No. 10-63

IN THE
Supreme Court of the United States

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

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

BRIEF FOR AMICI CURIAE THE CONSTITUTION PROJECT AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.[1] The Project's essential mission is to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and filed consent letters with the Clerk.

promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty itself, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness.

The Committee issued its first report in 2001, and in 2005 issued an updated version of its report with thirty-two consensus recommendations. *See* The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) (www.constitutionproject.org/manage/file/30.pdf). The report concludes, *inter alia*, that the "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as

currently administered, arbitrary, unfair, and fraught with serious error." *Id*. at 1.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. The instant case concerns Cato because it represents a disruption in the rule of law caused by the State's own misconduct: notice and the opportunity for hearing are fundamental to the process due any individual upon whom the weight of government power is brought to bear. Cato takes no position on the merits of the death penalty other than that the Constitution does not prohibit it.

SUMMARY OF THE ARGUMENT

The representation of prisoners accused of capital crimes or sentenced to death is unique in its difficulty, and in its consequences when that representation is inadequate. The administration of justice in such cases depends on an effective system of representation for indigent defendants, and constitutionally adequate performance by both courts and counsel in ensuring that prisoners receive fair notice of orders on which their lives may depend. This case, however, exposes some of the serious cracks in that system. The lower courts held that petitioner Cory Maples may be put to death despite potentially meritorious claims that may save his life,

where he did not receive notice of a deadline-triggering order because his principal counsel left the representation for other jobs, and a court clerk did nothing when the letter to them containing the order was returned unopened.

As explained below and in petitioner's brief, there is cause to excuse the resulting default under basic notions of procedural due process and in light of the abdication of Maples' counsel. Even when property interests far less significant than a man's life are at stake, this Court has consistently held that the government must take steps reasonably calculated to ensure notice given all the relevant circumstances. And that is particularly true where, as here, the State represented that that notice was being given to all counsel yet did nothing when it learned that this representation was untrue.

Indeed, if the default is not excused, Maples will be denied his right to meaningful access to the courts. Alabama has chosen not to provide counsel in post-conviction proceedings and instead to rely largely on out-of-state *pro bono* counsel. But if that system is to work, the State must take the most basic steps to ensure that defendants themselves receive notice of orders when the State learns that counsel have abandoned the representation. And that abandonment is yet another reason to excuse the default. This was not an error made by Maples' counsel in the course of representing him; it was a complete abdication of the representation.

But in the end, this case does not turn on whether the State's conduct rises to the level of a constitutional violation or whether counsel's abandonment, standing alone, would constitute cause. This case turns not on precise notions of constitutional error,

but rather on the flexible, equitable discretion to excuse defaults that is inherent in the Great Writ of habeas corpus. The issue in this case transcends views on the death penalty, on which amici have taken no position. It transcends views on the constitutional rights of prisoners. This case measures our courts' basic commitment to correct what reasonable observers would readily perceive as a miscarriage of justice. The orderly functioning of the U.S. criminal justice system will not be impaired if Maples' federal habeas claims are heard, given the constellation of egregious circumstances that underlie this case. But if he is allowed to die with those claims left unheard, damage could be done to the well-deserved reputation of the Nation's judiciary as the ultimate guardian of liberty and justice.

ARGUMENT

I. THE STATE FAILED TO PROVIDE MAPLES ADEQUATE NOTICE.

A. The State Failed To Take Reasonable Steps To Notify Maples Of An Order That Could Result In His Death.

The question in this case is whether there is "cause" to excuse Maples' failure to timely appeal the denial of his state-court petition for post-conviction relief, and thereby allow consideration of federal habeas claims that could save his life. This equitable inquiry focuses on whether the cause of the default may "fairly be attributed" to the petitioner himself or instead to some "external" factor. *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991); *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) (cause requires that "some objective factor external to the defense

impeded counsel's efforts"). In this case, one such external factor was the State itself.

1. When there has been a procedural default, a showing "that 'some interference by officials,' made compliance impracticable, would constitute cause." *Murray*, 477 U.S. at 488 (quoting *Brown* v. *Allen*, 344 U.S. 443, 486 (1953)). *Accord Strickler* v. *Greene*, 527 U.S. 263, 283 n.24 (1999). Here, more than "some interference by officials" led to the procedural default. The state court affirmatively represented that Maples' principal counsel were being notified of the deadline-triggering order, yet the clerk's office took no action to ensure actual notice when it learned that the representation was incorrect. And there can be no legitimate dispute that the default would not have occurred but for these failures.

