No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

RICHARD F. ALLEN,
Commissioner, Alabama Dept. of Corrections,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals for
the Eleventh Circuit

BRIEF IN OPPOSITION

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(Capital Case)

QUESTIONS PRESENTED

Cory Maples failed to appeal the dismissal of his state post-conviction petition within 42 days, as mandated by Alabama law. As a result, Maples failed to exhaust his post-conviction remedies in the state appellate courts.

Both the district court and the court of appeals held that Maples' failure to exhaust constituted a procedural default of his post-conviction claims during federal habeas review. The questions presented are:

1. Is Alabama's 42-day time limit for filing a notice of appeal an independent and adequate state procedural rule that warrants procedural default during federal habeas review?

2. To excuse his procedural default, can Maples establish that his failure to appeal the denial of his state post-conviction petition was "caused" by either the state circuit clerk or his "abandonment" by post-conviction counsel when Maples raised neither of these arguments below?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

Blank Page

BRIEF IN OPPOSITION

INTRODUCTION

Every state and federal appellate court limits the amount of time for filing a notice of appeal or petition for a writ of certiorari. Nearly every day, a party forfeits his appeal by missing one of these deadlines.

Petitioner Cory Maples says that it is a "shocking prospect" that the failure of a death row inmate to meet a filing deadline forfeits further review of the inmate's claims, Pet. 10, and "the fact that a man may be executed in these circumstances ought to be enough to merit this Court's review." Pet. 11. But filing deadlines apply to death row inmates. For example, this Court rejected Ryan Heath Dickson's certiorari petition as untimely because he missed the Court's 90-day filing deadline by one day. *See Bowles v. Russell*, 551 U.S. 205, 212 n.4 (2007). Four months later, Dickson was executed "without any Member of this Court having ever seen his petition for certiorari," much less having reviewed its merits. *Id.*

Alabama similarly applies its 42-day deadline for filing notices of appeal. Ala. R. App. P. 4(a)(1). Maples was represented in state post-conviction proceedings by local counsel and a team of attorneys from a multi-million-dollar law firm, Sullivan & Cromwell. A series of errors lead to Maples missing the 42-day filing deadline: (1) The attorneys of record from Sullivan & Cromwell left the firm but failed to notify the state court; (2) the firm assigned new attorneys to Maples' case, who likewise failed to notify the state court; and, apparently, (3) no one

notified the firm's mailroom of the switch. As a result, when the state circuit clerk mailed copies of the court's order dismissing Maples' petition to Maples' attorneys of record, the Alabama attorney took no action, believing that Sullivan & Cromwell attorneys would file the notice of appeal, and Sullivan & Cromwell returned its copies of the order, unopened.

Alabama codifies the consequence of failing to meet the 42-day filing deadline: "An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court." Ala. R. App. P. 2(a). Maples failed to exhaust his post-conviction claims in state court by failing "to invoke the jurisdiction of the appellate court[s]." *Id.* Applying this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), both the district court and court of appeals held that (a) each of Maples' claims that arose during the state post-conviction proceedings is procedurally defaulted from habeas review for failure to exhaust in state court and (b) the errors of post-conviction counsel cannot excuse the default. The courts were correct, and certiorari review is unwarranted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Maples correctly cites the relevant Constitutional and statutory provisions, Pet. App. 242a-252a, except that he omits the state procedural rule that bars any attempt to exhaust Maples' post-conviction claims in Alabama's appellate courts:

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 2. PENALTIES FOR NON-COMPLIANCE WITH THESE RULES; SUSPENSION OF RULES

(a) Dismissal of Appeal

(1) An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.

STATEMENT OF THE CASE

Both questions presented require fact-intensive inquiries. Accordingly, the State details the history of this case at length. We do so with an eye toward three facts that not only drive the questions presented, but we believe are not fully and fairly fleshed out in Maples' petition:

- The factual distinction between Maples' post-conviction representation and the representation of the petitioner in *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002) (Question #1, Pet. 13-17);

- Maples' decision below *not* to argue that the state circuit clerk was the "cause" of his failure to appeal (Question #2, Pet. 24-27);

- Maples' continuous representation by Sullivan & Cromwell attorneys, and Maples' failure to argue below that his attorneys abandoned him (Question #2, Pet. 27-33).

A. The Murders of Stacy Terry and Barry Robinson

Maples spent the evening of July 7, 1995, "drinking, playing pool, and riding around" with Stacy Terry, a high school acquaintance. Pet. App. 36a-37a. When the duo left the pool hall later that evening, they agreed to give another acquaintance, Barry Robinson III, a ride home. Pet. App. 37a.

Their first stop was Maples' house. Upon arriving, Maples got out of Mr. Terry's car and went into his home, where he retrieved his father's .22 caliber rifle. *Id.* When he returned, Maples walked to the driver's side of the car and shot Mr. Terry twice in the head before shooting Mr. Robinson twice in the head, killing both instantly. *Id.* Maples removed Mr. Terry from the driver's seat and fled in his car.

Shortly after the murders, Maples' half-brother discovered Mr. Terry's body sprawled on the driveway. *Id.* Police found Mr. Robinson's body in a nearby creek 20 hours later. *Id.* Nearly a full month passed before police located Maples in a Nashville, Tennessee hotel. Pet. App. 38a. The day after his apprehension, Maples confessed to both murders. *Id.*

B. Maples' Trial and Direct Appeal

Maples was tried and convicted of intentional murder during a robbery and the intentional murder of two or more persons, both capital offenses under Alabama law. *See* Ala. Code §§13A-5-40(a)(2),

-40(a)(10). Following the jury's recommendation, the state trial court sentenced Maples to death.[1]

Both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Maples' conviction and death sentence on direct appeal. *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999); *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App. 1999). This Court denied certiorari review. *Maples v. Alabama*, 531 U.S. 30 (2000).

C. State Post-Conviction Proceedings

1. *The Rule 32 Petition*: Maples filed a post-conviction "Rule 32" petition with the state circuit court on August 1, 2001, which he later amended. Doc. #30, Tabs 47, 49. In his petition, Maples raised several claims of ineffective assistance of trial counsel.

Maples' Rule 32 petition was filed by Clara Inga-Housz and Jaasi Munaka, both attorneys with the New York office of Sullivan & Cromwell, and by local counsel, John G. Butler, Jr. Pet. App. 222a.

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[1] The State does not detail Maples' trial strategy because Maples' ineffective assistance of counsel claims are procedurally defaulted. But we do note the glaring factual omission in Maples' contention that trial counsel were ineffective for failing to prove that Maples was intoxicated when he committed the murders. Pet. 3-4. Maples' attorneys argued that Maples was *not* intoxicated at the time of the murder, and presented three witnesses to back up their assertion, because they were faced with Maples' signed confession that, despite having several beers by 8:00pm, he "didn't feel very drunk" when he murdered Mr. Terry and Mr. Robinson several hours later. Pet. App. 2a; Doc. #30, Tab 2 at 207-210, 2739, 2749, 2757, 2761.

