedural default at issue here.

The New York firm was Sullivan & Cromwell, and contrary to what Maples and his *amici* assert in this Court, the record definitively establishes that Maples had an attorney-client relationship with the firm. In the amended habeas petition he filed with the District Court, he alleged that "[a]t the time" he filed his state-court petition, he "was represented by Sullivan & Cromwell." JA 256. Likewise, in an affidavit, Maples simply referred to his attorneys as "my lawyers at Sullivan and Cromwell." JA 253. Although S&C partner Marc De Leeuw did once tell the state courts that "[l]awyers at S&C handle *pro bono* cases on an individual basis," Pet. App. 257a, Maples and his lawyers never made any representation of that sort before either the District Court or Court of Appeals, and the federal courts

adjudicated this case based on the allegations in the federal petition.

Maples and his lawyers had good reasons to take the position they took in federal court. As Maples's ethics-scholar *amici* explain, any assertion that the S&C lawyers were handling the case exclusively on an "individual basis" would have been "contradicted" by the firm's public statements "tout[ing]" its "pro bono program." Ethics Br. 10-11. It also would have been "belie[d]" by the fact that these lawyers were using S&C's resources when representing Maples. *Id.* at 11.

At least three of the firm's lawyers were involved at the outset. Associates Clara Ingen-Housz and Jaasi Munanka appeared of record for Maples on the state-court petition he filed in August 2001. De Leeuw did not appear of record but was also "involved in this case" at that time. Pet. App. 257a. Alabama attorney John Butler appeared as local counsel. By signing on, he accepted, under the Rules Governing Admission to the Alabama State Bar, "joint and several responsibility with the foreign attorney." JA 366. That responsibility ran "to the client, to opposing parties and counsel, and to the court . . . in all matters arising from" Maples's case. *Id.*

Butler, Ingen-Housz, and Munanka filed a 92-page petition for Maples, raising numerous claims of ineffective assistance of counsel. JA 22. The court denied the State's motion to dismiss in late 2001, and Butler, Ingen-Housz, and Munanka each received a copy of the order. JA 228, Pet. App. 258a. Maples's lawyers accordingly set about preparing for an evidentiary hearing they had requested, Pet. App.

258a, and met "periodically" with their client, JA 257.

1. Maples's missed deadline

The trial court, meanwhile, did not enter any more orders until May 2003. At that point, the court—presided over by the same judge who had witnessed trial counsel's performance first-hand—denied Maples's petition. JA 146-225.

Under Alabama law, Maples and his legal team had 42 days—or until July 7, 2003—to file a notice of appeal. *See* ALA. R. APP. P. 4(a). But they did not file one. About a month after the deadline passed, Assistant Attorney General Jon Hayden wrote Maples directly, informing him that he had missed the deadline and that his "time for filing a habeas petition in federal court . . . will expire on or about September 9, 2003." Pet. App. 253a-254a.

Maples called his stepmother, and she called S&C. Maples's legal team—the New York lawyers and Butler—leapt into action.

2. Maples's attorneys' mistakes

In the flurry of state and federal filings that followed, Maples's lawyers revealed that their client had missed the deadline because of a series of mistakes they had made.

At S&C, De Leeuw, who had been working on the case with Ingen-Housz and Munanka from the beginning, had "assumed responsibility" for the case within the firm in 2002. JA 228, 273, 299. Ingen-Housz and Munanka had left the firm in the summer of that year, some 10 months before the court issued

the order. Ingen-Housz had gone to Belgium, while Munanka had accepted a clerkship with a federal judge. JA 228. When they left, they did not take Maples with them as a client. He instead remained a client of De Leeuw and at least one associate, Felice Duffy, who joined Maples's team in October 2002. JA 231. Likewise, Gary Alexion, an attorney at the Legal Aid Society in New York, had been working on Maples's case since at least September 2002. Doc 2 – Pg 1. There is no indication that Maples was unaware of these arrangements. To the contrary, in the time between the order denying the State's motion to dismiss in late 2001 and the order denying Maples's petition in 2003, Maples "periodically met with his lawyers." JA 257.

But De Leeuw and the other lawyers in New York failed to seek *pro hac* admission and appear in the Alabama court after Ingen-Housz and Munanka left. Nor did any partners supervising Ingen-Housz and Munanka ensure that the two associates withdrew from the case. Instead, De Leeuw simply assumed that the firm's mailroom would forward, to the lawyers who "ha[d] taken responsibility for that matter," any notices the court sent Ingen-Housz and Munanka. JA 303.

De Leeuw's assumption turned out to be mistaken. The trial-court clerk sent two copies of the order, separately addressed to Ingen-Housz and Munanka, to their address of record with the court—namely, the Manhattan address where S&C keeps its office. Pet. Reply Add. 7a-8a. Instead of forwarding the envelopes to De Leeuw and the others, S&C's mailroom marked them return to sender, and wrote, on Ingen-Housz's, "Left Firm."

Pet. Reply Add. 7a–8a. The envelopes then went back to the clerk. JA 228-29, 257, 262.

Butler, meanwhile, received the order. But he mistakenly "assum[ed]" that the S&C lawyers "would handle the contemplated appeal" because despite his joint and several responsibility for the case, his role had been "limited to moving for the admission of the Sullivan & Cromwell attorneys." JA 257-58. He therefore "did nothing" when the order came across his desk. JA 257.

3. Proceedings after the default

After De Leeuw, Butler, and the others learned that they had missed the deadline, Butler found his copy of the order and sent it to S&C. Pet. App. 256a. The team then quickly prepared, and Butler filed, a motion asking the trial court to reissue its order so Maples could file an appeal within the deadline. That court declined, finding that reissuing the order "would perpetrate subterfuge on the appellate court." Pet. App. 222a-225a. Butler, De Leeuw, and Duffy then asked the Alabama Court of Criminal Appeals, in a petition Butler signed, for an out-of-time appeal. JA 235-36. The court denied that petition, finding that Maples "failed to show that his right to procedural due process was violated" or that the clerk had mishandled its state-law notice obligations. Pet. App. 236a. Butler and De Leeuw then asked the Alabama Supreme Court to grant their client an out-of-time appeal. JA 237-38. After that court denied the petition, Butler, De Leeuw, Duffy, Alexion, and others unsuccessfully sought certiorari in this Court. JA 241-42.

C. Federal habeas proceedings

In the meantime, Butler, De Leeuw, and Alexion filed a federal habeas petition for Maples. JA 226-30. It raised not only the ineffective-assistance claims he had defaulted before the state postconviction court, but also additional federal claims he had preserved on direct review.

1. Maples's District Court filings

When the State asserted the procedural bar in its answer, Maples fired back with a cause-and-prejudice argument that asserted, at most, only one of the theories he is now pressing in this Court. In that argument, he criticized the state court for making "no attempt to have the order forwarded to Mr. Maples or to contact local counsel to clear up any ambiguity regarding Mr. Maples' representation or the appropriate mechanism for delivery of this time-sensitive document." JA 262. Nowhere, however, did he cite the Due Process Clause.

Likewise, his petition and reply did not assert that his legal team had abandoned him during the state-court proceedings. To the contrary, Maples personally acknowledged that he had lawyers at the time of the default. The court had issued a standard order requiring him to submit a memo specifying, among other things, whether he was "fully satisfied with the representation of his habeas counsel and waives any complaint as to counsel's competency." JA 247. Maples's signed response stated "that something happened in the Alabama state courts that meant that I was not able to appeal because my

lawyers at Sullivan and Cromwell in New York didn't get the decision from the Alabama court in time to file the appeal," JA 253. He elaborated that "[m]y lawyers told me that the papers that got sent to them ended up being returned to the court clerk because two of the lawyers who were working on the case left the law firm." *Id.* Likewise, "[t]here was a local lawyer, Mr. Butler, who got the decision but never sent it along to the lawyers in New York." *Id.* Maples not only acknowledged that he had lawyers at the time of the default, but also emphasized that he "want[ed] the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers because I feel that they will do everything they can for me." *Id.*

The court denied his habeas petition, finding the ineffective-assistance claims barred on the ground that "the ineffectiveness of postconviction counsel cannot establish the cause and prejudice necessary to overcome Maples's procedural default." Pet. App. 55a. The court also denied, on the merits, several additional claims Maples had preserved on direct review. Pet. App. 56a-202a.