The Alabama court order denying post-conviction relief recited that *all* counsel were being notified—specifically including Maples' out-of-state counsel handling the substance of his case. JA225 ("CC" notation on order specifically listing out-of-state counsel). The court clerk undertook to carry out this judicial directive by sending the order to those counsel. The mandated notice, however, never occurred because Maples' counsel had left their jobs and a New York mailroom returned the letters unopened. Yet when the clerk's office learned that the notice was never made and therefore that the court's contrary representation was incorrect, it made no attempt to rectify the problem. It did not try to locate Maples' counsel; it did not contact Maples himself in prison (as the prosecution did only after the default); and it did not inform local counsel that the court-mandated notice was never made. Instead, someone just put the returned letters in a file drawer.

As petitioner has shown, Pet. Br. 23-34, these failures by the State not only demonstrate cause to excuse the default, but also violate fundamental principles of procedural due process. The bare "minimum" requirement of the Due Process Clause is that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Mullane* v. *Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950) (emphasis added). Notice must be "reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314 (emphasis added). When notice is due, "process which is a mere gesture is not due process." *Id*. at 315. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*

In *Mullane*, which involved a deprivation of property, the Court held that because the State knew the addresses of the owners there was "no tenable ground for dispensing with a *serious effort* to inform them personally." *Id.* at 318 (emphasis added). And in other property cases, the Court has required specialized efforts at notice, varying on the particular circumstances. *See Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 799 (1983) (where state is aware of recipient's "inexperience or incompetence," Court has required "particularly extensive efforts" at notice); *Greene* v. *Lindsey*, 456 U.S. 444, 453 (1982) (notice must account for fact that notices posted on apartment doors were "not infrequently" removed).

Moreover, as the Court held in *Jones* v. *Flowers*, 547 U.S. 220 (2006), due process requirements

continue to follow the State *after* an unsuccessful attempt at notice. There, repeat attempts to send a tax sale notice to a homeowner by certified mail resulted in the return of the unopened packet. *Id*. at 223-24. Knowledge that the attempted notice was ineffective "triggered an obligation on the government's part to take *additional steps* to effect notice," *id*. at 230 (emphasis added), and the failure to follow up was unreasonable even though the letters were reasonably calculated to reach their intended recipients when delivered to the postman. *Id*. at 229.

As the Court analogized, "[i]f the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again." *Id*. "[N]o one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.'" *Id*. (citation omitted). When exerting extraordinary power against a property owner, "[i]t is not too much to insist that the State *do a bit more* to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Id*. at 239 (emphasis added). But the State did "nothing." *Id*. at 234.

Under *Jones*, due process requires corrective action even when the failure of notice is due to the recipient's own *willful* actions. In *Schlereth* v. *Hardy*, 280 S.W.3d 47 (Mo. 2009) (en banc), the purchaser of property at a tax delinquency sale complied with a statutory requirement by attempting to send notice to the former owner by certified mail. The former owner, however, willfully refused to

claim the mail. Nevertheless, the court held that because the purchaser knew that notice had not been effected, *Jones* required him "take additional steps to ensure adequate notice" and he "may be well advised to use a process server to ensure that the *best notice practicable* is delivered if the addressee does not sign for it." *Id.* at 52 (emphasis added).

In this case, it is even more clear that the State's efforts at notice were neither "appropriate to the nature of the case" nor reasonably calculated to provide Maples actual notice "under all the circumstances." *Mullane*, 339 U.S. at 313-14. In *Jones*, the State's efforts were particularly deficient given that "the subject matter of the letter concern[ed] such an important and irreversible prospect as the loss of a house." 547 U.S. at 230. This case involves the most important and irreversible deprivation that can ever exist: a man's *life* was at stake. If due process requires notice before property can be taken—and it does—then surely it requires at least the same notice before a life can be taken. Accordingly, even more so than in *Jones*, the State was required to "take additional steps" and "do a bit more" to provide notice. *Id.* at 230, 239.

