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When Counsel Abandonment Forecloses Post-Conviction Relief: An Argument for Applying the Doctrine of Cause and Prejudice to the AEDPA Statute of Limitations

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ARTICLES

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"Abandoned by counsel, Maples was left unrepresented at a critical time for his state post-conviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door."[1]

I. INTRODUCTION

Justice Ginsberg, writing for the majority in *Maples v. Thomas*, painted a stark picture of the injustice facing a death-row inmate who was abandoned by his attorneys. This Article uses the case of Robin Myers to illustrate the inconsistency in the law that applies when a post-conviction petitioner is abandoned by his attorney. The result of this inconsistency is that the same court reached opposite conclusions in the cases of two men on death row in Alabama. The distinguishing fact between the two cases is not counsel's abandonment of his client in the midst of complex post-conviction proceedings, but rather the procedural posture of the two cases. In *Maples*,[2] even though the petitioner was abandoned by his attorneys, he discovered the abandonment before the federal statute of limitations lapsed.[3] In fact, the Office of the Alabama Attorney General notified Mr. Maples that the deadline to file an appeal with the Alabama Court of Criminal Appeals had lapsed and specifically informed him that only four weeks remained to file a petition for a writ of habeas corpus in federal court.[4] While new counsel filed a timely petition for a writ of habeas corpus in federal court, the

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1. Maple v. Thomas, 132 S. Ct. 912, 917 (2011).
2. *Id.*
3. *Id.*
4. *Id.*

claims raised in state court were considered "procedurally defaulted" because they had not been presented to the Alabama Court of Criminal Appeals and the Alabama Supreme Court.[5] In *Maples*, the United States Supreme Court held that counsel's abandonment of Mr. Maples excused the procedural default, thus allowing full federal review of the claims asserted in Mr. Maples' petition for a writ of habeas corpus.[6]

In another Alabama case, the courts denied review because the petitioner, Robin Myers, was not notified of counsel's abandonment until after the federal statute of limitations had run.[7] The requirements to excuse a statute of limitations default are different than those that excuse a procedural default.[8] Excusing a statute of limitations default requires a showing that the petitioner was "diligent" in protecting his rights, a showing not required to excuse a procedural default.[9] Thus, in stark contrast to the result in *Maples*, Mr. Myers will likely be executed without any federal court having reviewed his federal constitutional claims.[10] Contrary to Justice Ginsberg's majority opinion in *Maples*, the default has been "laid at [Mr. Myers'] death-cell door."[11]

II. THE POST-CONVICTION PROCESS[12]

People often refer to the lengthy appellate process in capital cases. What many do not realize is that most of that process is not an appeal, but rather post-conviction.[13] Once a defendant is convicted and sentenced to death, the state appellate courts review the case.[14] Once the conviction and sentence are affirmed, the defendant may petition the United States Supreme Court to review

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5. *Id.*

6. *Id.*

7. *See* Myers v. Allen, 420 Fed. App'x 924, 927 (11th Cir. 2011).

8. *See Maples,* 123 S. Ct. at 922 ("Cause for a procedural default exists where "something external to the petitioner, something that cannot fairly be attributed to him[,] . . . 'impeded [his] efforts to comply with the State's procedural rule.") (*citing Coleman v. Thompson*, 501 U.S. 722, 753 (1991), *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986)). In contrast, a statute of limitations default can only be cured when a petitioner demonstrates that equitable tolling is warranted. *See* Holland v. Florida, 560 U.S. 631 (2010) (holding that the one-year statute of limitations set forth in 28 U.S.C. 2244(d) can be equitably tolled in appropriate cases). Equitable tolling requires the petitioner to show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing." *Id., quoting, Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

9. *See Holland*, 560 U.S. at 649 (equitable tolling requires a showing by the petitioner that "he has been pursuing his rights diligently"); *Maples*, 123 S. Ct. at 922 (demonstrating "cause" for a procedural default requires a showing by the petitioner that something external to the petitioner caused the default).

10. *See Myers*, 420 Fed. Appx. At 928.

11. *Maples*, 123 S. Ct. at 917.

12. This Part of the Article is intended as a general overview of post-conviction procedure for those unfamiliar with this stage of litigation in capital cases. It is not in any way intended to be an exhaustive description of this complex area of the law.

13. *See* RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 3.5(a)(6) (LexisNexis, 6th ed. 2011) (describing the role of state post-conviction proceedings).