2. Maples's Eleventh Circuit filings

Maples did not assert any "abandonment" theory before the Eleventh Circuit; and he disclaimed his earlier argument about the clerk. When the State accused him of trying "to shift the blame from his post-conviction attorneys to the circuit clerk," JA 281, Maples called that a "straw-man argument" and said that the "cause" was, instead, "a mailroom oversight." JA 286. If there was any ambiguity about which mailroom he was referring to, De Leeuw

cleared it up at oral argument. "The whole procedural bar," he told the panel, "comes down to a mail room error that was made in New York." JA 299. De Leeuw then told the Court that to "dispel I think an argument the State has made and perhaps suggested, Mr. Maples is not blaming this on the Clerk of the Circuit Court." JA 302.

Because Maples never made any argument that he had been abandoned and expressly disclaimed his prior attempt to blame the clerk, the Eleventh Circuit addressed neither of the theories Maples is now pressing before this Court. The court noted De Leeuw's representations "at oral argument" that "arrangements had been made within the firm for other attorneys at Sullivan & Cromwell to take over representation of Maples" and that "due to a clerical error in the Sullivan & Cromwell mailroom, the firm instead returned the Rule 32 Order to the trial court clerk." Pet. App. 4a & n.3. Based on these representations, the court concluded that "the factor that resulted in Maples's default—namely, counsel's failure to file a timely notice of appeal of the Rule 32 Order—cannot establish cause for his default because there is no right to post-conviction counsel." Pet. App. 17a. Although Judge Barkett dissented on a different question, she took no issue with the majority's analysis of the cause-and-prejudice issue. Indeed, she expressly acknowledged that the default was "entirely the fault of his post-conviction counsel." Pet. App. 30a.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that Maples could not establish cause to excuse his default in light of *Coleman v. Thompson*, 501 U.S. 722 (1991).

I. This case is indistinguishable from *Coleman*. The capital petitioner there failed to appeal in postconviction proceedings, and the Court held that his lawyer's mistakes could not establish cause to excuse the default. In light of the States' interests in federalism and finality—and because the petitioner had no right to counsel to appeal the order—the Court saw "no inequity" in requiring him to bear the risk of the error.

Likewise, Maples failed to appeal because of errors made by his postconviction lawyers. Marc De Leeuw and others in New York mistakenly failed to appear and assumed that orders sent to their departed colleagues would be forwarded to them. Local counsel John Butler mistakenly assumed that other members of the team would handle the appeal. In light of *Coleman*, Maples must bear the risk of those errors.

II. Maples cannot shift the blame for the default to the court clerk. This Court should not reach this argument because Maples disclaimed it in the Eleventh Circuit. In any event, the clerk complied with state law. The Alabama Court of Criminal Appeals held that when a party is represented by multiple counsel of record, service on any one of them is sufficient under Alabama law. Its decision on that state-law matter is dispositive.

The Alabama court also correctly found that the clerk's actions were consistent with due process

because Maples received actual notice through Butler. Because the notice made its way to that attorney of record, the returned envelopes from Sullivan & Cromwell did not signal that Maples had not received notice. For that reason, *Jones v. Flowers*, 547 U.S. 220 (2006), is inapposite. Butler had joint and several responsibility for the case under Alabama law. The clerk could not have taken any steps here that would have been more reasonable than serving Butler was.

Even if Maples had established a due-process violation, he has not established cause. Each step he believes the clerk should have taken would not have been necessary but for his own attorneys' errors. A petitioner cannot establish cause to excuse a default if the defense was not making "efforts" to comply with the rule. *See McCleskey v. Zant*, 499 U.S. 467, 473 (1991).

III. Maples cannot circumvent *Coleman* by arguing that the attorneys who made the mistakes were, at least temporarily, "external" to his defense.

De Leeuw and S&C established an attorney-client relationship with Maples long before the default. The record establishes that "[a]t the time" Maples filed his state-court petition, he "was represented by Sullivan & Cromwell." JA 256. De Leeuw was also personally representing Maples at that time. When Ingen-Housz and Munanka left the firm, De Leeuw assumed lead responsibility, and other lawyers began working on the case soon thereafter. Maples assented to those arrangements. The failure by De Leeuw and the others to seek *pro hac* admission and file appearances was one of the mistakes that led to the default.

Butler was also part of Maples's team. Although Butler did not have substantive involvement, attorneys on legal teams often divide responsibility amongst themselves, with some playing more significant roles than others. Butler failed to file the notice of appeal not because he was not Maples's attorney, but because he mistakenly assumed that others on the team would handle the appeal. Butler's actions in response to the default confirm that he and Maples had an attorney-client relationship throughout.

Maples's attorney-client relationship with his team did not terminate before the default. Ingen-Housz and Munanka's departures are irrelevant to the cause question. These associates did not abandon their client or breach their duty of loyalty to him. They simply left their firm, and sensibly left the case in a partner's hands.

The remaining members of Maples's team did not breach their duty of loyalty to Maples or abandon him. Maples has not alleged that his lawyers had a conflict of interest that caused them to miss the deadline. To whatever extent lack of diligence can ever rise to a breach of loyalty, that did not happen here. Maples's team was preparing for the hearing and meeting periodically with its client.

For similar reasons, the team did not terminate their agency relationship with Maples by "abandoning" him. This case thus does not resemble *Holland v. Florida*, 130 S. Ct. 2549 (2010). Maples made no attempt to terminate counsel, and affirmatively requested that they remain his attorneys after the default. They did so, representing him in proceedings through the Eleventh Circuit.

These lawyers did not abandon their client, temporarily or otherwise. They simply made mistakes, and under *Coleman* those mistakes are attributable to Maples.

ARGUMENT

Maples's failure to appeal was the direct result of errors committed by De Leeuw and others on his postconviction legal team. That makes this case exactly like *Coleman*, which held that, in light of the principles of federalism and finality underlying our system of habeas-corpus review, petitioners who make no claim of actual innocence must "bear the burden" of their postconviction counsel's mistaken "failure to" appeal an adverse trial-court order. 501 U.S. 722, 754 (1991). Maples cannot get around that principle by now reversing course and pinning the blame on a court clerk whose actions were fully consistent with the law. He cannot get around it by pointing the finger at the two departed Sullivan & Cromwell associates from whom De Leeuw took lead responsibility, with Maples's consent, for the case. And he cannot evade *Coleman* by claiming that his local counsel was, for a brief moment, not his lawyer.

I. This Court's decision in *Coleman* precludes Maples from establishing cause.

The procedural history of this case is a virtual replay of *Coleman*'s. Both Coleman and Maples were found guilty of capital crimes and sentenced to death. *Compare* 501 U.S. at 726-27, *with* Pet. App. 1a. After their convictions, both unsuccessfully

appealed. *Compare* 501 U.S. at 727, *with* Pet. App. 2a. Both then presented ineffective-assistance claims to state postconviction courts, and those courts denied relief. *Compare* 501 U.S. at 727, *with* Pet. App. 3a, *and* JA 151-224. Then, due to mistakes made by their postconviction attorneys, both failed to meet their deadlines to appeal those rulings. *Compare* 501 U.S. at 727-28, *with* Pet. App. 4a.

Coleman and Maples also followed parallel tracks in federal court. Both asserted claims in their habeas petitions that ordinarily would be barred because they missed their appeal deadlines in state court. *Compare* 501 U.S. at 729-44, *with* Pet. App. 10a-16a. Neither argued that his default should be excused because he was actually innocent. Instead, both insisted that although those missed deadlines were caused by the mistakes of their attorneys, they could establish "cause" to excuse their defaults because they were not personally to blame. *Compare* 501 U.S. at 752, *with* JA 272-73, 275.