2. Nor can the State's failures be disregarded because Maples' local counsel could have learned, with additional inquiry, that the court's order erred in stating that principal counsel would be notified. Under this Court's precedents, there is cause to excuse a habeas petitioner's procedural default where the State has made an erroneous representation on which counsel reasonably relies.

In *Strickler* v. *Greene*, *supra*, a petitioner's post-conviction counsel failed to raise a *Brady* claim that

prosecutors withheld exculpatory witness interview documents, yet the Court found cause to excuse that default. The Court recognized that counsel "must have known" of the interviews, 527 U.S. at 285, but counsel did not investigate the possible existence of undisclosed documents, which were eventually revealed in discovery in the federal habeas proceeding. Nevertheless, the Court held that cause existed to excuse the default because petitioner's counsel reasonably relied on the State's "open file" policy, under which the prosecution allowed access to all its files and which constituted an "implicit representation" that all exculpatory materials were contained in those files. *Id.* at 284. Counsel was entitled to rely on "[t]he presumption, well established 'by tradition and experience,' that prosecutors have fully 'discharged their official duties.'" *Id.* at 286 (citations and quotations omitted).

Here, there was an *explicit* representation by the State, through a notation in a court order, that Maples' principal counsel were being notified. *See also* Ala. R. Crim. P. 34.4 (requiring service on all attorneys of record). And Maples' local counsel, who never undertook to handle any substantive aspects of the representation, was reasonably entitled to rely on the correctness of that notation given the presumption that the court clerk had fully discharged his official duties. When the clerk learned that those duties had not been properly discharged, the clerk had an obligation to do *something* to correct the error, either by attempting to locate the *pro bono* counsel, or by informing Maples or his local counsel that the court-ordered notice was not made.

Even where a man's life does not depend on it, a missed deadline will be excused where a clerk fails to

take such corrective action. For example, in *Babich* v. *Clower*, 528 F.2d 293 (4th Cir. 1975), a court had instructed the clerk to serve a deadline-triggering order on "all counsel of record." *Id*. at 295. Local counsel received the order but out-of-state lead counsel did not, resulting in a missed appeal deadline. A rule provided that service on local counsel was considered the equivalent of service on all parties for whom the local counsel appeared. Nevertheless, the court held that where the clerk has instructed that "all counsel of record" receive an order, it is reasonable for local counsel to assume that out-of-state lead counsel will receive and act on the order as they had in the past. In such circumstances, the court refused to deprive the plaintiffs of a right to appeal that was lost "through no fault of their own." *Id*. The court made clear that local counsel could reasonably rely on the court-ordered statement that *all* counsel of record were served, regardless of the language of the local rule. *Id*. at 296.

Where the State undertakes an obligation to notify all counsel of a court order that could result in a person's execution and has represented that this obligation will be discharged, it cannot sit idly by and do nothing when it learns that the notice was never made. No person should be put to death because government officials have failed to carry out such basic and obvious duties.

B. If The Default Is Not Excused, The State's Inaction Will Deny Maples Meaningful Access To The Courts.

There is even more cause to excuse Maples' default in this case, because the State's affirmative obligations to him go beyond the mere minimum

notice requirements of due process. It is "established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977). *See also Lewis* v. *Casey*, 518 U.S. 343, 350 (1996). The right of access includes habeas proceedings. *Bounds*, 430 U.S. at 821-22. *See also Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O'Connor, J., concurring) (recognizing right of "meaningful access" to post-conviction process). If the State's failure of notice is not rectified in this case, Maples will have been denied that constitutional right.

Just like its affirmative obligations under *Jones* to ensure adequate notice, the State has "affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824. Thus, in *Bounds*, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. The State must ensure that prisoners have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825.

In *Murray* v. *Giarratano*, *supra*, the Court held that Virginia's lack of appointed counsel for post-conviction proceedings did not deny prisoners meaningful access to the courts. Justice Kennedy, however, provided the critical fifth vote, noting that "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." 492 U.S. at 14 (Kennedy, J., concurring). His opinion confirmed that whatever

combinations of resources states dedicate to ensure prisoners' ability to file habeas petitions, that scheme must ensure meaningful access to the courts. *Id*. On the facts of that case, Justice Kennedy found that "[w]hile Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Id*. at 14-15.

