American Bar Association
www.supremecourtpreview.org

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 TEXAS, ARIZONA, DELAWARE, FLORIDA, GEORGIA, IDAHO, LOUISIANA, MISSISSIPPI, NEBRASKA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-0596
adam.aston@oag.state.tx.us

COUNSEL FOR AMICI CURIAE

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

TOM HORNE
Attorney General of Arizona

JOSEPH R. BIDEN, III
Attorney General of Delaware

PAMELA JO BONDI
Attorney General of Florida

SAMUEL S. OLENS
Attorney General of Georgia

LAWRENCE G. WASDEN
Attorney General of Idaho

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

JIM HOOD
Attorney General of Mississippi

JON BRUNING
Attorney General of Nebraska

GARY K. KING
Attorney General of New Mexico

E. SCOTT PRUITT
Attorney General of Oklahoma

LINDA L. KELLY
Attorney General of Pennsylvania

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

ROBERT E. COOPER, JR.
Attorney General of Tennessee

MARK L. SHURTLEFF
Attorney General of Utah

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

ROBERT M. MCKENNA
Attorney General of Washington

J.B. VAN HOLLEN
Attorney General of Wisconsin

GREGORY A. PHILLIPS
Attorney General of Wyoming

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 1

Argument 1

I. Providing Maples the Requested Relief Would Unsettle a Settled Question of Law 3

II. The Untenable Nature of Maples's Proposed Limits Demonstrates the Unworkability of His Proposed Rule 5

III. Section 2254(i) Provides an Independent Basis For Denying the Relief Maples Seeks. .7

Conclusion 12

TABLE OF AUTHORITIES

Cases

Carroll v. Sec'y, DOC,
574 F.3d 1354 (11th Cir. 2009) 10

Coleman v. Thompson,
501 U.S. 722 (1991) 1, 2, 4, 7, 11

Cristin v. Brennan,
281 F.3d 404 (3rd Cir. 2002) 4-5

Ellis v. Armenakis,
222 F.3d 627 (9th Cir. 2000) 5

Henderson v. Campbell,
353 F.3d 880 (11th Cir. 2003) 9

Holland v. Florida,
130 S. Ct. 2549 (2010) 7, 10

Howlett v. Rose,
496 U.S. 356 (1990) 3

Johnson v. Singletary,
938 F.2d 1166 (11th Cir. 1991) (en banc) 5

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 7

Moore v. Dretke,
369 F.3d 844 (5th Cir. 2004) (per curiam) 10

Murray v. Giarratano,
492 U.S. 1 (1989) 2

Neal v. Gramley,
99 F.3d 841 (7th Cir. 1996) 5, 7-9

Nichols v. Scott,
69 F.3d 1255 (5th Cir. 1995) 10

Nolan v. Armontrout,
973 F.2d 615 (8th Cir. 1992) 5

Ogan v. Cockrell,
297 F.3d 349 (5th Cir. 2002) 4

Pennsylvania v. Finley,
481 U.S. 551 (1987) 2

Post v. Bradshaw,
422 F.3d 419 (6th Cir. 2005) 8, 10, 11

Spears v. Mullin,
343 F.3d 1215 (10th Cir. 2003) 9

Szabo v. Walls,
313 F.3d 392 (7th Cir. 2002) 9

Wainwright v. Torna,
455 U.S. 586 (1982) (per curiam) 2

Weeks v. Angelone,
176 F.3d 249 (4th Cir. 1999) 4

Wilson v. Corcoran,
131 S. Ct. 13 (2010) (per curiam) 10

Constitutional Provisions, Statutes, and Rules

Sup. Ct. R. 10 4

28 U.S.C. § 2254 8

28 U.S.C. § 2254(a) 10

28 U.S.C. § 2254(i) 1, 7, 9, 11

Other Authorities

Bradford v. Thaler,
No. 09-11519 (U.S.) 6

Foster v. Texas,
No. 10-8317 (U.S.) 6

Kerr v. Texas,
No. 10-10218 (U.S.) 6

INTEREST OF AMICI CURIAE

This case involves the interplay between state and federal habeas. Petitioner seeks a rule that would expand the circumstances under which cases resolved on state habeas via procedural grounds are nevertheless reviewed on the merits in federal habeas proceedings. Amici States thus have a keen interest in the outcome of this case.

SUMMARY OF ARGUMENT

Maples's efforts to distinguish this case from *Coleman v. Thompson*, 501 U.S. 722 (1991), fail—his postconviction attorneys' mistakes caused his procedural default, therefore he is not entitled to federal habeas review of the merits of his claims. Granting Maples an exception to *Coleman* would have implications beyond just the facts of this case.