Attorneys Inga-Housz and Munaka were granted *pro hac vice* status pursuant to Rule VII(A) of the Alabama Rules of Admission to the Bar. Pet. App. 223a. Attorney Butler served as Sullivan & Cromwell's local sponsor pursuant Rule VII(C), which bestowed upon him "joint and several responsibility with the foreign attorney[s]."

The state circuit court entered a written order denying Maples' Rule 32 petition on May 22, 2003. Pet. App. 222a; Doc. #30, Tab 66. Pursuant to Rule 34.4 of the Alabama Rules of Criminal Procedure, the circuit clerk promptly mailed a copy of the court's order to "all of the attorneys of record at the addresses provided by each attorney." Pet. App. 222a. "Included on that list were attorneys Clara Inga-Housz and Jaasi Munaka [address omitted], as well as local counsel John G. Butler." Pet. App. 222a-223a. Pursuant to the same state rule, the clerk did not mail a fourth copy to Maples in prison. *See* Ala. R. Crim. P. 34.4 (requiring service on both a represented defendant/petitioner and his attorney(s) to announce "hearings at which the defendant's presence is required" and only on counsel "[a]s to all other notices or documents").

2. *The Failure to Appeal*: Maples had 42 days to file a notice of appeal with the circuit clerk. Ala. R. App. P. 4(a)(1). The failure to meet that July 7, 2003 deadline subjected Maples' case to mandatory dismissal. Ala. R. App. P. 2(a) ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court"). But when July 7th came, Maples' notice of appeal did not.

Another month passed. Maples filed nothing. Recognizing that Maples' September 9, 2003 deadline for filing his federal habeas petition was approaching, and that Maples still had the ability to seek habeas review of his fully-exhausted claims from direct appeal, the State's attorney took action. On August 13, 2003, Assistant Attorney General Jon Hayden wrote Maples a letter, informing Maples of the upcoming deadline for filing a federal habeas petition and providing him with the name and address of the district court clerk with whom the petition should be filed. Pet. App. 253a-254a.

Upon receiving the letter, Maples contacted his mother, who in turn contacted Sullivan & Cromwell. Pet. App. 258a. Maples, through different Sullivan & Cromwell attorneys, moved the state circuit court to vacate its May 23rd dismissal order and replace it with a new dismissal order, thereby resetting the 42-day window to appeal. Pet. App. 223a. Maples attached two affidavits to the motion. In the first, local counsel Butler admitted that he received his copy of the May 23rd dismissal order but took no action because he believed the Sullivan & Cromwell attorneys would. Pet. App. 255a-256a. In the second, Marc De Leeuw, a Sullivan & Cromwell attorney, averred that (1) Attorneys Ingen-Housz and Munanka left the firm in 2002; (2) since their departure, "other lawyers at S&C have worked on this case;" and, (3) the copies of the final order sent to Attorneys Ingen-Housz and Munanka "had been returned to the clerk's office." Pet. App. 257a-258a.

The circuit court denied Maples' request to vacate its original order and issue a substitute, stating that "[t]his Court is unwilling to enter into subterfuge in order to gloss over mistakes by counsel." Pet. App. 224a. The court found that the circuit clerk properly served all three of Maples' attorneys of record at their listed addresses, with local counsel receiving his copy and both foreign counsel returning their copy, unopened, marked "Return to Sender." Pet. App. 222a-223a. The court further found that, despite the departure of Maples' original attorneys from Sullivan & Cromwell, and the firm's assignment of new attorneys to Maples' case, no one notified the court or its clerk of the switch. Pet. App. 223a.

3. *The Mandamus Proceeding*: Alabama's 42-day filing deadline speaks in mandatory and jurisdictional terms. *See* Ala. R. App. P. 4(a)(1) ("the notice of appeal shall be filed with the clerk of the trial court within 42 days"); Ala. R. App. P. 2(a) ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court."). Yet, the Alabama courts have granted criminal appellants with an out-of-time appeal in the limited instances in which the defendant/petitioner's constitutional rights were implicated. Pet. App. 13a (outlining the "three limited circumstances").

Still represented by Sullivan & Cromwell attorneys, Maples filed a mandamus petition with the Alabama Court of Criminal Appeals seeking an out-of-time appeal. Doc. #30, Tab. 51. Maples relied on the same court's granting of an out-of-time appeal

in *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002), rev'd on other grounds, 884 So. 2d 900 (Ala. 2003)—the same case upon which Maples bases Question One here, *see* Pet. 13-17—to argue that an out-of-time appeal is due when a Rule 32 petitioner fails to personally receive a copy of the court's dismissal order. Pet. App. 231a.

The appellate court denied Maples' petition. The court noted that (1) unlike Maples, the petitioner in Marshall "was proceeding *pro se*" and (2) Alabama courts had granted out-of-time appeals only "when there was evidence indicating that the circuit clerk failed to mail notification that the Rule 32 petition had been denied," which amounted to a violation of "procedural due process." Pet. App. 232a. The court held that Maples "failed to show that his right to procedural due process was violated" because Criminal Rule 34.4 mandated service on Maples' attorneys (not Maples) and the circuit clerk had mailed a copy of the final order to all three of Maples' attorneys of record. Pet. App. 234a-236a.

Both the Alabama Supreme Court and this Court denied review without opinion. Doc. #30, Tabs 68, 69.

D. Federal Habeas Proceedings

1. *District Court*: Maples timely filed a federal habeas petition pursuant to 28 U.S.C. §2254. Doc. #1. Maples was represented by the same Sullivan & Cromwell attorneys who led his attempts to garner an out-of-time appeal in state court. In their September 12, 2003 motions for admission *pro hac*

vice, each of Maples' Sullivan & Cromwell attorneys swore that he or she had been working on Maples' case since before the state circuit court issued its dismissal order. Docs. #2 at 1, #3 at 1, #4 at 1.

In his petition, Maples raised claims that arose both on direct appeal and during his post-conviction proceedings. With regard to Maples' ineffective assistance of counsel ("IAC") claims, which arose during Maples' state post-conviction proceedings, the State argued that the claims were procedurally defaulted for alternative reasons: (1) Maples' failure to sufficiently plead the claims in the state circuit court and (2) Maples' failure to exhaust the claims on appeal. Doc. #29 at 23.