In *Coleman*, this Court held that the petitioner was required to "bear the risk" of his attorney's mistakes. 501 U.S. at 754. In reaching that conclusion, *Coleman* issued four holdings that require the same outcome in the case at hand.

First, the Court held that unless someone in Coleman's or Maples's shoes can show that a miscarriage of justice would result from the default (a concept this Court would later equate with a showing of actual innocence), his federal claims will be procedurally barred unless he establishes "cause" for his default and "actual prejudice" therefrom. *Id.* at 750. The Court adopted this rule because of concern about the high costs of federal habeas

review. "These costs are particularly high," *Coleman* explained, "when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court" and thereby keeps the state court from correcting any asserted error before it is too late. *Id.* at 748. If the federal court later orders relief, the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982). These costs are unwarranted because "'the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.'" *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (quoting Henry Friendly, *Is Innocent Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970)).

Second, the Court explained that the same equitable concerns required a narrow definition of "cause." Cause exists only when some objective factor "external" to the defense "impeded" counsel's "efforts" to comply with the procedural rule. *Coleman*, 501 U.S. at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). A paradigmatic example is a tornado that destroys a lawyer's office and thereby impedes a petitioner's diligent efforts to make a filing. *See* Blue Br. 21. Another is "interference by officials"—a warden, say, who raids a prisoner's cell and destroys the petition he is set to mail the next day. *Coleman*, 501 U.S. at 753. So, too, is error by a criminal-defense attorney that violates the petitioner's Sixth Amendment right to counsel. In that circumstance, the Constitution "itself requires that responsibility for the default be imputed to the State." *Carrier*, 477 U.S. at 488.

Third, the *Coleman* Court explained that when a default results from an attorney's error that does not violate the petitioner's Sixth Amendment right to counsel, the attorney's error cannot constitute cause. That is so because a petitioner's lawyer is "the petitioner's agent when acting, or failing to act, in furtherance of the litigation." *Coleman*, 501 U.S. at 753 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990)). Excusing a petitioner's default because of an attorney's negligence "would be contrary to well-settled principles of agency law." *Id.* at 754 (citing RESTATEMENT (SECOND) OF AGENCY §242 (1958)). Thus, when the attorney's error does not violate the Sixth Amendment, it is attributable to the petitioner.

Fourth, the *Coleman* Court concluded that the failure of Coleman's attorney to file a timely appeal of the state-court postconviction judgment was not cause. That was so because even assuming *arguendo* that petitioners have a right to effective assistance of counsel in certain trial-level postconviction proceedings, that hypothetical right would not extend to a "right to counsel to appeal a state collateral determination of [their] claims of trial error." 501 U.S. at 756-57. Accordingly, a petitioner in these circumstances "bears the risk in federal habeas for all attorney errors" of this variety. *Id.* at 754.

Coleman was rightly decided, and Maples is not challenging it here. And because Maples is making no claim of actual innocence, this case is, as the Eleventh Circuit recognized, *Coleman* all over again. Maples failed to appeal the postconviction court's

judgment because of a series of mistakes made by his team of lawyers. The default occurred because De Leeuw and others in New York mistakenly failed to appear in the Alabama proceedings, and mistakenly assumed that the firm's mailroom would forward them any notices the court sent to their departing colleagues. The default also occurred because another member of the team, local counsel John Butler, mistakenly assumed that others would prepare the documents to effectuate the appeal.

Coleman says Maples must bear the risk of these errors, and Maples recognizes that *Coleman* precludes him from arguing that his attorneys' errors were attributable to the State.[2] *See* Blue Br. 36. Yet

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[2] After Maples filed his opening brief, this Court granted certiorari in *Martinez v. Ryan*, No. 10-1001, to consider a question *Coleman* arguably left open: whether a petitioner has a right to effective assistance in trial-level postconviction proceedings with respect to ineffective-assistance claims when state law precludes him from raising those claims on direct review. The Court's disposition of *Martinez* will not affect this case for at least three reasons. First, this Court's grant of certiorari in *Martinez* is limited to that question, and the petitioner there has not asked this Court to overrule *Coleman*'s holding that in the very least, the petitioner has no "right to counsel to appeal" an adverse trial-court judgment in those proceedings. 501 U.S. at 756-57. That holding governs this case. Second, Maples has not argued, either here or below, that his lawyers' actions in the state postconviction proceedings violated his Sixth Amendment right to counsel. *See* Blue Br. 37; JA 271-79, 283-88. If he had made that argument here or below, it would have been procedurally defaulted because he failed to exhaust any such claim in the state courts. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000). Third, in contrast to the Arizona system at issue in *Martinez*, Alabama law permitted Maples to ask the trial court to appoint a new, state-funded attorney, following trial, to pursue ineffective-assistance claims

despite his lawyers' responsibility for the default, Maples endeavors to get past *Coleman* in two ways. He first tries to go around it, arguing that the court clerk's actions were an external factor that impeded his attorneys' efforts to comply with the deadline. When that fails, he tries to go right through it, arguing the acts of these attorneys were "cause" because, it turns out, they were not his attorneys after all.

As explained below, neither of those theories is tenable. Both fail to account for the fact that at all relevant times, De Leeuw, Butler, and others remained Maples's lawyers. At the end of the day, this is simply a case about a default caused by attorney error. Just as in *Coleman*, due regard for finality and federalism requires the federal courts to uphold the state procedural bar.[3]

II. The clerk's actions do not establish cause to excuse Maples's default.

Maples cannot work an end-run around *Coleman* by way of the clerk's office. The actual receipt of the

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on direct appeal. *See supra* at 6. Accordingly, even if the Court were to hold that the *Martinez* petitioner had a right to effective assistance in the Arizona proceedings, it will not mean that Maples had a right to effective assistance at any stage of the Alabama postconviction proceedings at issue here.

[3] Although the question on which this Court granted certiorari is limited to the "cause" inquiry, Maples now asks this Court to hold that he has established "prejudice" as well. *See* Blue Br. 22. The Court of Appeals did not pass on this question, Pet. App. 18a n.14, and if this Court does not affirm the judgment below, it should allow the lower courts to resolve that issue in the first instance.

order by Maples's attorney of record means that the clerk fully complied with state law and due process. In any event, Maples has not shown that the clerk's actions impeded the efforts of Butler and De Leeuw to file the appeal on time.

A. Maples waived the clerk argument.

As a threshold matter, Maples waived any argument that the clerk's actions established cause. In his initial district-court filings criticizing the clerk's actions, Maples never cited the Due Process Clause. JA 261-62. When the State later accused Maples of casting blame on the clerk in the Eleventh Circuit, Maples called the State's argument a "straw-man argument" in his reply. JA 286. Then he told the Eleventh Circuit at oral argument that "Maples is not blaming this on the Clerk of the Circuit Court." JA 302. Accordingly, the Eleventh Circuit said nothing about the clerk issue in its opinion. Maples cannot now ask this Court to reverse that court for failing to hold that the clerk was to blame. *See Stewart v. LaGrand*, 526 U.S. 115, 120 (1999) (per curiam).

B. The clerk complied with state and federal law.

In any event, the clerk did more than state or federal law required in this case. He sent the order to the address on file of not just one, but all three of Maples's attorneys of record. One of those attorneys actually received the order. Nothing in state law or the Constitution required the clerk to do more.

1. The clerk's actions satisfied state law.

Maples's assertion that the clerk violated Alabama law is a nonstarter. State courts get the last word on what state law means. *See Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825) (Marshall, C.J.); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). It was thus emphatically the province of the Alabama courts to say whether the clerk complied with Alabama's rules. The Alabama Court of Criminal Appeals found that the clerk had acted in accordance with Alabama law. Pet. App. 235a-236a. The Alabama Supreme Court saw no reason to disturb that decision. *Id.* at 237a. And those conclusions end the state-law analysis.