First, even as Maples attempts to limit this case to its purportedly unique facts, granting Maples relief would inject uncertainty into an area of law where this Court and the courts of appeals are already clear—no cause exists to excuse procedural default when a petitioner's state habeas counsel errs. And second, Maples's limiting principle would prove unworkable, as demonstrated by the number of petitioners who are already seeking review of purported "*Maples* claims." Finally, 28 U.S.C. § 2254(i) provides an additional barrier for Maples's claim that his postconviction counsel's conduct was cause to excuse his procedural default.

ARGUMENT

Maples asserts that "[n]o sustainable system of capital punishment" would preclude federal courts from

excusing his failure to comply with Alabama's appellate deadline and reviewing the merits of his habeas claims. Pet'r Br. 2, 52. But it is Maples, not Respondent, whose argument is in great tension with settled principles regarding the interplay between state and federal habeas.

State habeas corpus is provided as a matter of legislative grace rather than federal constitutional right. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) ("States have no obligation to provide [postconviction] relief."). There is no constitutional right to the assistance of counsel on state habeas. *Giarratano*, 492 U.S. at 10, 12–13; *Finley*, 481 U.S. at 556–57, 559. Thus, there can be no right to have the effective assistance of counsel on state habeas. *Coleman*, 501 U.S. at 752 (Absent a constitutional right to state habeas counsel, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."); *see also Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam). Accordingly, habeas petitioners bear the costs of their attorneys' errors. *Coleman*, 501 U.S. at 754 ("[T]he petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation."). Finally, given the broad sovereign authority States retain over their own judicial functions, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [the Court] must act with

utmost caution before deciding that it is obligated to entertain the claim." *Howlett v. Rose*, 496 U.S. 356, 372 (1990). "The general rule . . . is that federal law takes the state courts as it finds them." *Id.* (citation omitted). Maples's request for relief is irreconcilable with these principles.

Thus, even if this were a case in which a petitioner had been truly abandoned and left without counsel during his state habeas proceedings, relief would be unwarranted. But as Respondent made clear, this is not a case of abandonment. Resp't Br. 7–11, 38–45, 51–54. And Respondent forcefully demonstrates that, under the actual circumstances of this case, *Coleman v. Thompson* forecloses the relief Maples seeks. Resp't Br. 15, 18–23.

Amici States fully support Respondent on those points and do not re-argue them here. Rather, the States will make two brief points regarding the practical implications of adopting Maples's rule and urge one additional reason why Maples is not entitled to the relief he seeks.

I. PROVIDING MAPLES THE REQUESTED RELIEF WOULD UNSETTLE A SETTLED QUESTION OF LAW.

In declining to ask the Court to reconsider *Coleman*, Maples is necessarily disavowing his amicus curiae's suggestion that the Court create a new constitutional right to competent state habeas counsel in capital cases. *See* NAACP Br. 23–26. That new right would have no foundation in either the Sixth Amendment or the Due Process Clause. Moreover, recognizing that right at this time would inject

uncertainty into an area of law that is currently clear. The Court should decline the invitation to overturn the long-settled cases that would be necessary to accomplish that task.

Even Maples's narrower request suffers a similar flaw: in order to provide the relief Maples seeks, the Court must inject uncertainty into an area of the law that is currently settled. Typically, the Court prefers to resolve uncertainty, not create it. *See* Sup. Ct. R. 10 (only "compelling reasons"—which generally involve the resolution of a conflict in the lower courts—warrant certiorari review).

Maples's request, in practical effect even if not by its own terms, requires the Court to find that attorneys who fail to file timely appeals provide their clients with cause to excuse procedurally defaulted claims. *Coleman* forecloses this. *Coleman*, 501 U.S. at 754, 756–57 ("Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas."). And the courts of appeals have been faithful in applying this *Coleman* rule. *Ogan v. Cockrell*, 297 F.3d 349, 356–57 (5th Cir. 2002) (noting that the Fifth Circuit has repeatedly rejected claims that ineffective state habeas counsel can constitute cause to overcome procedural bars); *Weeks v. Angelone*, 176 F.3d 249, 272–74 (4th Cir. 1999) (finding that the alleged ineffective assistance of state habeas counsel was not cause to excuse the default of ineffective-assistance-of-trial-counsel claims); *see also*, *e.g.*, *Cristin v. Brennan*, 281 F.3d 404, 420 (3rd Cir.

2002); *Ellis v. Armenakis*, 222 F.3d 627, 632–33 (9th Cir. 2000); *Neal v. Gramley*, 99 F.3d 841, 843–44 (7th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Johnson v. Singletary*, 938 F.2d 1166, 1174–75 (11th Cir. 1991) (en banc).[1]

The Court should reject Maples's invitation to disrupt this area of law.