The district court denied Maples' petition. The court rejected 27 claims arising from Maples' direct appeal on the merits. Pet. App. 56a-202a. The district court held that Maples' IAC claims were procedurally defaulted due to Maples' failure to appeal the dismissal of his Rule 32 petition. Pet. App. 48a-55a. With regard to the "firmly established and regularly followed" question, the district court held that Maples' reliance on "the unique factual circumstances" in *Marshall* was misplaced because "[t]here is no indication that Maples ever submitted *pro-se* pleadings nor did he request that he be informed of the status of his case.[2]" Pet. App. 54a. With regard to "cause and prejudice," the court held

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[2] In response to Maples' motion to alter the court's judgment, the district court entered a second, "extended parsing of *Marshall*" to establish the "clear factual distinction" between the two cases. Pet. App. 212a-215a.

that "[t]here is no constitutional right to postconviction counsel, and as such, the ineffective assistance of counsel cannot establish the cause and prejudice necessary to overcome Maple's procedural default." Pet. App. 55a.

2. *Circuit Court of Appeals*: Sullivan & Cromwell attorneys continued to represent Maples in the court of appeals. Concerning the "cause" of his failure to appeal in state court, Maples did not argue to the court that his attorneys "abandoned" him in May 2003, as he argues now. *See* Pet. 27-32. Instead, Maples argued in his initial brief that:

> Mr. Maples has established cause by the very fact that he never received a copy of the State's *sua sponte* order dismissing his Rule 32 Petition. [Citations omitted.] Cause exists when a court fails to properly deliver the required documents so that a petitioner may timely affect an appeal.

Maples v. Allen, No. 07-15187 (11th Cir.), Blue Br. 21. In its brief, the State challenged Maples' contention: "In other words, Maples tries to shift blame to the circuit clerk." *Maples*, *supra*, Red Br. 21. Maples clarified his argument in response:

> The State then argues that Mr. Maples cannot establish cause by 'shift[ing] the blame ... to the circuit clerk.' (Appellee Br. at 21-22.) This straw-man argument misses the point. Mr. Maples demonstrated cause because an external objective factor—a mailroom oversight—impeded his efforts to

> comply with a state procedural rule. (Opening Br. at 20-21.) This mailroom clerical error qualifies as an 'exculpatory reason' for not filing a timely appeal from the *sua sponte* dismissal of Mr. Maples' Rule 32 petition.
>
> Mr. Maples is not seeking to 'shift the blame' to the circuit clerk or anyone else. (*See* Opening Br. at 20-21.) Rather, because 'clerical error was to blame,' Mr. Maples has established cause to excuse a procedural default.

Maples, *supra*, Reply Br. 8-9. At oral argument, which we detail further below, Attorney De Leeuw confirmed four times that the "mailroom clerical error" that Maples claimed established cause and prejudice was the failure of the Sullivan & Cromwell mailroom to forward him a copy of the state court's dismissal order. Attorney De Leeuw expressly disavowed making the argument that the circuit court clerk constituted the "cause" of Maples' default.

A divided panel of the court of appeals affirmed, holding that Maples' IAC claims were procedurally defaulted due to Maples' failure to exhaust. The court found that "Alabama's 42-day and out-of-time appeal rules were firmly established by the Alabama courts." Pet. App. 12a. Like the district court and state appellate court, the court of appeals distinguished the *Marshall* case by noting that, unlike Maples who "relied exclusively on his counsel and made no attempt to deal directly with the state trial court or its clerk," Pet. App. 16a,

"Marshall had filed 'numerous *pro se* motions and pleadings'" and "[t]he out-of-time appeal in *Marshall* was granted only because the 'court assumed a duty of notification it did not otherwise owe the petitioner and then failed to perform that duty.'" Pet. App. 14a (quoting *Marshall*, 884 So. 2d at 903).

Regarding "cause and prejudice," the court found that the cause of Maples' failure to exhaust was "counsel's failure to file a timely notice of appeal of the Rule 32 Order."[3] Pet. App. 17a. The court held that post-conviction counsel's failure "cannot establish cause for [Maples'] default because there is no right to post-conviction counsel." Pet. App. 17a.

3. *The Oral Argument Transcript*: Maples replaced his Sullivan & Cromwell attorneys with his present counsel for rehearing. In his rehearing petition, Maples argued that the court of appeals erred by "refus[ing] to recognize" that the "trial court clerk['s]" failure to act upon the receipt of Sullivan & Cromwell's unopened mail "itself constituted cause." Pet. for Rehearing and Rehearing *En Banc* at 10-13.

Having argued the case below, the undersigned called Maples' current counsel to inform him that Maples' former counsel expressly disavowed this claim during oral argument, which by circuit rule is not transcribed for anyone except the court. App. 5a. *See* Eleventh Circuit Rule 34-4(g). The undersigned then moved the court of appeals to suspend Rule 34-4(g) and provide both parties with a transcript because "[i]t is in neither party's interest

[3] The dissent agreed that "any such default is entirely the fault of [Maples'] post-conviction counsel." Pet. App. 30a.

to present this Court, or the Supreme Court, with a conceded argument." App. 1a-7a. The court consented, but only upon the condition that each party return the transcript to the court within 60 days, without making a copy. App. 8a-11a. Because the only copy of the transcript resides with the court of appeals, we cannot quote from it. But we can point the Court to the relevant pages:

- *Page 3*: Maples stated that the procedural bar stems from a mail room error in New York.

- *Page 4-5*: Maples stated that the relevant clerical error occurred in New York.

- *Page 6*: Maples stated that the clerical error occurred in a mail room in New York, and that the error was that the mail room should have forwarded the state court's order to Attorney De Leeuw.

- *Page 7*: Maples disavowed the suggestion that he is arguing that the state circuit clerk caused the error. Maples again clarified that the clerical error of which he complained occurred in the New York mailroom and that the error was the failure to forward the envelopes to Attorney De Leeuw.

- *Page 9*: Maples acknowledged that local counsel's failure to act upon receiving the dismissal order was not a clerical error.

The court denied rehearing. Pet. App. 238a-239a.

REASONS FOR DENYING THE PETITION

Countless attorneys have missed filing deadlines over the years, and state and federal courts routinely dismissed their client's tardy appeal as a consequence. This case is no different, and it presents nothing new or nationally compelling.

Maples failed to exhaust his federal claims in state court by failing to meet Alabama's 42-day limit for filing an appeal. The same procedural rule would bar Maples' attempt to return to Alabama's appellate courts. Consequently, Maples' IAC claims are procedurally defaulted from federal habeas review unless he can make one of three showings: (1) Alabama's 42-day filing deadline was not an independent and adequate procedural rule; (2) Maples had good cause for failing to meet the 42-day deadline and was prejudiced by not having done so; or, (3) Maples is actually innocent. *See Edwards v. Carpenter*, 529 U.S. 446, 455 (Breyer, J. concurring). The questions presented fall under the first two exceptions, respectively. Pet. i. Maples does not claim that he is actually innocent.