But as it turns out, those state-law conclusions are also critical to Maples's federal due-process arguments. The lynchpin of Maples's analysis on that front is a fundamental misreading of the Alabama Court of Criminal Appeals' decision in this case. He asserts that "the Alabama courts below found" that Rule 34.4 of the Alabama Rules of Criminal Procedure "required that the clerk provide notice to Maples's *pro bono* attorneys of record as well as local counsel." Blue Br. 23; *accord id.* at 31. That is incorrect. What the Alabama court actually said was that Rule 34.4, which governs "Service and filing," has the same meaning as its federal counterparts: When the defendant is represented by counsel, it simply directs courts to serve "notices" and "documents" on the defendant's attorney *instead of* the defendant himself. Pet. App. 234a (citing ALA. R. CRIM. P. 34.4); *accord* FED. R. CIV. P. 5(b)(1); FED. R. CRIM. P. 49.

Rule 34.5—a provision Maples does not mention—is what governs "Notice of Orders." It simply requires the clerk to "furnish all parties a copy" of orders "by mail or by other appropriate means approved by the judge." ALA. R. CRIM. P. 34.5. The Alabama Court of Criminal Appeals did not read this or any other rule as requiring service on each listed attorney when a party is represented by more than one attorney. Instead, that court expressly held that "'the trial court's notification of [one attorney representing a party] and not [the other attorney representing the same party] concerning certain trial matters was sufficient to give notice to both in light of their apparent co-counsel status.'" Pet. App. 235a-236a (alterations in original) (quoting *Thomas v. Kellett*, 489 So. 2d 554, 555 (Ala. 1986)). That interpretation of the Alabama Rules was consistent with the way the federal courts read analogous Federal Rules. "When a party is represented by more than one attorney, service upon any one of them satisfies the requirements." 4B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1145, at 431, 433 (3d ed. 2002); *accord Buchanan v. Sherrill*, 51 F.3d 227, 228 (CA10 1995) (per curiam); *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1063 (CA5 1990); *Allen v. Pac. Bell*, 212 F. Supp. 2d 1180, 1190 n.2 (C.D. Cal. 2002).

It is thus far from "undisputed that Rule 34.4 required service on Maples's *pro bono* attorneys of record." Blue Br. 31. Maples's mistaken view on this point renders his state-law argument meritless and fatally undermines his argument on the federal question as well.

2. The clerk's actions satisfied due process.

In addition to ruling on the state-law question, the Alabama Court of Criminal Appeals also found that Maples "failed to show that his right to procedural due process was violated." Pet. App. 236a. That adjudication is worthy of deference. Maples had a full and fair opportunity to litigate this issue in the state courts. In light of the fact that state-court adjudications of constitutional issues are entitled to considerable deference even when they go to the *merits* of a petitioner's claim, 28 U.S.C. §2254(d), the equitable considerations underlying the Great Writ counsel deferring to the state court's judgment on a procedural issue such as this one. *See Withrow v. Williams*, 507 U.S. 680, 720 (1993) (Scalia, J., concurring in part and dissenting in part).

But deference or no, the Alabama Court of Criminal Appeals was right about this question. As a general matter, due process does not require courts to serve parties with notice of their orders. The Federal Rules reflect this judgment, *see* FED. R. CRIM. P. 49(c); FED. R. CIV. P. 77(d)(2), and it is longstanding state practice as well. But even if, as the Court of Criminal Appeals determined, the clerk in this case "assumed a duty to notify the parties" that gave rise to a protectable interest under the Due Process Clause, Pet. App. 234a, the clerk's discharge of that duty fully comported with the Fourteenth Amendment. Because Butler got the order, the clerk gave Maples more notice than the Constitution required.

a. The clerk's actions satisfied due process because Butler received the order.

All of Maples's talk about *Jones v. Flowers* is irrelevant in light of what actually happened in this case. Unlike the plaintiff in *Jones*, Maples received notice. *See* 547 U.S. 220, 223-24 (2006). He did so through Butler, his designated counsel of record. The Constitution simply requires notice "reasonably calculated, under all the circumstances, to apprise interested parties" of the action. *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). In light of the "common and established practice of providing notification through counsel," *Irwin*, 498 U.S. at 93, the notice to Butler was "charged upon" Maples, *Link*, 370 U.S. at 634. And that ends the due-process inquiry. Actual notice "more than satisfie[s]" any notice obligations the Fourteenth Amendment might impose on the State in these circumstances. *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367, 1378 (2010); *see In re Furlong*, 885 F.2d 815, 818 (CA11 1989); *United States v. Everett*, 700 F.2d 900, 902 n.5 (CA3 1983).

Butler had both actual and apparent authority to receive the order. The Restatement of the Law Governing Lawyers explains that "simply retaining a lawyer confers broad apparent authority on the lawyer unless other facts apparent to the third person show that the lawyer's authority is narrower." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §27 cmt. a (2000). The Restatement also says that "[u]nder the law of agency, a client is bound by the lawyer's act or failure to act when the client has vested the lawyer with apparent authority." *Id.* §27 cmt. b. It is thus unclear why the

Reporter of the Restatement of Agency is maintaining that "the doctrine of apparent authority is generally inconsistent with ordinary understandings of the attorney-client relationship." DeMott Br. 23. This Court has long held that "[w]hen an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed." *Hill v. Mendenhall*, 88 U.S. (21 Wall.) 453, 454 (1874); *accord Kingvision Pay-Per-View, Ltd. v. Ayers*, 886 So. 2d 45, 52 (Ala. 2003).

b. The receipt of the notice by Butler makes Jones v. Flowers *irrelevant here.*

The only question, then, is whether the actual notice to Butler suddenly became not reasonably calculated to give notice to Maples simply because S&C sent the other envelopes back. The answer is no.

On this point, *Jones v. Flowers* is not the controlling precedent Maples makes it out to be. *Jones* does not govern here because it was a case in which *all* the notices came back. Arkansas's Commissioner of State Lands thus had "good reason to suspect when the notice was returned that Jones was no better off than if the notice had never been sent." *Jones*, 547 U.S. at 230 (internal quotation marks omitted). The Morgan County clerk, in contrast, would not have had that suspicion about Maples. As far as he knew, the order had reached Butler—and, as it turns out, it had. This is not a case in which the official simply shrugged his shoulders and "said, 'I tried.'" *Jones,* 547 U.S. at 229. It was a

case in which the official saw that notice had gotten to one attorney of record and said, "It worked."

The returned mail from S&C would not have called that conclusion into question. The returned mail could have signaled any number of things, all of which were more likely than the possibility that notice to Butler had not been notice to Maples. If it meant that Ingen-Housz and Munanka were no longer on the case, then the clerk could have reasonably concluded that Butler would carry on, perhaps with the help of others. If it meant that Ingen-Housz and Munanka had simply "Left Firm," Pet. Reply Add. 8a, then the clerk could have reasonably concluded that Butler knew how to get in touch with them. Either way, the clerk had "heard nothing back indicating that anything had gone awry," and could have been "'reasonably certain'" that the notice had "'inform[ed] those affected.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 315).

The rules simply direct that service be made on an "attorney of record." ALA. R. CRIM. P. 34.4. When a team of attorneys represents a party, a clerk cannot possibly know how that team has allocated responsibility for the case. From the clerk's perspective, all that matters is who counsel of record are, and the law provides that if a party chooses to employ multiple counsel of record, service on any one of them counts as service on the party. *See supra* 2526. Here, the clerk sent the notice to Butler, who was listed as counsel of record. That was all the law required.

That conclusion cannot change simply because a tiny fraction of Alabama's former bar presidents and

appellate judges has asserted that "local counsel for out-of-state attorneys in post-conviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted." Judges Br. 36. If *amici* are suggesting that everyone in the Alabama legal community thinks that local counsel do not even read court orders or confer with national counsel, the State can only respectfully counter that its experience does not bear out that characterization. *See* Brief in Opposition, *Barbour v. Allen*, No. 06-10605, at 8-9 (May 10, 2007) (observing that in addition to out-of-state firms, attorneys from "premier" Alabama law firms have represented capital clients on postconviction review). As Maples's other *amici* have said, the predominant view is that local counsel are "essential to maintaining the integrity of judicial proceedings into which out-of-state counsel wish[] to insert themselves." Ethics Br. 21.