The assurances Justice Kennedy found sufficient in *Murray* were absent from this case. The Eleventh Circuit has held that Alabama is not constitutionally required to provide counsel for post-conviction capital proceedings. *See Barbour* v. *Haley*, 471 F.3d 1222 (11th Cir. 2006). And Alabama, alone among all the states, has not done so. Instead, Alabama has chosen to rely on whatever representation a prisoner can locate on his own, which in most cases is out-of-state *pro bono* counsel like those who were initially representing Maples. *See* Pet. Br. 3-6. Alabama justifies this system because it believes it can rely on "'the efforts of typically well-funded out-of-state volunteers.'" *Id*. at 4 (citation omitted).

If Alabama is going to rely upon this patchwork system, however, the State must make sure it works. Given that Alabama relies on out-of-state counsel to ensure that condemned prisoners have meaningful access to post-conviction proceedings, it needs to take basic steps to ensure that these counsel receive adequate notice of court orders and that prisoners receive notice when the lawyers abandon the representation. Having given indigent death row inmates

the choice either to go it alone *pro se*, or to rely on whatever free counsel they can find, the State has an "affirmative obligation," *see Bounds*, 430 U.S. at 824, to ensure that prisoners receive *meaningful* notice of deadlines that affect their access to the courts. Once the court clerk learned that Maples' counsel had abandoned their representation of him by leaving their jobs, it could not simply stand idly by.

Had Maples instead proceeded *pro se*, he would have been entitled to direct notice, served on him personally, and the failure to provide such notice would unquestionably be cause to excuse any resulting default.[2] The State of Alabama has chosen to rely largely on out-of-state *pro bono* counsel to fulfill its obligations to ensure meaningful access to the courts. But once the State has knowledge that these counsel have abandoned that obligation in a case, the State has the affirmative obligation to ensure that the prisoner's access continues. At a bare minimum, that includes the obligation to provide Maples with the same notice he would receive if he were proceeding *pro se*. When mail to counsel is returned unopened, the State cannot just put the mail in a drawer and forget about it.

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[2] *See* Ala. R. Crim. P. 34.5 ("Upon the entry of any order in a criminal proceeding made in response to a motion, other than an order made in open court, the clerk shall, without undue delay, furnish all *parties* a copy thereof by mail or by other appropriate means approved by the judge.") (emphasis added); *Sanders* v. *United States*, 113 F.3d 184, 187 (11th Cir. 1997) ("[W]hen through no fault of his own, a pro se litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court.").

Thus, the State failed to provide the minimum notice required by due process, to correct the record once it knew that the promised notice never occurred, and to discharge its affirmative obligations to ensure meaningful access to the courts. All these factors, taken together, constitute sufficient "external" cause to excuse the procedural default for which Maples himself was indisputably blameless.

II. MAPLES' COUNSEL ABANDONED HIM.

In finding no cause to excuse the procedural default, the Eleventh Circuit relied on the rule that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings * * *, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Pet. App. 17a (quoting *Coleman*, 501 U.S. at 752). But Maples' habeas claim does not involve the ineffectiveness of his post-conviction counsel in the constitutional sense; his underlying claim is that his *trial* counsel provided such ineffective assistance. His post-conviction counsel provided *no* assistance whatsoever when it was time to appeal.

Coleman held that "'*[s]o long as a defendant is represented by counsel* whose performance is not constitutionally ineffective * * * we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.'" *Id*. at 752 (quoting *Murray* v. *Carrier*, 477 U.S. at 488) (emphasis added). For that important qualification to make sense, a defendant cannot be made to bear the risk of attorney error when his attorney is not actually representing him. Maples' *pro bono* counsel left their law firm, and his local counsel never assumed any responsibility for the representation

from the outset. That is not a mere attorney error. It is abandonment.

In *Holland* v. *Florida*, 130 S. Ct. 2549, 2554 (2010), the Court held that the Eleventh Circuit's rule that even "grossly negligent" attorney conduct could never warrant equitable tolling of the federal habeas limitation period was "too rigid." In that case, there was "a complete breakdown in communication" between a habeas petitioner and his attorney, who had "abandoned" his client, *id*. at 2555, necessitating the client's *pro se* filing of an untimely federal habeas petition. *Id*. at 2559. Finding that "'some extraordinary circumstance stood in his way'" that prevented timely filing, the court excused him from the missed deadline. *Id*. at 2562 (citation omitted).