In Parts I and II, we explain why neither question presents a compelling, nationally-important issue for future petitioners. In Part III, we show that granting the writ would fail to even help Maples because his IAC claims are likely defaulted on alternative grounds.[4]

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[4] The Amici's collective complaint that Alabama does not employ a public defender service or compensate attorneys who are appointed to represent capital post-conviction petitioners is a red herring. Maples' "default is entirely the fault of his post-

I. MAPLES' CLAIM THAT ALABAMA'S 42-DAY FILING DEADLINE IS NOT AN "INDEPENDENT AND ADEQUATE" PROCEDURAL RULE IS NOT WORTHY OF REVIEW.

Federal habeas courts cannot review a claim that was "rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 130 S.Ct. 612, 614 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Maples does not contend that Alabama's 42-day filing deadline is not "independent" of federal law. *Id.* Maples argues only that the rule was not "adequate" in 2003 because it was not "firmly established and regularly followed"—"FERF" for short. Pet. 12 (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). This State-specific, fact-intensive argument is not worthy of the Court's review for two primary reasons: (1) an opinion regarding the adequacy of Alabama's 42-day deadline in 2003 is not nationally important and (2) Maples' FERF argument is incorrect.

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conviction counsel," Pet. App. 30a (Barkett, J. dissenting), not the system that led to their appointment. As we have previously shown the Court, no inmate currently on Alabama's death row proceeded through his state post-conviction proceedings without an appointed attorney, and 86% of those attorneys either worked for the Equal Justice Initiative (headed by NYU Law professor Bryan Stevenson), out-of-state public interest groups like the Innocence Project, or an out-of-state mega-firm such as Sullivan & Cromwell. *See Barbour v. Allen*, No. 06-10605, State's BIO 5-23.

A. Alabama's 42-Day Filing Deadline Was Firmly Established And Regularly Followed In 2003.

1. *FERF Analysis*: A combination of two rules prevented Maples from appealing the dismissal of his Rule 32 petition after July 7, 2003 and would prevent him from doing so today: Alabama Rules of Appellate Procedure 4(a)(1), which sets the 42-day deadline for filing a notice of appeal, and 2(a), which mandates dismissal for filing outside the 42-day window.[5] Both rules were "firmly established" in 2003 because each took effect on December 1, 1975, and have been published in the Alabama Code ever since. *See* Ala. Code, Vol. 23, Rules of Appellate Procedure 2(a), 4(a) (1975).

The rules were also "regularly followed" in 2003, as shown by numerous published decisions recognizing the dismissal of untimely appeals before 2003. *See, e.g., Hayden v. Harris*, 437 So.2d 1283 (Ala. 1983) (citing five cases for the proposition that "[w]e have consistently held that the failure of an

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[5] Maples cabins his FERF analysis to Alabama Rule of Criminal Procedure 32.1(f). Pet. 13-19. Criminal Rule 32.1(f), however, merely provides the *vehicle* for criminal defendants/petitioners to request an out-of-time appeal; that is, a second post-conviction petition filed in the circuit court. Furthermore, Rule 32.1(f) did not apply to post-conviction petitioners like Maples until January 2005—more than a year after Maples sought an out-of-time appeal. *See Loggins v. State*, 910 So. 2d 146, 151 n.6 (Ala. Crim. App. 2005). That is why, in 2003, Maples instituted mandamus proceedings in the state appellate court to seek his out-of-time appeal, *see* Pet. App. 11a n.5, and likely why Rule 32.1(f) is not mentioned in the state court's opinion denying Maples' out-of-time appeal. Pet. App. 226a-236a.

appellant to comply with the rules that requiring [sic] notice of appeal be filed within 42 days from the date of entry of final judgment deprives the Court of appellate jurisdiction"); *Woods v. State*, 371 So.2d 944 (Ala. 1979) (dismissing an untimely criminal appeal); *Davis v. State*, 644 So. 2d 44 (Ala. Crim. App. 1994) (same); *Martinez v. State*, 602 So.2d 504 (Ala. Cr. App. 1992) (same); *Shephard v. State*, 598 So.2d 39 (Ala. Crim. App. 1992) (same); *Turner v.* State, 365 So.2d 335 (Ala. Crim. App. 1978) (same). Of course, published cases are the tip of the iceberg. As with any court, Alabama courts do not issue opinions regarding the overwhelming majority of appeals dismissed as untimely. For example, during its 2009 Term, the Alabama Court of Criminal Appeals dismissed 22% of its appellate docket (*i.e.* 398 appeals) prior to submission—a statistic that primarily reflects appeals that were docketed, then dismissed as untimely filed. Alabama Unified Judicial System, *FY 2009 Annual Report*, p.12.[6]

2. *Notice*: The purpose of the FERF requirement is to prevent States from "invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law." *Beard*, *supra*, 619 (Kennedy J., concurring). That purpose was met here. Maples' attorneys had notice of the 42-day deadline and the consequence for failing to meet it because, as previously stated,

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[6] Available at http://www.alacourt.gov/Annual%20Reports/2009AOCAnnualReport.pdf. (Last checked August 12, 2010). The undersigned verified that the category "Dismissed Prior to Submission" reflects cases dismissed as untimely filed with the Clerk of the Court, the Honorable Lane Mann, on July 22, 2010.

Appellate Rules 2(a) and 4(a) had been published in the Alabama Code since 1975.

Maples attempts to have the Court ignore whether he "in good faith complied with existing state procedural law," *id.*, by focusing his notice analysis on the exception, rather than the rule. Maples argues that he "lacked the requisite notice of that rule at the time it was invoked" because "Maples could have reasonably understood Rule 32.1(f) to authorize relief from a missed Rule 32 appeal deadline through no fault of his own—and indeed many then extant Alabama court decisions took that very position at the time of the events at issue." Pet. 13-14. In other words, Maples and his attorneys believed that they could shrug off the State's published and mandatory 42-day deadline because another rule permitted Maples to *request* an out-of-time appeal, as others had successfully done.[7]

We address the "extant Alabama court decisions" mentioned by Maples, Pet. 13-14, in subpart (3). As for the contention that a vehicle to seek an out-of-time appeal destroyed Maples' notice that he was required by Alabama law to file a notice of appeal within 42 days, the State doubts the Court will "seriously entertain the notion," and we therefore address it no further. *Beard*, *supra*, 619-20 (Kennedy, J. concurring) (stating that "no one could seriously entertain the notion" that an escapee acted in "justified reliance" on Pennsylvania's

[7] By analogy, Maples would argue that he would lack notice that it is illegal to drive 80 miles per hour on a highway with clearly posted '60mph' speed limit signs if he noticed someone else driving 65mph on the same road without being stopped.

discretionary fugitive forfeiture rule because "[t]here is no justification for an unlawful escape").