14. *Id.* at § 5.1.

his case.[15] Once that petition is denied, or the time to file such a petition has expired, the conviction and sentence are deemed final.[16]

Once a conviction and death sentence become final, everything changes. The process with which most people are familiar is essentially turned on its head. The defendant has lost the presumption of innocence and must petition the courts for relief from an unconstitutional conviction or sentence.[17] The petitioner must seek review first in the state courts, most often by filing a post-conviction petition with the same judge who presided over his trial.[18] The grounds for state post-conviction relief are narrow[19] and any issues that could have been, but were not, raised on direct appeal are barred.[20] Discovery is limited and evidentiary hearings are rarely granted.[21] Each claim that the petitioner plans to raise in state or federal court, along with its supporting facts, must be set out in the initial state post-conviction petition.[22] If the state trial court denies post-conviction relief, all claims in the initial post-conviction petition must be presented to the state appellate courts.[23] Once the state post-conviction process is complete, the petitioner may petition for relief in federal court.[24]

In state capital cases, post-conviction relief in federal court is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[25] The petitioner files a Petition for a Writ of Habeas Corpus against the warden of the state's prison system alleging that he is being held in custody by the state in

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15. *Id.*

16. *See* Teague v. Lane, 489 U.S. 288, 295 (1989) (defining "final" to mean a case "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed") (internal citation omitted).

17. *See* Herrera v. Collins, 506 U.S. 390, 399-400 (1993).

18. *See, e.g.*, ALA. R. CRIM. PRO. 32.5 ("Petitions filed under this rule shall be filed in and decided by the court in which the petitioner was convicted. If a petition is filed in another court, it shall be transferred to the court where the conviction occurred"); *see also* ALA. R. CRIM. PRO. 32.1 ("any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction").

19. *See, e.g.*, ALA. R. CRIM PRO. 32.1; *see* HERTZ AND LIEBMAN, *supra* note 13, at §§ 7.1, 7.2.

20. *See, e.g.*, ALA. R. CRIM. PRO. 32.2; *see also* Wainwright v. Sykes, 433 U.S. 72 (1973) (holding that claims not presented in state appellate proceedings in conformity with state procedural rules are not cognizable in federal habeas proceedings absent a showing of cause and prejudice); Engle v. Isaac, 456 U.S. 107 (1982) (applying the rule of *Wainwright* to bar federal habeas review of claims not raised at trial by a contemporaneous objection as required by state procedural rules).

21. *See* Christopher Flood, *Closing the Circle: Case v. Nebraska and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 657 (2001-02).

22. *See* HERTZ & LIEBMAN, *supra* note 13, at § 6.2 ("federal exhaustion and procedural default doctrines compel prisoners, when permitted by state law and practice, to include in their state postconviction applications all claims that might warrant federal habeas corpus relief and that were not exhaustively litigated at trial and on direct appeal in the same case.").

23. *See* HERTZ & LIEBMAN, *supra* note 13, at § 23; 28 U.S.C. §§ 2254 (b)-(c) (requiring exhaustion of all available state remedies as a predicate to seeking federal habeas relief); Rose v. Lundy, 455 U.S. 509 (1982) (holding that a federal district court must dismiss a federal habeas petition containing both exhausted and unexhausted claims).

24. *See* 28 U.S.C. § 2254 (providing remedies in federal court for state prisoners).

25. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254 (2013)).

violation of his federal constitutional rights.[26] AEDPA contains very strict procedural rules and a one-year statute of limitations that runs from the time the conviction becomes final.[27] This statute of limitations is tolled during state post-conviction proceedings.[28] A federal court can only grant relief if the petitioner demonstrates that the state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[29]

As noted above, all claims presented to a federal habeas court must be properly raised and litigated in state court. For example, all claims must be "exhausted" before being presented to a federal court, meaning that there are no avenues of relief open to the petitioner in state court.[30] Claims cannot be "procedurally defaulted" if they are to be raised in federal court.[31] A procedural default occurs when a claim is raised in the state trial court and is not presented to the state appellate courts.[32]

The difference between a procedural default and a failure to exhaust was explained by Justice Stevens in his dissent in *O'Sullivan v. Boerckel*.[33] A claim is unexhausted if the petitioner still has an available avenue to pursue relief in state court.[34] In that case, principles of comity and federalism require a petitioner to seek relief in state court prior to seeking federal habeas relief.[35] "[T]he exhaustion inquiry focuses entirely on the availability of state procedures at the

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26. *See* Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004) (the correct respondent in a federal petition for a writ of habeas corpus is "the person who has custody over [the petitioner]"), *quoting*, 28 U.S.C. § 2242; *see also* § 2243 (a writ of habeas corpus "shall be directed to the person having custody of the person detained").