More importantly, *amici*'s unsubstantiated assertions that local counsel "do nothing" can hardly trump what the law says local counsel does. The rules governing admission to the State Bar said Butler would appear on all notices and accept joint and several responsibility to the court. JA 365-66. And four years before the pertinent events in this case, an Alabama Supreme Court opinion declared that "[t]his Court will presume, until it is proven otherwise in the appropriate forum, that an attorney at all times acts in an ethical manner and upholds the oath of the profession." *Ex parte Stephens*, 676 So. 2d 1307, 1315 (Ala. 1996), *overruled in non-pertinent part by Ex parte Henry*, 770 So. 2d 76, 81 (Ala. 2000). If the Alabama Supreme Court could

presume as much, so could the clerk for the Circuit Court of Morgan County. By serving the notice on Butler, the clerk had every reason to believe he was serving it on Maples as well.

There is even less merit to Maples's assertion that the clerk should have done something more because the order said it was cc'ing Ingen-Housz and Munanka. By including those attorneys on the cc: line, the court was not vouching that Ingen-Housz and Munanka "would receive notice of the order." Blue Br. 32. The only thing the cc: line communicated was that the clerk would *send* the order to Ingen-Housz's and Munanka's address of record. The clerk, in fact, did so, and the order in fact arrived at S&C's office in Manhattan. When the order came back from that address but did not come back from Butler, the clerk had every reason to believe that Butler, as co-counsel to Ingen-Housz and Munanka, would have already known that his two colleagues had "Left Firm" and would thus take whatever measures were appropriate. Pet. Reply Add. 7a-8a.

c. Further action by the clerk was not necessary.

Because one of Maples's attorneys of record received the order, *Jones* did not require the clerk to continue taking steps to effect notice. Two more considerations confirm that the Due Process Clause did not require more.

First, *Mullane* speaks of the State's duty to provide notice of the "pendency" of an action—not everything that happens after the parties are made aware of it and have filed their appearances. 339

U.S. at 314. Notice was vital in *Jones* because the State was *instituting* an action to take Jones's property. Orders issued by courts in "situations where the litigation had already begun," on the other hand, are not in the same due-process ballpark. *United States v. $184,505.01 in U.S. Currency*, 72 F.3d 1160, 1164 (CA3 1995) (Alito, J.). Courts are entitled to assume that parties and attorneys will follow their rules, and unlike the *Jones* context—where it may not have been reasonable for the State to presume that non-lawyers will inform officials when they have changed their addresses—courts can legitimately demand that lawyers diligently update their contact information while a particular piece of litigation runs its course. Once a party has received notice of the pendency of an action, the burden falls on the party to keep abreast of developments in the case.

Indeed, there is no indication that due process actually requires a clerk to notify *any* of the attorneys in a case about orders that the court issues after the parties have made their initial appearances. In federal court, the deadline to appeal begins to run even if the district-court clerk fails to send the order to any of a party's attorneys. *See* FED. R. CRIM. P. 49(c); FED. R. CIV. P. 77(d)(2). If the losing party does not discover on his own within a specified time that the court has issued the order, he will be deemed to have waived his appeal. *See Ashby Enters. v. Weitzman, Dym & Assocs.*, 780 F.2d 1043, 1046 (CADC 1985) (Wright, J.); FED. R. APP. P. 4(a)(6). If due process does not require the federal government to inform the parties of an order at all, then it certainly does not require a clerk to track down an

attorney for a party, after an order sent to that attorney's address on file is returned, when one of the other attorneys representing that party actually received the order.

Second, Maples has not pointed to any "additional steps" that would have been "reasonable" for the clerk to take in light of the fact that the notice had made its way to Butler. *Jones*, 547 U.S. at 234. In *Jones*, the State could have perfected notice by simply resending the letter by regular mail. *Id.* The clerk here did not have an option like that. He had already sent the orders to Ingen-Housz and Munanka via regular mail. The S&C mailroom had written "Left Firm" on one of the envelopes, so a phone call to the firm would have been pointless. JA 23. Calling Butler would have made little sense because he had actually received the order. Maples now speculates that if the clerk had sifted through the state-court record, he might have discovered Ingen-Housz's and Munanka's home addresses and phone numbers (from two years before) in their *pro hac* applications. But given that these two associates had "Left Firm," it would not have been obvious to the clerk that those addresses and numbers would still have been good ones. (Maples basically admits that Ingen-Housz's would not have been, given that she "had left the country by that time." Blue Br. 28 n.3.) And contacting Maples directly in prison hardly would have been the first thing to spring to the clerk's mind. It would not even have been *sufficient* because "service upon a party represented by an attorney does not comply" with applicable procedural rules. *See* 4B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1145, at 433 & n.4 (3d ed. 2002);

Fortner v. Balkcom, 380 F.2d 816, 820 (CA5 1967), *abrogated on other grounds*, *Harris v. Nelson*, 394 U.S. 286, 290 n.1 (1969).

At the end of the day, "[w]hat steps are reasonable in response to new information depends on what the new information reveals." *Jones*, 547 U.S. at 234. Because the new information indicated that counsel of record had gotten the order, it would not have been clear to the clerk that any of these additional steps would have been "reasonable" at all.

C. Even if the clerk had erred, his actions would not establish cause.

Maples recognizes that even if he were right about all these notice issues, he still would not have established cause. *See* Blue Br. 34. To seal the deal, Maples would need to show that the clerk's putative constitutional violation also "impeded counsel's efforts" to appeal. *Carrier*, 477 U.S. at 488. But his assertions on that point only confirm two things, and both actually undercut the arguments he is pressing here.

The first is that this case really is just *Coleman II*. The clerk's failure to take these various steps has become an issue only because of the mistakes Butler, De Leeuw, and the others made. If the New York lawyers had simply filed notices of appearance, they would have received the order. If Butler had called S&C when his copy of the order arrived, S&C presumably would have moved forward with the appeal. And if either of those things had happened, no one here would be talking about the Circuit Clerk of Morgan County.

But because Maples's own lawyers' failings caused the problem in the first place, he cannot establish that anything the clerk did *after* the fact was the true "cause" of his default. If the petitioner and his lawyers are not making proper "efforts" to comply with the rules, then there is nothing for an external factor to "impede." The cause-and-prejudice doctrine "define[s] the court's discretion to excuse pleading and procedural requirements for petitioners who *could not comply with them in the exercise of reasonable care and diligence*." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (emphasis added). It is thus not a good cause argument to say, "My attorneys missed the deadline because they were negligent, but if somebody else had reminded them about the deadline, they might have straightened up and filed on time." For that reason alone, Maples cannot establish cause here.

Maples's clerk-as-cause argument also belies his attempt to distinguish *Coleman* on the alternative ground that his lawyers abandoned him. Maples says that things would have been different if the clerk had picked up the phone and called Butler, Ingen-Housz (in Belgium, apparently), or Munanka. At that point, Maples says, his lawyers would have saved the day. If it is unclear how Maples can maintain as much while in the next breath claiming that these same lawyers had abandoned him, it is only because, as explained below, these attorneys never abandoned him at all.

III. The acts of Maples's legal team do not establish cause to excuse his default.

With the clerk's office offering no way around *Coleman*'s barrier to habeas review, Maples tries to blast a hole right through it, asserting that despite *Coleman*, "[t]he actions of Maples's attorneys independently establish cause to excuse the procedural default." Blue Br. 35. *Coleman* held that a petitioner must "bear the risk of attorney error" at this stage of postconviction proceedings. 501 U.S. at 752-53. Later, when this Court held that attorney misconduct could give rise to equitable tolling in *Holland v. Florida*, this Court recognized that *Coleman* required a petitioner to bear the risk of attorney error "without qualification." 130 S. Ct. 2549, 2563 (2010). The *Holland* Court distinguished *Coleman* on the basis that it was a case "'about federalism,'" saying that federalism concerns are more significant when it comes to procedural defaults than they are in the equitable-tolling context. *Id.* (quoting *Coleman*, 501 U.S. at 752-53).