3. *Judicial Discretion*: That Alabama courts have discretion to grant an out-of-time appeal does not strip Alabama's 42-day filing deadline of its FERF status. *Beard*, *supra*, 618 ("We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. . . . [A] discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others"). Nor does the fact that the state courts have exercised that discretion render the rule inadequate. *See id.*; *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (concluding that Florida's procedural rule barring post-conviction claims that were not raised on direct appeal was "consistently and regularly" applied because "in the vast majority of cases ... the Florida supreme court has faithfully applied its rule" and the exceptions cited by the petitioner were not "sufficient to undercut the adequacy of the Florida procedural rule").

Maples discusses only one case, *Marshall v. State,* 884 So. 2d 898 (Ala. Crim. App. 2002), to argue that Alabama courts were not regularly following the 42-day rule in cases like his in 2003. Pet. 15-17. Even if Maples is correct that *Marshall* is factually "indistinguishable" from his case, Pet. 15, a single exception does not render a state's procedural

rule inadequate.[8] *Dugger*, *supra*, 410 n.6.

Regardless, Maples' reliance on *Marshall* is misplaced. Maples' claim that his case and *Marshall* are factually "indistinguishable" is based solely on the characterization of the one-judge *dissent*. Pet. 15 (quoting Pet. App. 30a (Barkett, J. dissenting)). Both lower federal courts and the Alabama Court of Criminal Appeals recognized the same factual distinction between the two cases: In *Marshall*, the petitioner was proceeding *pro se* and the clerk assumed a duty to serve him, but failed to do so. Maples, on the other hand, was relying solely on counsel, and the clerk fulfilled his duty to serve Maples' attorneys as required by Criminal Rule 34.4. Pet App. 13a-16a (Eleventh Circuit), 53a-55a, 212a-215a (district court), 231a-234a (Alabama Court of Criminal Appeals).

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[8] Maples cites three additional cases, without providing a parenthetical or any discussion: *Jenkins v. State*, 12 So. 3d 166 (Ala. Crim. App. 2008); *Fountain v. State*, 842 So.2d 719 (Ala. Crim. App. 2002); *Thompson v. State*, 860 So. 2d 907 (Ala. Crim. App. 2002). Pet. 15. His amici add four more: *Ex parte Miles*, 841 So. 2d 242 (Ala. 2002); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001); *Robinson v. State*, 865 So. 2d 1250 (Ala. Crim. App. 2003); *Brooks v. State*, 892 So. 2d 969 (Ala. Crim. App. 2002). *See* Amicus Br. of Alabama Appellate Court Justices 7-14; Amicus Br. of ACDLA 3-12. Each case is readily distinguishable. Six of the seven (*Jenkins*, *Fountain*, *Miles*, *Johnson*, *Robinson*, and *Brooks*) involved *pro se* petitioners who were not served a copy of their dismissal orders within 42 days. Only Thompson had counsel, and he was granted an out-of-time appeal because the circuit clerk "rebuk[ed]" Thompson's attempts to appeal, telling Thompson that "if [he] wanted to file anything to the court, [he] would have to file it through counsel," despite the fact that counsel ignored two letters that Thompson wrote during the 42-day filing period regarding an appeal. *Thompson*, *supra*, 908-10.

Maples argues that the facts cited by the courts to distinguish *Marshall* from this case were "taken out of context from a subsequent decision by the Alabama Supreme Court." Pet. 16. But a quick perusal of the state appellate record in *Marshall* proves every court correct. *See Marshall v. State*, CR-01-0204 (on file with counsel and the Alabama Court of Criminal Appeals); Fed. R. Evid. 201(a-b) (permitting judicial notice of "adjudicative facts" that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). The record shows that Marshall filed a handwritten, *pro se* Rule 32 petition in April 1998. While Marshall was appointed an attorney more than a year later, Marshall filed numerous handwritten, *pro se* pleadings both before and after the appointment. Marshall also litigated both his untimely appeal and his quest for an out-of-time appeal *pro se*, typically with handwritten appellate briefs. In other words, Marshall, not an attorney (much less a team of attorneys), litigated his Rule 32 proceedings *pro se* at every level.

As outlined by the Eleventh Circuit, the limited circumstances in which the Alabama courts have granted an out-of-time appeal involved situations where the failure to do so would implicate a defendant/petitioner's constitutional rights. *See* Pet. App. 13a. *Marshall* presented the state court with a procedural due process problem; that is, the circuit clerk assumed a duty to serve Marshall in prison because he was proceeding *pro se*, then failed to do so. Pet. App. 232a. Consequently, Marshall was given an out-of-time appeal. *See also supra* at 21 n.8 (outlining the same distinction between the

cases relied upon by Maples' Amici and this case). Because the clerk in this case had not assumed a duty to personally serve Maples (because Maples was represented throughout by a team of attorneys), this case failed to present a similar constitutional concern. Pet. App. 236a ("Maples has failed to show that his right to procedural due process was violated."). Accordingly, the state court enforced its mandatory filing deadline against Maples. *Id.*

4. *Exorbitant Application*: Maples concludes by arguing that, even if Alabama's 42-day filing deadline was FERF in 2003, the State's actions makes this an "exceptional case in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." Pet. 18 (quoting *Lee*, 534 U.S. at 376). Specifically, Maples complains that "the State had no difficulty notifying Maples immediately *after* the appeal period had lapsed. [Pet.] App. 253a. Its attempt to preclude federal review in these circumstances reflects a 'gotcha' mentality that this Court long ago repudiated." Pet. 19.

Alabama's filing deadlines are published in the Alabama Code and the Alabama Rules of Court. We assume that attorneys will read and follow them. The State has no additional duty to warn opposing counsel of pending deadlines.

Furthermore, Maples' assertion that Assistant AG Hayden's August 13, 2003 letter was a nefarious "attempt to preclude federal review" is plainly wrong. *Id.* Mr. Hayden's letter informed Maples of his federal filing deadline and provided him with the

address to submit his habeas petition. Pet. App. 253a-254a. If anything, that letter *saved* Maples' federal habeas proceedings, which resulted in 27 of Maples' claims being decided on the merits by the district court. Pet. App. 56a-202a. Had the State truly acted with a "gotcha mentality," Pet. 19, we would have waited four more weeks, let Maples' deadline for filing his federal habeas petition pass, and then written Maples to inform him of his execution date.

The Court should reject Maples' call for an extraordinary suspension of the procedural default rule based on the State's action, which is the only reason this case still proceeds seven years later.

B. If Alabama's 42-Day Filing Deadline Is An "Inadequate" Procedural Rule, Then So Is This Court's 90-Day Filing Deadline.