Justice Alito explained how *Holland*'s reasoning applies to the "cause" issue before the Court here. When an attorney has "effectively 'abandoned'" a habeas petitioner, that "suffice[s] to establish extraordinary circumstances beyond his control" because "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id*. at 2568 (Alito, J., concurring) (citing *Coleman*, 501 U.S. at 754). Maples' attorneys provide an even more dramatic and compelling instance of leaving a client "effectively abandoned." His principal counsel did not just figuratively abandon Maples, they literally did so, leaving their jobs and therefore the representation of him. And his local counsel *never* undertook any substantive representation of him. Pet. Br. 10.

The Eleventh Circuit held that "the factor that resulted in Maples' 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. As shown above, the State's own actions were another principal factor that caused the default. But regardless, the Eleventh Circuit's reasoning cannot survive *Holland*. Once counsel had abandoned the representation, Maples' lack of notice—through no fault of his own—became "something external * * * that cannot fairly be attributed to him," that excused the purported default. *Coleman*, 501 U.S. at 753.

The Eleventh Circuit's holding that Maples "cannot establish cause for his default because there is no right to post-conviction counsel," Pet. App. 17a, is completely backward. The lack of a right to post-conviction counsel is a reason why equitable principles demand greater sensitivity to the impact of extraordinary attorney misconduct—not less. In the context of trial-level procedural defaults, this Court has held that "[t]he ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices." *Murray* v. *Carrier*, 477 U.S. at 496. There is less need to employ equitable powers to excuse "sufficiently egregious and prejudicial" trial-level defaults because ineffective assistance claims are available to reach the same result and avoid injustice. *See id.* ("[t]he presence of such a safeguard may properly inform this Court's judgment in determining '[w]hat standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims") (quoting *Reed* v. *Ross*, 468 U.S. 1, 9 (1984)).

In this case, however, the procedural default occurred in part because of egregious and prejudicial conduct by Maples' *post-conviction* attorneys. For that conduct, the safeguard of an ineffective assistance claim is unavailable. Because that critical "safeguard against miscarriages of justice" is absent in the post-conviction context, inflexible application of the procedural default rule for the actions of post-conviction counsel will in fact lead to "unremedied manifest injustices." *Murray*, 477 U.S. at 496. Indeed, just such a manifest injustice will occur in this case if the default engendered by Maples' post-conviction counsel is not excused.

III. EQUITY REQUIRES EXCUSING THE DEFAULT UNDER THESE CIRCUMSTANCES.

Few, if any, reasonable observers would conclude that it is fair or equitable to uphold the application of the death penalty in a case based on a missed deadline, without considering claims that could well save a man's life, simply because his lawyers left their jobs, a mailroom returned letters to them unopened, and the court represented that they were being notified but did nothing when it discovered that the notice was never received. The Court need hold no more than that in order to reverse the Eleventh Circuit's judgment.

"[T]he only writ explicitly protected by the Constitution," habeas corpus is "an area of the law where equity finds a comfortable home." *Holland*, 130 S. Ct. at 2561 (citing *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008)). *See Schlup* v. *Delo*, 513 U.S. 298, 319 (1995) ("Habeas corpus is, at its core, an equitable remedy."); 28 U.S.C. § 2243 (court entertaining habeas petition shall "dispose of the

matter as law and justice require"). The Great Writ "is not now and never has been a static, narrow, formalistic remedy." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

Equitable principles are at the heart of the cause-and-prejudice rule at issue in this case. As the Court has held, it is given the "equitable power to overlook [a] respondent's state procedural default." *Dugger* v. *Adams*, 489 U.S. 401, 410 (1989). Thus, the "cause and prejudice" rule is, at its core, "an equitable exception." *Dretke* v. *Haley*, 541 U.S. 386, 393 (2004). *See McCleskey* v. *Zant*, 499 U.S. 467, 490 (1991) ("A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion."). The "cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke*, 541 U.S. at 393 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984)) (bracketed material in original). "The terms 'cause' and 'actual prejudice' are not rigid concepts," and "[i]n appropriate cases" the principles of comity and finality that underlie the procedural default rule "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle* v. *Isaac*, 456 U.S. 107, 135 (1982).