If *Coleman* and *Holland* nevertheless leave any space for an argument that the actions of a petitioner's attorneys can establish cause in certain circumstances, it can only be in a case in which, according to the settled principles of agency law referenced in *Coleman*, the lawyer was not acting as the petitioner's "agent." 501 U.S. at 754. The petitioner would thus need in the very least to show *both* (1) that his lawyers had somehow become "'external to the defense'" in light of these agency principles; *and* (2) that those lawyers actually "'impeded'" his efforts "'to comply with the state's

procedural rule.'" *Id.* at 753 (quoting *Carrier*, 477 U.S. at 488).

Maples cannot satisfy this test. Significantly, Maples was not represented by a solo attorney here. He was represented by a team of lawyers. And because De Leeuw and S&C were a part of that team from day one in state court right up through the proceedings in the Eleventh Circuit, Maples's accusations of abandonment and disloyalty have no basis. Maples's team of lawyers never became external to the defense, and nothing external to them impeded their efforts to comply with the deadline.

A. De Leeuw and Butler represented Maples from the outset.

The lawyers who committed the critical mistakes here were never "external" to Maples. From the time Maples filed his state-court petition, De Leeuw and Butler were part of Maples's legal team. At that point, Ingen-Housz and Munanka were part of the team as well. Their departure did not end the relationship between Maples and his other attorneys, and it did not otherwise impede that team of attorneys from complying with the deadline.

1. Maples established an attorney-client relationship with De Leeuw and others before the default.

Although Maples did not argue below that his attorneys were external to him, he now asserts that a remand is needed to determine "to what extent" De Leeuw, Duffy, and the other S&C lawyers who succeeded Ingen-Housz and Munanka "had actually

formed an attorney-client relationship with Maples before the default," Blue Br. 46. No remand would be appropriate in any event, but the record answers all the relevant questions on this front anyway. It shows that De Leeuw and these other S&C lawyers had established an attorney-client relationship with Maples long before the default.

a. Maples established an attorney-client relationship with S&C before the default.

Maples had an attorney-client relationship not just with De Leeuw, but with the firm in which he was a partner. "When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §31 cmt. f. And Maples's pleadings before the District Court confirm that he had retained the entire firm. His amended petition states that "[a]t the time" he filed his state-court petition, he "was represented by Sullivan & Cromwell." JA 256. It also states that "Sullivan & Cromwell represented Mr. Maples *pro bono publico*." JA 256. Although De Leeuw had initially told the state courts that the S&C lawyers had represented Maples "on an individual basis," Pet. App. 257a, he did not make that representation to the District Court or the Court of Appeals. It is those courts' decisions that are under review here, so it is the allegations he made there that control. And for reasons Maples's ethics-scholar *amici* have given, those later allegations were accurate, and De Leeuw's earlier characterization was not. *See* Ethics Br. 10–11.

The petition's allegations, conclusive for present purposes, are important because "[w]hen a lawyer leaves a large firm, . . . it can usually be assumed that, absent contrary client instructions or previous contract, the firm continues to represent the client in pending representations and the lawyer does not." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §31 cmt. f. Accordingly, when Ingen-Housz and Munanka left the firm, Maples's representation remained with S&C.

b. In the very least, Maples established an attorney-client relationship with De Leeuw and others before the default.

Whether or not Sullivan & Cromwell had an attorney-client relationship with Maples, De Leeuw, as an individual lawyer, clearly did. He had been "involved in" the case since the time Maples filed his state-court petition. *See* Pet. App. 257a. After the state court initially denied the State's motion to dismiss, "Mr. De Leeuw and other attorneys at Sullivan & Cromwell continued to prepare for the anticipated evidentiary hearing." JA 228.

De Leeuw assumed lead responsibility for the case once Ingen-Housz and Munanka left for jobs under which they could no longer represent Maples. JA 228, 273, 299; Pet. App. 4a. Three months later, Duffy also joined the effort. JA 231. Maples's original federal habeas petition thus alleged that when Ingen-Housz and Munanka left, "Sullivan & Cromwell attorneys continued in the *pro bono* representation of Mr. Maples." JA 228. Gary Alexion of the Legal Aid Society also worked on the case starting no later than September 2002. Doc 2-Pg 1.

The memorandum Maples signed and submitted to the District Court makes his assent to these arrangements clear. Maples submitted that memorandum in response to a court order requiring him to specify whether he was "fully satisfied with the representation of his habeas counsel." JA 247. His response said, "I want the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers." JA 253. He noted that before the court's order, he "had discussed" his desire to appeal with these lawyers. JA 253. And he said he understood that they did not file his appeal because they "didn't get the decision from the Alabama court in time." JA 253.

It is irrelevant, for these purposes, that De Leeuw, Duffy, and Alexion failed to appear in the Alabama courts before Maples missed his appeal. The mere fact that an attorney is not counsel of record does not mean he or she is not that party's attorney. As long as the client "manifests to a lawyer the person's intent that the lawyer provide legal services" and the lawyer agrees, then the "relationship of client and lawyer arises." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14. And although Maples asserts that the state postconviction trial court made dispositive "findings" that De Leeuw and Duffy did not "represent[] Maples" because they had not filed appearances, Blue Br. 47 n.9, that is not what that court said. It simply noted that De Leeuw and Duffy were not *counsel of record* in the Alabama proceedings at the time. Pet. App. 223a.

For the same reason, it is irrelevant that De Leeuw, Duffy, and Alexion did not get around to

filing motions seeking *pro hac* admission before the default occurred. Section 111 of the Restatement (Second) of Agency does not help Maples on this front, for it does not say that a principal is not responsible for the acts of an agent who "lacks a license necessary to the performance of the relevant tasks." Blue Br. 47. It instead says an agent may *lose* authority to act for the principal based on the "loss of or failure to acquire a qualification by the agent without which it is illegal to do an authorized act." RESTATEMENT (SECOND) OF AGENCY §111. That rule simply terminates an agent's power, on a going-forward basis, if something happens that makes it *impossible* for him to act legally—if, to use the example from the Restatement, he is "disbarred" from the practice of law altogether, *id.* illus. 1, or he applies for admission to the bar and is denied. That is not what happened here. The Alabama court never denied De Leeuw and the others admission *pro hac*. Indeed, the state and federal courts in Alabama admitted De Leeuw when he sought the out-of-time appeal and filed the federal habeas petition. JA 238, 7. His failure to seek admission earlier was not an event that retroactively nullified his and Maples's entire attorney-client relationship. It was simply one of the mistakes that caused his client's default.

2. Maples established an attorney-client relationship with Butler before the default.

From the beginning of the state postconviction proceedings, Butler was also part of Maples's legal team. Maples acknowledges that Rule VII of the Rules Governing Admission to the Alabama State Bar gave Butler "joint and several responsibility" for

his case. JA 366. So just by signing Butler up, Maples necessarily authorized him to accept service of court orders on his behalf. In suggesting otherwise, Maples is trying to have it both ways. Unless he wants to concede that every pleading he filed in the state postconviction court was a nullity—in which case he has bigger procedural-bar problems than anyone here has previously realized—then he must acknowledge that Butler acted as his lawyer when he allowed his name, as Rule VII required, to "appear on all notices, orders, pleadings, and other documents filed in the cause." JA 365-66.

Although Butler did not plan to lead the charge as the case moved forward, the record does not show that he refused to accept his "responsibility" under Rule VII. Blue Br. 48. Butler told the courts he had not had "substantive involvement" in the case, Pet. App. 255a, but that does not mean he did not accept "joint and several responsibility" in the sense that if something went wrong, he would be held responsible. The words "substantive involvement" can mean any number of things. A senior partner whose name appears at the top of a brief may not have had "substantive involvement" in the sense that she did not do the drafting—or even, sometimes, the editing. But that does not mean she is not an attorney for the client whose name appears on the front cover. A "client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §19. A team of lawyers can therefore divide up responsibility for a case, with some playing more significant roles than others.