Last Term, the Court recognized the federalism issues that arise from declaring a State's procedural rule to be "inadequate":

> In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.

Beard, 130 S.Ct. at 618 (citations omitted). These Federalism concerns are manifest here, as Maples'

argument against Alabama's 42-day deadline applies with full force to this Court's 90-day deadline for filing petitions for a writ of certiorari.

Maples levies three primary arguments against Alabama's 42-day deadline:

1. Because court decisions, not published rules, decide who gets an out-of-time appeal, "the rule is riddled with *ad hoc* exceptions and evolving,"[9] Pet. 13;

2. Because there are no published rules that determine who gets an out-of-time appeal, "Maples lacked the requisite notice of that rule," Pet. 13; and,

3. The Alabama courts had previously granted an out-of-time appeal to a petitioner who failed to personally receive notice that his petition was denied, Pet. 15-17.

Each of these arguments applies to this Court's Rule 13.1, which provides a 90-day deadline for filing petitions for a writ of certiorari. Like Alabama courts, this Court can exercise its discretion to excuse criminal petitioners who miss the 90-day filing deadline. *See Bowles v. Russell*, 551 U.S. 205, 212 (2007); *Schacht v. United States*, 398 U.S. 58, 64

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[9] *See also* Pet. 17-18 (chastising the court of appeals' alleged "effort to manufacture a [FERF] default rule by reconceiving the case law 'in retrospect' as 'forming part of a consistent pattern.'" (quoting *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)).

(1970). Like Alabama courts, this Court determines which untimely petitions will be considered on a case-by-case basis. *See* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 389-91 (9th ed. 2007) (citing 11 examples). Finally, like Alabama courts, this Court has allowed an out-of-time petition when the lower court's clerk failed to personally notify the petitioner that his petition was denied, despite assuming a duty to do so. *See Durham v. United States*, 401 U.S. 481, 481-82 (1971).

Our point is not to prove the "inadequacy" of this Court's 90-day rule. Clearly, the Court's 90-day deadline is "firmly established" because the Court has published the rule for more than 20 years, *see* Gressman & Geller, *supra*, 376, and the deadline is "regularly followed" because the Court has denied thousands of untimely petitions, including every late petition between 1982 and 2007. *Id.* at 391.

Our point is that Maples' FERF analysis is flawed, as it would establish that every discretionary rule was inadequate if the jurisdiction exercised its discretion. *But see Beard*, *supra*, 618 ("[A] discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others"). Furthermore, declaring that Alabama's 42-day deadline is an "inadequate" procedural rule implicates major federalism issues when Alabama applies its 42-day deadline precisely as this federal Court applies its corresponding 90-day deadline.

C. No Split Of Authority Warrants This Court's Review.

We briefly dispel Maples' contention that this case presents three circuit splits that warrant the Court's intervention.

1. *Burden of Proof*: Maples argues that the Eleventh Circuit improperly shifted the burden of proving the adequacy of Alabama's filing deadline from the State to Maples. Pet. 19-20. We disagree. The court of appeals never mentioned the burden of proof in its FERF analysis. Pet. App. 11a-16a. Regardless, the State has met any burden. We have shown that our rule was published in 2003. We have cited numerous cases before 2003 applying the rule. And we have shown that the Alabama courts had not allowed an out-of-time appeal under the unique facts presented here, at least to the extent that it is possible to prove a negative. Therefore, even if there is a lingering question as to which party bears what burden, this is not the case to answer it.

2. *Case-by-case development*: Maples notes that the Ninth Circuit has held that "the fact that a rule is 'subject to a growing number of exceptions' would have compelled the conclusion that it is 'not an adequate state ground to bar federal habeas review.'" Pet. 20 (quoting *Fields v. Calderon*, 125 F.3d 757, 763 (9th Cir. 1998)). Whether a particular State's procedural rule has been swallowed by judicially-created exceptions, however, is a fact-based, State-specific inquiry. It is not a question of law that creates a "split" necessitating the Court's intervention.

3. *Post-event decisions*: Maples complains that the Eleventh Circuit cited cases decided after 2003 to find that Alabama courts regularly followed the 42-day filing deadline. Pet. 20. As shown *supra* at 17-18, however, there are numerous Alabama decisions from before 2003 that demonstrate the state courts' enforcement of the rule—not to mention the hundreds of appeals dismissed each year that we cannot cite because they were never heard.

D. The Grant Of Certiorari Review In *Walker v. Martin* Has No Bearing On The Outcome Of This Case.

Finally, Maples asks the Court to grant review here as a "complement" to its grant of review in *Walker v. Martin*, No. 09-996. Pet. 21-24. The cases are inapposite.

Unlike Alabama's codified 42-day deadline, *Walker* concerns the adequacy of California's rule against "substantial delay" in filing state habeas petitions, a deadline that lacks a definite time period. *Martin v. Walker*, 357 Fed. Appx. 793, *2 (9th Cir. Nov. 20, 2009) ("[U]nlike other states, California has chosen to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines."). The Ninth Circuit held that California's undefined deadline was not adequate to bar the petitioner's five-year delay in filing a second habeas petition in May 2001 because California's "standard has yet to be defined" and the handful of decisions pre-dating May 2001 "do not

form a coherent pattern of consistent application." *Id.* at *1.

For habeas petitioners, the best outcome in *Walker* is that this Court affirms the Ninth Circuit's holding that a State's judicially-enforced time bar with no specific time limit is "inadequate." But that ruling is of no help to Maples, as Alabama's 42-day deadline has a definite end-date, which has been published in our Code for 35 years.

Because the decision in *Walker* has no effect on this case, the Court should not grant or hold Maples' petition pending *Walker's* outcome. If the Court does grant review here as a "compliment to *Walker*," Pet. 19, Alabama reserves the right to join the Criminal Justice Legal Foundation's call for "this Court [to] consider whether to scrap the 'adequacy' inquiry in habeas altogether," *Walker*, *supra*, CJLF Amicus Br. 15, in favor of the existing "cause and prejudice" and "actual innocence" exceptions to procedural default. Any analysis that concludes by finding that Maples did not have sufficient notice that he must follow a codified, mandatory filing deadline is fatally flawed.

II. MAPLES FAILED TO RAISE EITHER OF HIS "CAUSE AND PREJUDICE" ARGUMENTS BELOW.

Maples raises alternative theories to establish cause and prejudice for his procedural default. Maples argued neither theory below, and neither theory is supported by the facts.