This is such a case. Equity and fundamental fairness dictate that a man should not be put to death without consideration of potentially meritorious claims because his lawyers left their firm and the representation without substituting other counsel; a mailroom made no attempt to re-route correspondence to others in the firm; and the court had represented that the lawyers were being

notified, but the clerk did nothing to ensure proper notice when the letters were returned unopened. Regardless of whether these deficiencies constitute a violation of due process or the right of meaningful access to the courts, or whether counsel's abandonment, by itself, would require excusing the default if proper notice had been received, the combination of these factors warrants equitable relief. *See Strickler*, 527 U.S. at 289 ("We need not decide in this case whether any one or two of these factors would be sufficient to constitute cause, since the combination of all three surely suffices.").

Moreover, in considering whether equity requires consideration of the merits of Maples' claims, the Court should not lose sight of what is at stake. "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). In its finality, death is "qualitatively different from a sentence of imprisonment, however long," creating a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). In particular, "[i]n capital cases, it is *constitutionally* required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence." *Sumner* v. *Shuman*, 483 U.S. 66, 72 (1987) (emphasis in original; citation and quotation omitted).

If the procedural default is not excused, no federal court will ever consider the merits of Maples' underlying claims, which allege a litany of failures by his lawyers. Maples' appointed trial counsel had never

previously tried the penalty phase of a capital case. The State called 60 witnesses at trial. JA44. But Maples' counsel were paid a maximum of $1,000 for out-of-court work for each phase of the trial, making it impossible to adequately prepare for cross-examination, rebuttal, or expert witnesses. JA30-31 (citing Ala. Code § 15-12-21 (1975)).

Maples' counsel admitted to the jury that they "'may appear to be stumbling around in the dark.'" Pet. Br. 8 (citation omitted). And they were. Undercutting a diminished capacity defense, counsel told the jury that the case was about Maples' "own actions for which he is responsible." JA33. Although evidence of intoxication could have rebutted the charge of capital murder, Maples' counsel not only failed to present such evidence but objected to and attempted to rebut the State's presentation of such evidence. JA35. No jury instruction was requested on intoxication or the lesser offense of manslaughter. JA39. And counsel undermined both their own and Maples' credibility by pursuing conflicting strategies at the guilt and sentencing phases. During the guilt phase, they argued that "[t]here is no evidence that [Maples] consumed drugs that night." JA37. But during the sentencing phase, they told the jury that there was both alcohol and drug use, JA124, which reflected the actual evidence. JA35-37.

At sentencing, counsel failed to elicit mitigating evidence regarding Maples' tortured upbringing by his birth mother as well as evidence indicating that Maples' birth mother and maternal grandmother probably suffered from mental illness. JA87-88. For example, counsel failed to elicit testimony that Maples' mother tried to choke him, tied him to a chair and beat him with a broom handle, and would

alternatively abandon Maples at times of his life and return with highly erratic behavior. JA89-91.

Particularly given that the jury recommended a death sentence by the bare minimum vote, Pet. Br. 7, it is reasonable to think that Maples' claims of ineffective assistance may have merit. Under the Eleventh Circuit's holding, however, no federal court can review Maples' serious claims of ineffective assistance of counsel at trial because he was the victim of even more egregious misconduct by his attorneys at the post-conviction stage, aggravated by the clerk's failure of notice. That this case involves multiple levels of error, rather than just one, is no reason to ignore those errors when the result literally involves a question of life or death.

The Court need only hold that equity requires excusing the procedural default on the particularly egregious facts of this case. No statute requires a contrary result. And such a case-specific equitable holding will wreak no havoc on the criminal justice system. Defaults engendered by other, less problematic circumstances will still be respected, and no violence will be done to the legitimate principles of finality and comity that animate the procedural default rule. But a failure to do equity in this one case could have broader consequences for the well-deserved perception of our Nation's courts as fair arbiters of justice, a perception that ultimately sustains the authority and legitimacy of the judiciary.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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