27. *See* § 2244(d)(1).

28. *See* § 2244 (d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.")

29. § 2254(d)(1).

30. *See* HERTZ & LIEBMAN, *supra* note 13, at § 23; 28 U.S.C. §§ 2254 (b)-(c) (requiring exhaustion of all available state remedies as a predicate to seeking federal habeas relief.

31. *See Maples*, 132 S. Ct. at 922 ("As a rule, a state prisoner's habeas claims may not be entertained by a federal court "when (1) 'a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" *quoting Walker v. Martin*, 562 U.S. ——, ——, 131 S. Ct. 1120, 1127 (2011) (quoting *Coleman*, 501 U.S., at 729-730).

32. The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Id.* at 750, 111 S. Ct. 2546; *see also Wainwright*, 433 U.S. at 84-85.

33. 526 U.S. 838 (1999).

34. *Id.* (The question of exhaustion "refers only to remedies still available at the time of the federal petition, it requires federal courts to ask whether an applicant for federal relief could still get the relief he seeks in the state system.") (internal quotation and citations omitted) (Stevens, J. *dissenting*).

35. *Id.* ("If the applicant currently has a state avenue available for raising his claims, a federal court, in the interest of comity, must generally abstain from intervening. This time-honored rule has developed over several decades of cases, always with the goal of respecting the States' interest in passing first on their prisoners' constitutional claims in order to act as the primary guarantor of those prisoners' federal rights, and always separate and apart from rules of waiver.") (Stevens, J., dissenting).

time when the federal court is asked to entertain a habeas petition."[36] In contrast, the doctrine of procedural default focuses on a petitioner's waiver of certain claims.[37] If a state prisoner fails to raise a claim in an available state proceeding, and no avenue to raise the claim in state court remains at the time the petition for federal habeas relief is filed, the claim is considered procedurally defaulted.[38] A procedural default can only be cured upon a showing of "cause and prejudice"[39] or a "fundamental miscarriage of justice."[40] Cause in this context is defined as "something external to the petitioner, something that cannot fairly be attributed to him."[41] In sum, before seeking federal habeas relief, a state prisoner must "invok[e] one complete round of the State's established appellate review process."[42]

As noted above, AEDPA contains a very strict one-year statute of limitations. A federal habeas petitioner must file his petition for a writ of habeas corpus in federal court within one year of one of four statutory triggering dates.[43] The text of AEDPA provides that the statute of limitations is tolled while a properly filed state petition for post-conviction relief is pending.[44] In cases in which a timely petition for federal habeas review is not filed, the Supreme Court has held that the AEDPA statute of limitations is a non-jurisdictional statute of limitations that can be equitably tolled.[45] In other words, a statute of limitations default can be lifted if the petitioner can demonstrate extraordinary circumstances beyond his control that caused the missed deadline, as well as diligence in pursuing relief in the federal courts.[46] In contrast, the doctrine of cause and prejudice does not require a showing of diligence on the part of the petitioner.[47]

The fact that courts do not apply the doctrine of cause and prejudice to the AEDPA statute of limitations has resulted in inconsistent results in cases with

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36. *Id.*
37. *Id.*
38. *See* Murray v. Carrier, 477 U.S. 478, 485 (1986).
39. *Id.*
40. *Id.*
41. Coleman v. Thompson, 501 U.S. 722, 752 (1991).
42. *O'Sullivan*, 526 U.S. at 845.
43. 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.")
44. § 2244(d)(2).
45. *See, e.g.*, *Holland*, 560 U.S. at 653.
46. *Id.*
47. *See Murray v. Carrier*, 477 U.S. 478, 485 (1986).

nearly identical facts. In *Maples v. Thomas*,[48] the Supreme Court held that counsel's abandonment of a death-sentenced, post-conviction petitioner constitutes "cause" for a procedural default under the Court's cause and prejudice doctrine.[49] To date, no court has held that the doctrine of cause and prejudice applies to a statute of limitations default.[50] Therefore, Mr. Myers was required to satisfy the criteria for equitable tolling of the statute of limitations.[51]