A. Maples Affirmatively Disavowed The Argument That The State Circuit Clerk "Caused" His Failure To Appeal.

1. *Failure to Raise*: Maples first argues that the state circuit clerk's failure to contact Maples' Sullivan & Cromwell attorneys upon receiving their unopened mail constitutes "cause" sufficient to excuse the procedural default. Pet. 24-27. Maples claims in a footnote to have raised, and not subsequently waived, this argument below. Pet. 25, n.5. ("Although respondent conceded below that this argument was raised in Maples's opening brief, respondent argued that it was somehow waived at oral argument. Resp. Mot. To Review Oral Argument Record and/or Transcript at 2. That is incorrect.").

The record speaks for itself. In our Statement of the Case, *supra* at 11-12, the State quotes from all three appellate briefs to show that Maples' "clerical error" argument was targeted at Sullivan & Cromwell's mailroom clerk, not the circuit court clerk. We provide the Court with the page numbers of the oral argument transcript where Maples unequivocally repudiated the circuit-clerk-error argument and where he expressed, four times, that any clerical error occurred in Sullivan & Cromwell's New York mailroom. *See supra* at 14. We also attach our motion to transcribe the oral argument in its entirety *infra* at App. 1a-7a to refute any notion that the State conceded that Maples properly raised the circuit-clerk-error argument below.

Furthermore, here is what the court of appeals said about Maples' "clerical error" argument:

> At oral argument, Maples's attorney also acknowledged that, per Sullivan & Cromwell's internal policy, the Alabama court's Rule 32 Order should have been forwarded to the Sullivan & Cromwell attorneys who had taken responsibility for Maples's case after Munanka's and Ingen-Housz's departures. *But 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-5a, n.3 (emphasis added). Like the State, the court of appeals understood Maples' "clerical error" argument to be targeted at the Sullivan & Cromwell mailroom clerk, not the state circuit clerk, because Maples' attorney repeatedly said so at oral argument. That is why the court's opinion never mentions the circuit-clerk-error issue that Maples now claims to have raised.

Because Maples repudiated the argument that the state circuit clerk's actions constituted "cause," and the court of appeals therefore did not address the issue, the Court should refuse to address it in the first instance here. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("ordinarily, this Court does not decide questions not raised or resolved in the lower courts").

2. *Poor Factual Vehicle*: Even if Maples had raised the circuit-clerk-error question below, this

case presents a poor factual vehicle to resolve it. Undisputed facts show that the circuit clerk served all three of Maples' attorneys of record at their listed addresses as required by Alabama Rule of Criminal Procedure 34.4, and that Maples' local attorney promptly received and reviewed his copy. Pet. App. 223a, 256a. If the Court wishes to take a case to determine whether a court clerk's error may "cause" a petitioner to miss his filing deadline, it should not be a case in which (1) the clerk properly mailed copies of the court's final order to all three attorneys of record; (2) every copy arrived at the correct address; and, (3) one of the petitioner's attorneys admits to opening his copy and failing to act. In this case, as even the dissent agreed, "any such default is entirely the fault of [Maples'] post-conviction counsel." Pet. App. 30a (Barkett, J. dissenting).

Furthermore, regarding prejudice, Maples cites no evidence from the record that proves when the circuit clerk received the unopened envelopes back from Sullivan & Cromwell, Pet. 7, and the state court made no such finding. Pet. 222a-225a. Maples' evidence to the state court was only that the clerk informed him on August 22, 2003—*i.e.* more than a month after the 42-day deadline expired—that the unopened envelopes had been returned. Pet. App. 258a. Apparently, there is no evidence as to when that occurred. Accordingly, a factual question exists whether the clerk's alleged (in)actions prejudiced Sullivan & Cromwell's ability to file Maples' notice of appeal within 42 days.

B. Maples Failed To Argue Below That Attorney Abandonment "Caused" His Failure To Appeal.

Maples alternatively argues that attorney abandonment caused his default. Pet. 27-33. Maples recognizes the Court's holding in *Coleman* that post-conviction "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is acting as the agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Pet. 27 (quoting *Coleman*, 501 U.S. at 753). Maples therefore asks the Court to grant review to hold that *Coleman* does not apply to situations in which the attorney's abandonment of the petitioner ended their agency relationship, thereby establishing the cause that excuses procedural default. Pet. App. 27-32. According to Maples, he meets that proposed standard because he was "left without counsel in his Rule 32 proceeding—despite his belief to the contrary—and thus abandoned." Pet. 29 n.6.

1. *Failure to Raise*: Maples did not raise this abandonment argument below. The reason is simple: Sullivan & Cromwell attorneys, who Maples now claims to have abandoned him, represented Maples throughout the lower federal court proceedings.

In both state and federal court, Maples' Sullivan & Cromwell attorneys went out of their way to note that Sullivan & Cromwell attorneys represented Maples at all times during his Rule 32

proceedings, including the 42-day period in which Maples' filing deadline lapsed. For example:

- Attorney De Leeuw swore in his August 2003 affidavit to the state circuit court that, after the departure of Sullivan & Cromwell's original attorneys in 2002, "other attorneys at S&C have worked on this case." Pet. App. 258a.

- In the same affidavit, Attorney De Leeuw swore that Sullivan & Cromwell attorneys had been preparing for an evidentiary hearing since December 17, 2001. *Id.*

- In his September 12, 2003 motion for admission *pro hac vice* in federal district court, Attorney De Leeuw affirmed that "I have worked on Mr. Maple's [sic] case for over a year." Doc #3 at 1.

- Sullivan & Cromwell Attorney Gary Alexion also affirmed to the district court on September 12, 2003 that "I have worked on Mr. Maple's [sic] case for over a year." Doc #2 at 1.

- Sullivan & Cromwell attorney Felice Duffy likewise affirmed on September 12, 2003 that "I have worked on Mr. Maple's case since October 14, 2002." Doc. #4 at 1.

As outlined *supra* at 14, Attorney De Leeuw also orally argued to the Eleventh Circuit that the Sullivan & Cromwell mailroom erred by not

forwarding him a copy of the state court's final order during the 42-day window to appeal.

Furthermore, local counsel John Butler maintained his agency relationship with Maples throughout Maples' Rule 32 proceedings. Attorney Butler admitted that he promptly received his copy of the court's dismissal order, and he filed an affidavit after the 42-day deadline passed to assist the Sullivan & Cromwell attorneys garner an out-of-time appeal. Pet. App. 255a-56a. So, even if Sullivan & Cromwell abandoned Maples (and it did not), Maples' local counsel, who shared equal responsibility, never did. *See* Rule VII(C), Alabama Rules for Admission to the Bar ("Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.").

The Court should not consider Maples' new "abandonment" argument, especially when it is contrary to Maples' position below. *See Freeland & Kronz*, 503 U.S. at 646 ("ordinarily, this Court does not decide questions not raised or resolved in the lower courts").