Here, although Butler's role on the team did not involve drafting or other substantive work, the record shows that he thought, quite reasonably, that he was Maples's attorney. *See* RESTATEMENT (THIRD) OF AGENCY §2.01 (2006) (agent's actual authority turns on agent's reasonable belief that the principal wishes the agent to act). Butler said he did nothing with the order not because he did not represent Maples, but because he "assum[ed]" that other members of the team would do what needed to be done. JA 257-58. And after Maples missed his appeal, Butler filed papers for his client in five different courts, including this one, signing at least two of them. JA 229, 230, 236, 238, 242. Courts look to the "totality of the circumstances" to determine whether an agency relationship exists. *E.g., People v. Pilkington*, 156 P.3d 477, 480 (Colo. 2007); *State v. Wall*, 910 A.2d 1253, 1258 (N.H. 2006); *Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 878 A.2d 567, 583 (Md. 2005). These circumstances serve as compelling evidence that neither Butler, nor Maples, nor anyone else on the team thought Butler had not established an agency relationship with Maples at the outset of this case.

The record does not support the theory, pressed by Maples and his *amici* for the first time in this forum, that Butler was merely "a *sub*-agent of Ingen-Housz and Munanka" and that he therefore became "external" to Maples when those lawyers left. Blue Br. 49-50; *accord* DeMott Br. 16-17. That theory relies on the false premise, disclaimed by Maples below and debunked by the ethics scholars here, that "when Maples engaged Ingen-Housz and Munanka as his agents, he engaged *only* them, and not their

law firm or any other individuals in the firm." DeMott Br. 19. Perhaps because that premise is wrong, Maples made no allegation below that Ingen-Housz and Munanka simply enlisted Butler's help as a sub-agent. JA 226, 255, 271. Indeed, the Rules Governing Admission to the Alabama State Bar definitively made Butler more than that. Rule VII's provision giving Butler "joint and several responsibility" meant, if nothing else, that if for some reason national counsel withdrew, Butler would remain counsel of record, responsible to the court and the client. JA 365-66. In any event, the fact that Butler remained on the case with Maples's blessing after Ingen-Housz and Munanka left shows that he was not simply the sub-agent for those two associates.

B. Because the team's attorney-client relationship with Maples did not terminate before the default, their actions did not establish cause.

Thus, immediately after Ingen-Housz and Munanka departed, Maples had a team in place, consisting of Butler and De Leeuw at least. Soon thereafter, De Leeuw's associate Felice Duffy, and Gary Alexion from Legal Aid, joined their ranks. The only question remaining, then, is whether something happened, between then and the day the appeal deadline passed, that severed the agency relationship between Maples and those lawyers, thus rendering them "external to the defense."

The answer is no. Maples has offered two theories on this front. First, drawing from the Restatement of Agency, he claims that his lawyers breached the duty

of loyalty and thereby severed their relationship. Second, drawing from language in this Court's decision in *Holland*, he asserts that his lawyers abandoned him and thereby became "external to the defense." As explained below, neither of those theories is plausible in light of what actually happened in this case.

1. Ingen-Housz and Munanka's departures are irrelevant to the cause question.

One threshold point needs to be made at the outset. Much of Maples's analysis is devoted to allegations that Ingen-Housz and Munanka were disloyal and abandoned him. But the fact that De Leeuw had been working on the case and then took responsibility for it upon their departure takes all the air out of those tires. These two young associates did not breach their duty of loyalty or abandon their client. They simply left their law firm. When they departed, each had a duty to "take steps to the extent reasonably practicable to protect the client's interests," including "allowing time for employment of other counsel." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §33(1). And each discharged that duty in full. It is not as if they were sole practitioners who resigned on the eve of trial and left their client without representation of any sort. Instead, they handed off responsibility for the case to another firm lawyer—a partner, no less—who had already been working on the case. Nothing about their departure itself was disloyal or a *de facto* abandonment, and it certainly did not "impede" the other members of the team from representing Maples effectively on a going-forward basis.

Granted, Ingen-Housz and Munanka did do one thing wrong when they left: They failed to file motions to withdraw from Maples's case. But that is a non-issue for two reasons.

First, this failing was not "external" to Maples's team. The right time for these associates to have withdrawn would have been before they left the firm. The record does not make clear whether it was a coincidence that neither withdrew, or whether they instead were following instructions from S&C to hold off until others at the firm had appeared. Either way, De Leeuw and S&C bear responsibility for the matter. As the ethics-scholar *amici* observe, De Leeuw and his partners had a duty to supervise their associates. *See* Ethics Br. 10-12 & n.10 (citing ALA. R. PROF. CONDUCT 5.1(a); N.Y. CODE PROF'L RESPONSIBILITY DR 1-104, 22 N.Y.C.R.R. §1200.5 (2002)). In so doing, they should have ensured that Ingen-Housz and Munanka filed all appropriate documents with the court before they left.

Second and just as important, the associates' failure to withdraw did not impede the team from representing Maples in the future. Nothing prevented De Leeuw and the others in New York from appearing in the litigation on Maples's behalf. That fact distinguishes two lower-court decisions that Maples cites for the proposition that "cause" exists "where [an] attorney of record ceased representation but 'had not taken any formal steps to withdraw,' precipitating default.'" Blue Br. 45 (citing *Porter v. State*, 2 S.W.3d 73 (Ark. 1999); *Nara v. Frank*, 264 F.3d 310 (CA3 2001)). Neither of those cases involved the cause-and-prejudice doctrine, and neither involved circumstances like those here, in

which the petitioner was represented by a team of lawyers, at least one of whom maintained responsibility for the matter after the others had departed.

Maples's accusations about Ingen-Housz and Munanka are thus a smokescreen. The real question is whether the remaining members of the team became "external factors" that impeded Maples's ability to appeal.

2. The team's attorney-client relationship did not terminate based on any breach of the duty of loyalty.

Maples has no valid claim that the remaining members of his team breached their duty of loyalty and thereby became external to him. An agent breaches that duty if and only if he "prefers his own or another's interests" to those of the principal. RESTATEMENT (SECOND) OF AGENCY §112 & cmt. b. The Restatement says an agent breaches the duty if he "acquires adverse interests," and every example the Restatement uses to describe the duty involves an agent's acquisition of some sort of conflict-of-interest. *See id.* illus. 1–3. Decisions Maples cites on this point also discuss the duty in these conflict-of-interest terms. *See Baldayaque v. United States*, 338 F.3d 145, 154 (CA2 2003) (Jacobs, J., concurring) (petitioner's lawyer "undertook a futile, unresearched, and frivolous initiative for the sole purpose of keeping" a $5000 retainer); *Manning v. Foster*, 224 F.3d 1129, 1134-35 (CA9 2000) (default can be excused when petitioner's lawyer has "conflict of interest"); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (CA8 1992) (default can be excused when the

"alleged conflict" is "inimical to [the client's] interests"); *United States v. Galindo*, 871 F.2d 99, 101 (CA9 1989) ("When an agent acts contrary to the interests of the principal, the agency relationship ceases."); *State v. DiGiulio*, 835 P.2d 488, 492 (Ariz. Ct. App. 1992) ("Violating the duty of loyalty, or failing to disclose adverse interests, voids the agency relationship."). Maples has not alleged that his lawyers had a conflict-of-interest that caused them to miss the deadline.

Nor does Maples have a compelling argument that his lawyers breached their duty of loyalty by failing to act diligently on his case. For one thing, a mere lack of diligence does not violate the duty of loyalty. "[T]he fact that an action taken by an agent has unfavorable results for the principal does not establish that the agent acted adversely" for duty-of-loyalty purposes. RESTATEMENT (THIRD) OF AGENCY §5.04 cmt. c. The canons of professional responsibility draw a distinction between diligence, on the one hand, and loyalty, on the other. *Compare* ABA MODEL RULES PROF'L CONDUCT R. 1.3 (imposing a duty of diligence), *with* ABA MODEL RULES PROF'L CONDUCT R. 1.7 & cmt. (discussing concepts of "loyalty" with respect to conflict-of-interest rules). *See generally* REUSCHLEIN & GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §68, at 127-28 (2d ed. 1990) (saying nothing about diligence-related issues in conjunction with their duty-of-loyalty discussion).