III. *MAPLES*

In *Maples*, the petitioner was represented by two attorneys at Sullivan & Cromwell, a large New York law firm, and John Butler, a local attorney in Huntsville, Alabama. Counsel filed a petition for state post-conviction relief pursuant to the Alabama Rule of Criminal Procedure 32. By the time the trial court denied the petition, both New York attorneys had left Sullivan & Cromwell for other employment. The agreement between the New York attorneys and Mr. Butler was that he would serve only as a mechanism for the *pro hac vice* admission of the New York attorneys and would provide no substantive role in the case. Notice of the trial court's denial of Mr. Maples' Rule 32 petition was mailed to Sullivan & Cromwell and returned. An identical notice was mailed to Mr. Butler, but he assumed that the New York attorneys would take appropriate action. After a notice of appeal was not filed, the Office of the Alabama Attorney General notified Mr. Maples that a critical deadline had been missed and informed him that only four weeks remained before the deadline to file a petition for federal habeas relief remained.[52] After receiving this letter, Mr. Maples called his mother and new counsel was obtained.[53] Mr. Maples did not make any effort to monitor his own case prior to his receipt of the State's letter.[54] While a timely petition for federal habeas relief was filed, because the claims raised in the Rule 32 Petition were not presented to the Alabama appellate courts, those claims were deemed procedurally defaulted.[55]

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48. 132 S. Ct. 912 (2012).

49. A procedural default occurs when a claim has not been presented to every appropriate state court and at the time there is no available means by which to present the claim in state court. *Id.* at 927.

50. However, as discussed more fully below, in United States v. Montano, 381 F.3d 1265, 1268-69, 1272-73, 1274 n.8 (11th Cir. 2004), *overruled on other grounds by United States v. Montano*, 398 F.3d 1276 (11th Cir. 2005), the Eleventh Circuit seemed to imply without discussion that a statute of limitations default could be overcome by a showing of cause and prejudice or actual innocence.

51. *Myers*, 420 Fed. App'x at 928.

52. *Maples*, 132 S. Ct. at 920 ("[O]n August 13, 2003 . . . the attorney representing the State in Maples' collateral review proceedings, sent a letter directly to Maples . . . [informing him] of the missed deadline for initiating an appeal within the State's system, and [notifying] him that four weeks remained during which he could file a federal habeas petition. Hayden mailed the letter to Maples only, using his prison address. No copy was sent to Maples' attorneys of record, or to anyone else acting on Maples' behalf.") (internal citations omitted).

53. *Id.* ("Upon receiving the State's letter, Maples immediately contacted his mother.").

54. *Id.*

55. *Id.* at 927.

The lower courts held that attorney abandonment could not constitute cause for a procedural default. In so holding the lower courts relied on the Supreme Court's decision in *Coleman v. Thompson* which held that ineffectiveness of post-conviction counsel could not constitute cause for a procedural default.[56] The Supreme Court reversed, holding that attorney abandonment can constitute cause for a procedural default.

IV. THE CASE OF ROBIN MYERS

Robin Myers was convicted of capital murder and sentenced to death in Morgan County, Alabama for the 1991 murder of Ludie Mae Tucker.[57] Mr. Myers' conviction and death sentence were upheld by the Alabama Court of Criminal Appeals[58] and the Supreme Court of Alabama.[59] The Supreme Court of the United States denied Mr. Myers' petition for review by that Court.[60] Represented by volunteer counsel from Tennessee, Mr. Myers filed a petition for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32.[61] The petition was denied and volunteer counsel filed a timely appeal to the Alabama Court of Criminal Appeals.[62] The appeal was denied and notice was mailed only to out-of-state volunteer counsel.[63] At this point, volunteer counsel abandoned Mr. Myers.[64] Mr. Myers was not aware that the Alabama Court of Criminal Appeals denied his appeal until he received a letter from the Office of the Alabama Attorney general notifying him that all relevant deadlines—both state and federal—had lapsed.[65] With the help of other prisoners, Mr. Myers obtained new counsel and a Petition for a Writ of Habeas Corpus was filed in federal court in 2004.[66]

In Mr. Myers' case, the Eleventh Circuit noted that the facts were strikingly similar to those the Supreme Court suggested would satisfy the "extraordinary circumstances" requirement in *Holland v. Florida*.[67] However, the Eleventh Circuit did not reach the question of whether counsel's abandonment of Mr. Myers constituted extraordinary circumstances because the court found that

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56. 501 U.S. at 755.

57. *See Ex parte Myers*, 699 So. 2d 1285, 1286 (Ala. 1997). While the jury returned a life verdict, the trial judge exercised his discretion and overrode the verdict and imposed a sentence of death. *Id.*

58. *See Myers v. State*, 699 So. 2d 1281 (Ala. Crim. App. 1996).

59. *Id.* at n.2.

60. *See Myers v. Alabama*, 522 U.S. 1054 (1998).

61. *See Myers v. Allen*, 420 Fed. App'x at 926.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* ("While Schwarz's inexcusable abandonment is strikingly similar to the "extraordinary circumstance" of abandonment in Holland, we need not reach that issue because Myers cannot show that he has exercise reasonable diligence in pursuing his rights.").