2. *Poor Factual Vehicle*: Maples is in a pickle. Either his statement to this Court that he was "left without counsel in his Rule 32 proceeding—despite his belief to the contrary—and thus abandoned" is factually incorrect, Pet. 29 n.6, or his former attorneys falsely swore to state and federal courts

about their continuous involvement during Maples' Rule 32 proceedings.

Either way, this is a terrible vehicle to decide whether attorney abandonment can excuse procedural default. Maples' agency relationship with Sullivan & Cromwell did not end until 2009, as demonstrated by the facts that (1) Sullivan & Cromwell attorneys have sworn that they were preparing for an evidentiary hearing when the May 2003 dismissal order was issued; (2) Maples' mother called Sullivan & Cromwell upon learning of the dismissal order; (3) Sullivan & Cromwell attorneys sought an out-of-time appeal throughout the state courts; and, (4) Sullivan & Cromwell attorneys represented Maples in both the district court and the court of appeals. Simply put, Maples' attorneys may have neglected Maples, but they never abandoned him.

3. *Federalism*: Adoption of Maples' "abandonment" argument carries major federalism concerns. If Maples is correct that the failure to timely file notices in state court can excuse the failure to exhaust state remedies, he has sketched the blueprint to side-step AEDPA deference in capital cases. Under Maples' theory, an attorney could agree to represent a capital petitioner, fail to timely file a state post-conviction petition, and then timely file a federal habeas petition. Because the attorney "abandoned" his client during the period in which the state petition had to be filed, and state law would bar a return to state court to file an untimely post-conviction petition, the federal petition could move forward, unencumbered by (1) the exhaustion

requirement, (2) the procedural default rule, and (3) §2254(d)'s deference to the (non-existent) state court opinion. The Court should resist any call to strip state courts of the first opportunity to decide questions arising from a state court judgment.

III. EVEN IF THE COURT GRANTS THE WRIT, MAPLES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS MAY STILL BE PROCEDURALLY DEFAULTED.

Maples asserts that, by granting the writ, the Court will assure that his IAC claims will be heard in federal court. *See* Pet. 11 ("[t]hose claims would have been heard if the Eleventh Circuit had properly followed this Court's precedent or this case had arisen in other circuits"). Maples is mistaken—or, at least, he fails to tell the rest of the story.

If the Court granted review and reversed the opinion below, Maples' failure to exhaust his post-conviction IAC claims in the state appellate courts would be irrelevant. But the lower courts still must review the opinion of the state circuit court, which did issue findings on Maples' IAC claims. Doc. #30, Tab 66 at 10-86. In its written order, the state circuit court summarily dismissed 33 of Maples' 34 IAC claims, in part, for failing to meet the pleading requirements of Alabama Rule of Criminal Procedure 32.6(b).[10] *Id.* In its answer to Maples' §2254

[10] The only IAC claim not dismissed in part for failing to satisfy Rule 32.6(b) was the claim that counsel was inherently ineffective due to inadequate compensation. Doc #30, Tab 66 at 10; *see also Hallford v. Culliver*, 379 F.Supp.2d 1232, 1279 (M.D. Ala. 2004) (denying the same claim on the merits).

petition, the State invoked two independent reasons that Maples' IAC claims are procedurally defaulted: (1) the circuit court's application of Rule 32.6(b) to summarily dismiss Maples' IAC claims and (2) Maples' failure to exhaust his state appeals. Doc. #29 at 23 ("Furthermore, the Morgan County Circuit Court dismissed this claim as insufficiently pleaded under Rule 32.6(b) of the Alabama Rules of Criminal Procedure, and Rule 32.6(b) is an adequate and independent state rule that precludes federal habeas relief.").

The district court did not address whether Rule 32.6(b) was a valid ground for procedural default because it was unnecessary; Maples' failure to exhaust his state appeals provided a sufficient bar to review. But two federal district judges have held in unpublished opinions that Rule 32.6(b) is an independent and adequate state procedural rule that procedurally defaults affected claims from federal habeas review. *See Williams v. Ferrell*, No. 07-0617-WS-M, 2008 WL 725105, at *2 (S.D. Ala. Mar. 17, 2008) ("This Court ... has held that claims not addressed by the state courts on the basis of Ala. R. Crim. P. 32.6(b) are procedurally defaulted."); *Reed v. Jones*, No. CIV. A. 970563RVL, 2000 WL 1848148, at *5 (S.D. Ala. Dec. 4, 2000) (holding that the state court's dismissal of a claim for failure to comply with Rule 32's specific pleading requirements "constitutes a sufficient statement resting on independent and adequate state grounds to bar" habeas review). The Eleventh Circuit Court of Appeals has similarly held that Rule 32.6(b) is an independent and adequate state procedural rule, albeit in an unpublished opinion. *See Jenkins v. Bullard*, 210 Fed. Appx. 895,

898-900 (11th Cir. Dec. 13, 2006) (unpublished). Accordingly, even if the Court ultimately granted the writ, nothing would change. In all likelihood, after another five years (or more) of litigation, Maples' IAC claims would still be procedurally defaulted.

In sum, Maples asks this Court to grant review to declare one State's procedural rule (Alabama's) inadequate for one distinct moment in time (May 2003) to the benefit of one person (Maples). Because even that person may not benefit from the Court's opinion, whatever it may be, the Court should decline review.

* * *

The Court has seen a collective plea to excuse a late filing before. In *Northwest Airlines, Inc. v. Spirit Airlines*, No. 06M7, attorney error caused the petitioner to miss this Court's 90-day filing deadline by five days. *See* Gressman & Geller, *supra*, 388. Backed by two former Solicitors General as amici, Northwest Airlines asked the Court to accept its untimely petition and grant review. *See id.* The Court declined without comment. 127 S.Ct. 340 (2006). Maples and his amici present a similar request, which the Court should similarly reject.

In fact, Maples' petition presents federalism concerns absent in *Northwest Airlines* and *Holland v. Florida*, 130 S.Ct. 2549 (2010), in which the Court held that "extraordinary circumstances" could equitably toll AEDPA's one-year deadline for filing federal habeas petitions. *See* Pet. 27-31 (likening this case to *Holland*). A federal court's decision to excuse a petitioner's failure to comply with a *federal*

rule is a far cry from a federal court excusing a petitioner's failure to satisfy mandatory *state* rules. To excuse Maples' failure to appeal the denial of his Rule 32 petition in state court would allow Maples to by-pass state appellate review of a state court judgment by declaring the inadequacy of a state procedural rule—a rule that is substantially similar to one applied by this Court and, we assume, every appellate court in the country. Just last Term, the Court noted how leery it was of treading these waters. *Beard*, 130 S.Ct. at 618 ("In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."). The Court should not tread them here.

CONCLUSION

The Court should deny Maples' petition.

Respectfully submitted,

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