More importantly for present purposes, even if the duty of loyalty encompassed some minimal level of diligence, Maples cannot show that his lawyers failed to meet it. On this front, Maples cherry-picks a single member of his team—Butler—arguing that

because the only function he had served was to move for Ingen-Housz's and Munanka's admission, he was disloyal. But Butler's level of participation in the case—which would not have impeded the New York lawyers' efforts in any event—was no violation of the duty of loyalty. The 1914 treatise Maples cites on this front simply says that when an agent serves more than one principal, he must offer "a fair and reasonable devotion to the business of the principal." 1 MECHEM, A TREATISE ON THE LAW OF AGENCY §1232, at 903 (2d ed. 1914). That treatise further notes that the appropriate amount of time for these purposes "depend[s] upon the circumstances of the case." *Id.* In light of the circumstances of this case—with Maples's lawyers having divvied up responsibility amongst themselves—nothing suggests that Maples or anyone on the team thought Butler had devoted less time to the matter than was fair and reasonable. Butler was supposed to play a limited role, while S&C's lawyers pulled the substantive oars. And they did so, "prepar[ing] for the anticipated evidentiary hearing" and "periodically me[eting] with" Maples. JA 228, 257.

It would have been one thing if Maples had alleged that his lawyers had missed the deadline because they were trying to "deliberately deceive[] him." *See Holland*, 130 S. Ct. at 2573 (Scalia, J., dissenting). If that had happened, Maples could have argued that his lawyers had breached their duty of loyalty, become external to him, and—by virtue of any intentional misrepresentations they might have made about their representation—impeded his ability to appeal. But because Maples made no such

allegation, the duty of loyalty is not a viable path to establish that his lawyers' actions were cause.

3. The team's agency relationship was not terminated by "abandonment."

Nor can Maples establish cause based on the theory that his lawyers "abandoned" him. The "abandonment" concept has not previously appeared in this Court's cause-and-prejudice jurisprudence. Nor do the Restatements use the term as an example of an act that can end an agency relationship. *See* RESTATEMENT (SECOND) OF AGENCY §§105-24; RESTATEMENT (THIRD) OF AGENCY §§3.06-3.11; *cf. Panzino v. City of Phoenix*, 999 P.2d 198, 201-03 (Ariz. 2000) (holding that an agent's "abandonment" of a principal does not affect his ability to bind principal to a third party, absent notice to the third party). Maples has drawn the term from this Court's decision in *Holland*, which addressed the circumstances under which the federal statute of limitations could be tolled in habeas cases. Even there, the term originated not in any precedent, but rather in a letter the petitioner wrote to the state courts, asserting that his lawyer had "abandoned" him and asking those courts to allow him to proceed *pro se*. 130 S. Ct. at 2555.

Whatever force the concept of abandonment might have in the cause-and-prejudice doctrine, it has no application to the particular facts of this case. Maples has relied heavily on the concurrence in *Holland*, in which Justice Alito found that the petitioner had alleged facts that, if true, would establish "extraordinary circumstances" warranting equitable tolling. 130 S. Ct. at 2565-66 (Alito, J.,

concurring in part and concurring in the judgment). The *Holland* Court premised its analysis on the notion that equitable-tolling doctrine could be more flexible than cause-and-prejudice doctrine, where federalism concerns are heightened. *Id.* at 2563 (majority opinion). But even if the same analysis applies in this context, Maples cannot establish cause. Nothing in Justice Alito's concurrence—or, for that matter, in the *Holland* majority—indicates that attorney "abandonment," standing alone, could justify equitable tolling. And nothing in either opinion indicates that what happened here amounted to "abandonment" for present purposes.

In finding that the petitioner there had alleged facts establishing "extraordinary circumstances," Justice Alito did not simply rely on the petitioner's assertion that his lawyer had "abandoned" him. He relied on the lawyer's "near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 2555-59 (majority opinion) (documenting the petitioner's unanswered letters). Also relevant were the petitioner's "reasonable efforts to terminate counsel due to his inadequate representation." *Id.* at 2568 (Alito, J., concurring in part and concurring in the judgment). Moreover, he specifically asked the state court to allow him to "proceed *pro se*" so he could file his federal petition on time. *Id.* Critically, these efforts had been "successfully opposed by the State," which had convinced the court to force the petitioner to stick with the nonresponsive lawyer. *Id.* On those

grounds, Justice Alito concluded that the petitioner's attorney was "not operating as his agent in any meaningful sense of that word." *Id.*

This case looks nothing like *Holland*. Although Butler did not "deal with substantive issues," Pet. App. 255a, the team as a whole was "prepar[ing] for the anticipated evidentiary hearing," JA 228. They were "periodically me[eting] with" Maples. JA 257. *Cf.* RESTATEMENT (SECOND) OF AGENCY §118 (allowing an agent to renounce his authority). It is thus no surprise that, unlike Holland, Maples himself made no attempt to terminate counsel or do anything else that would have ended the agency relationship. *Cf. id.* (allowing a principal to revoke an agent's authority). Nor was he forced, by the State or anyone else, to keep these lawyers. To the contrary, when given a chance to cast them aside even *after* the default, he told the District Court he "want[ed] the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers because I feel that they will do everything they can for me." JA 253. These lawyers by no means willfully ignored their client's directives. They simply made mistakes about how to ensure that they would receive notice of court action, and about who was going to take responsibility for the appeal. After they made these mistakes and the default occurred, each of these lawyers, by vigorously seeking relief for their client in state and federal court, proved that they never abandoned him. *See supra* at 11-14.

The mere fact that they made these mistakes, and thereby failed to serve their client at the critical juncture in this case, did not transform these lawyers into temporary abandoners. What happened

in this case is functionally indistinguishable from what happens most any time a lawyer misses a deadline. The lawyer in *Irwin v. Department of Veterans Affairs* did not do his job during the 30-day window for filing his client's complaint, but the Court properly called that failing "at best a garden variety claim of excusable neglect." 498 U.S. at 96. The lawyer in *Link v. Wabash Railroad Co.* did not even show up during a pretrial hearing, but the client was appropriately "deemed bound by" the lawyer's no-show. 370 U.S. at 634. The lawyer in *Coleman* failed in his responsibilities during the 30 days he had to file his client's notice of appeal, but this Court properly found that the petitioner had to "'bear the risk of attorney error.'" 501 U.S. at 753 (quoting *Carrier*, 477 U.S. at 488). These are not acts of abandonment in any meaningful sense of that word, and neither were the mistakes Maples's team committed here. To hold otherwise would invite a host of habeas filings "cloak[ing]," as the Fifth Circuit has put it, contentions "of poor representation . . . in the mantle of no representation." *Fairman v. Anderson*, 188 F.3d 635, 643 (CA5 1999).

This case is thus not *Holland*. When Ingen-Housz and Munanka departed S&C, they left Maples with a team of lawyers that, with his consent, acted as his agents going forward. Those lawyers did not abandon him, and they did not breach their duty of loyalty to him. They simply made mistakes, and that makes this case *Coleman*.

* * *

On the face of it, it is hard not to feel a little sorry for a petitioner like Keith Coleman or Cory Maples, who loses his chance to assert claims in federal court because of his lawyers' errors. But as this Court explained in *Coleman*, other equitable considerations take precedence in circumstances like these. Over 15 years ago, Maples killed two people, and he does not deny it now. He received a full determination of the merits of the claims at issue here in a state-court adjudication that Congress has deemed worthy of deference. *See* 28 U.S.C. §2254(d). He also obtained federal review of other claims that he had preserved on direct review, and the District Court and Court of Appeals found that those claims were without merit. Neither of the theories through which he is now seeking to excuse his default finds support in the facts or in this Court's precedents. *Coleman* found that no sustainable system of federal habeas review could excuse defaults in circumstances like these, and *Coleman* was right.

CONCLUSION

The judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

Luther Strange
Attorney General

John C. Neiman, Jr.
Solicitor General
*Counsel of Record

Nicholas Q. Rosenkranz
Deputy Attorney General

600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-4026

William G. Parker, Jr.
Assistant Attorney General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

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