II. THE UNTENABLE NATURE OF MAPLES'S PROPOSED LIMITS DEMONSTRATES THE UNWORKABILITY OF HIS PROPOSED RULE.

Maples's petition presented, and the Court granted certiorari on, a narrow, fact-bound question: Can (1) a blameless petitioner, (2) who had attorneys no longer functioning as his agents, establish cause when (3) the State's own conduct contributed to the default? Pet'r Br. i. For any habeas petitioner (including Maples) who cannot establish these factual predicates in his own case, the Court's resolution of the question presented will afford no relief.

Yet, a number of recent petitioners raising unrelated questions have alleged that they are raising "*Maples* issues" requiring the Court's review. This

---

1. Maples might try to distinguish these cases by repeating his claim that "abandonment" by counsel differs from ineffective or poor counsel. But a claim that Maples had no attorney when he missed his filing deadline is contrary to the facts in this case. Resp't Br. 7–11, 38–45, 51–54. Thus, to provide Maples relief, the Court would be required to recognize that the garden-variety failures of Sullivan & Cromwell LLP, Marc De Leeuw, and John Butler in missing the Alabama filing deadline now serve as cause to excuse procedural default.

attempted expansion is unsurprising, especially given the narrowness of the question.[2] Nevertheless, these petitions only further demonstrate what this case makes clear: Maples's argument contains no true, workable limiting principle.

In *Foster v. Texas*, No. 10-8317 (U.S.), the petitioner sought leave to file an out-of-time petition for rehearing and asserted that the grant of certiorari in this case warranted review of his claims that his habeas counsel was not functioning as his agent because he asserted the wrong claims in his case. *Foster v. Texas*, No. 10-8317 (U.S.), Petition for Rehearing of Order Denying Petition for Writ of Certiorari 6–7. Similarly, the petitioner in *Bradford v. Thaler*, No. 09-11519 (U.S.), sought rehearing (citing the Maples certiorari grant) on a petition raising claims that his attorney asserted the wrong habeas claims. *Bradford v. Thaler*, No. 09-11519 (U.S.), Petition for Rehearing of Order Denying Petition for Writ of Certiorari 4. Again, the petitioner deemed raising the wrong arguments as conduct so deficient that counsel no longer served as petitioner's agent. *Id.*; *see also Kerr v. Texas*, No. 10-10218 (U.S.), Petition for Writ of Certiorari to the Texas Court of Criminal Appeals 13.

These petitioners' claims that they were without counsel are overblown; if all a petitioner needed to do to establish "abandonment" and satisfy the "cause"

---

2. Perhaps emboldened by these petitioners' efforts, Maples himself has now tried to expand upon that narrow question by asking the Court to conduct a prejudice inquiry as well. Pet'r Br. 22 n.2.

showing was to come up with any new claim or argument that an attorney did not raise, then overcoming procedural default would pose no challenge.

Maples's contention is also overblown in light of the fact that both Butler and De Leeuw were, at all times, Maples's postconviction counsel. Try as he might, Maples cannot show that *Holland v. Florida*, 130 S. Ct. 2549 (2010), rather than *Coleman*, controls this case. And it makes sense to treat Maples and Coleman the same way. Whether the filing deadline is missed by days (Coleman) or weeks (Maples) the end result is the same: procedural default due to the conduct of postconviction counsel.

III. SECTION 2254(i) PROVIDES AN INDEPENDENT BASIS FOR DENYING THE RELIEF MAPLES SEEKS.

Maples asks the Court to excuse his procedural default on the ground that it was caused by his state habeas counsel, who he asserts abandoned him. But under 28 U.S.C. § 2254(i), the failures of postconviction counsel cannot provide grounds for that relief.

Section 2254(i) states: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

In *Neal v. Gramley*, the Seventh Circuit noted that "procedural defaults due to the blunderings of [counsel in postconviction proceedings] are not to be excused." 99 F.3d 841, 843 (7th Cir. 1996) (Posner, C.J.) (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8–9 (1992); *Coleman*, 501 U.S. at 752–53). The Seventh Circuit

added that "the new habeas corpus statute confirms [this] by providing explicitly that incompetence of counsel in postconviction proceedings, state or federal, is not a ground for relief in federal habeas corpus." *Neal*, 99 F.3d at 843 (citing 28 U.S.C. § 2254(i)). The Court thus concluded:

> It follows directly from the Supreme Court's rulings and the new statute that procedural defaults caused by counsel in state postconviction proceedings will not get the applicant for federal habeas corpus a more favorable standard of review or let him present evidence that a state court has held to be barred as a result of the default.

Id.

Similarly, in *Post v. Bradshaw*, a habeas petitioner filed a Rule 60(b) motion to vacate a judgment denying habeas relief in order to undertake limited discovery. 422 F.3d 419, 421 (6th Cir. 2005). The district court found that postconviction counsel's failure to pursue discovery was "inexcusable neglect" and stated its intention to grant the motion, so the petitioner moved in the Sixth Circuit for a remand of the case. *Id.* The Sixth Circuit denied the motion and explained that the motion "seeks relief from the judgment entered in [the] habeas proceeding brought under 28 U.S.C. § 2254." *Id.* at 421, 423. And the motion sought that relief based upon postconviction counsel's failure to seek discovery. *Id.* at 423. The Sixth Circuit concluded:

> [I]t is clear that, whatever appellation we might apply to counsel's neglect, the ground on

> which Post seeks relief in this Rule 60(b) motion is the incompetent and ineffective representation he received during that federal post-conviction collateral review. But relief on that ground is not permitted under AEDPA.

Id. And, critically, section 2254(i) "bars 'relief,' not simply particular kinds of relief, such as a writ of habeas corpus. We conclude, therefore, that the relief Post seeks is explicitly barred by the provisions of § 2254(i)." *Id. See also Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (noting that section 2254(i) codified the rule that ineffective postconviction counsel is not cause to excuse procedural default); *Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003) ("[I]neffective representation in state post-conviction proceedings is inadequate to excuse a procedural default") (citing 28 U.S.C. § 2254(i)); *Szabo v. Walls*, 313 F.3d 392, 396–97 (7th Cir. 2002) (Easterbrook, J.).

Thus, in these cases "relief" was read to mean more than just a writ of habeas corpus. And this is the reading of section 2254(i) that makes sense. Suppose the word "relief" is read narrowly to encompass only a writ of habeas corpus, then section 2254(i) would in effect say: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for [a writ of habeas corpus] in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). But, of course, counsel errors in a habeas proceeding are not a basis for granting a writ of habeas corpus. Obtaining a writ of habeas corpus requires the petitioner to show "that he is in custody in violation of the Constitution or laws

or treaties of the United States." 28 U.S.C. § 2254(a). As the Supreme Court recently noted, "[f]ederal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law." *Wilson v. Corcoran*, 131 S. Ct. 13, 14 (2010) (per curiam). And because postconviction errors—no matter how serious—occur in a proceeding collateral to the state court judgment on which custody is based, those errors cannot affect the legality of the underlying custody. *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) ("An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself.") (internal quotation marks and citation omitted); *see also, e.g.*, *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009) ("[D]efects in state collateral proceedings do not provide the basis for [federal] habeas relief."); *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) (per curiam). Reading section 2254(i) to preclude only a writ of habeas corpus based on the errors of state postconviction counsel would render section 2254(i) a superfluous addition, because section 2254(a) already precluded such claims prior to the enactment of AEDPA. *See Post*, 422 F.3d at 423 n.1.[3]

Maples asks the Court to find that postconviction counsel's conduct can serve as cause for his procedural default. The "ground" upon which Maples relies is most

---

3. In *Holland v. Florida*, the Court noted that the petitioner did not argue that his counsel's conduct provided a substantive ground for relief. 130 S. Ct. 2549, 2563 (2010).

certainly the "ineffectiveness or incompetence" of his postconviction counsel.[4] 28 U.S.C. § 2254(i). And what Maples seeks—the ability to obtain merits review of defaulted habeas claims—is "relief" within the most appropriate reading of section 2254. *See Post*, 422 F.3d at 423 n.1. Maples's postconviction-counsel-based request to obtain merits review of his habeas claims despite his default is foreclosed by section 2254(i).

One final note: section 2254(i) was added to the habeas statute in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), after the Court's *Coleman* decision made clear that postconviction attorney errors do not provide cause to excuse procedurally defaulted claims. *See Coleman*, 501 U.S. at 754, 756–57. Section 2254(i) thus demonstrates congressional approval of the *Coleman* decision and the underlying principle that postconviction counsel error does not give rise to *any* kind of relief in a proceeding arising under section 2254. Maples's attempt to create an exception to *Coleman* (even were he correct on his abandonment theory) is contrary to AEDPA and should therefore be rejected.

---

4. The use of the phrase "ineffectiveness or incompetence of counsel" is also worth noting, because it suggests at least two things: (1) congressional recognition that ineffective assistance of state habeas counsel does not exist as a claim, because there is no right to such assistance; and (2) section 2254(i) is meant to include something more than just the traditional errors that would be deemed ineffective assistance. As pertaining to this case, attorney "incompetence" should be read to include things like failing to withdraw and failing to file an appearance, even if the Court believes such conduct amounts to abandonment.

CONCLUSION

The Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-0596
adam.aston@oag.state.tx.us

July 7, 2011

COUNSEL FOR AMICI CURIAE