Mr. Myers did not exercise the requisite diligence.[68] The court's ruling was based on the fact that Mr. Myers, who grew up in dire poverty and functions at approximately a second-grade level,[69] had not made an effort to follow his case in state post-conviction.[70] No such diligence requirement is imposed on a petitioner where the applicable test was cause and prejudice.

The result is that while some prisoners sentenced to death will have their claims receive a full review on the merits in federal court, Mr. Myers, whose case was rejected by the Supreme Court,[71] will likely be executed. The disparate results demonstrate how the current focus on complex procedural rules can have fundamentally unfair results.

A. Post-Conviction Counsel's Abandonment of Mr. Myers

The United States Supreme Court denied Mr. Myers' Petition for a Writ of Certiorari on January 12, 1998.[72] At that point, the clock began to run on the AEDPA statute of limitations.[73] Mr. Myers had 365 days from the Supreme Court's denial of his Petition for a Writ of Certiorari to file a petition for a writ of habeas corpus in federal court.[74] Because the AEDPA statute of limitations is tolled during state post-conviction proceedings,[75] it was imperative that Mr. Myers' counsel file a state post-conviction petition before the one-year deadline expired. It was equally critical that the case remain "properly filed" in state court, meaning that all appeals and motions for rehearing had to be filed in a timely manner.[76] If a state procedural rule was not followed and a state deadline missed, the case would no longer be "properly filed" in state court and the AEDPA clock would start to run again.[77]

In January 1998, Earle Schwarz, an attorney in private practice in Tennessee, agreed to take his first capital case.[78] Mr. Schwarz was made aware of the extent

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68. *Id.*

69. *See* Testimony at the evidentiary hearing held in the United States District Court for the Northern District of Alabama on October 10-12, 2006 (on file with author).

70. Myers v. Allen, 420 Fed. App'x at 928 ("Myers claims that his cognitive impairments and reliance on counsel who had abandoned him made it reasonable for Myers to do nothing until he learned that his execution was scheduled. Although Myers's circumstances do yield a very low bar for what level of diligence is reasonable, he still bears the burden of showing he did something to at least attempt to inquire into the status of his case.").

71. Myers v. Thomas, 132 S. Ct. 2771 (2012) (denying Mr. Myers' petition for a writ of certiorari).

72. Myers v. Alabama, 522 U.S. 1054 (1998).

73. 28 U.S.C. § 2244(d)(1).

74. § 2244(d)(1)(a).

75. § 2244(d)(2).

76. *See* Carey v. Saffold, 536 U.S. 214, 236 (2002) (holding that a petitioner's claim is "pending" for the entire term of state court review, including those intervals between one state court's judgment and the filing of an appeal with a higher state court).

77. *Id.*

78. *See* Letter from Elisabeth Semel, Director, American Bar Association Death Penalty Representation Project, to Earle J. Schwarz (Jan. 31, 1998) (on file with the author) [hereinafter January 31 Letter];

of his obligations as counsel to a death-sentenced inmate.[79] In July 1998, Mr. Schwarz agreed to accept an Alabama case, and thereby committed himself to representing Mr. Myers in all state and federal post-conviction proceedings.[80]

On December 17, 1998, Mr. Schwarz filed a timely Petition for Relief Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in the Morgan County Circuit Court (Rule 32 Petition).[81] As described in Part II, this is the initial step in obtaining post-conviction relief in state court. A petitioner must pursue post-conviction relief in the state court before he files a petition for a writ of habeas corpus in federal court.[82] The Circuit Court denied Mr. Myers' petition and Mr. Schwarz filed a timely notice of appeal to the Alabama Court of Criminal Appeals.[83] Mr. Myers' appeal was denied by the Alabama Court of Criminal Appeals on February 21, 2003.[84]

After appealing the denial of Mr. Myers' Rule 32 petition to the Alabama Court of Criminal Appeals, Mr. Schwarz abandoned the case. Mr. Schwarz never informed Mr. Myers that the Alabama Court of Criminal Appeals had denied his appeal.[85] Mr. Schwarz did not tell Mr. Myers that he would not pursue relief on his behalf in the Alabama Supreme Court or in federal court.[86] After the Alabama Court of Criminal Appeals denied Mr. Myers' appeal, Mr. Schwarz had no further contact with Mr. Myers; he never informed Mr. Myers that he was no longer representing him.[87]

Mr. Schwarz admitted his abandonment of Mr. Myers in a Declaration submitted in federal court.[88] This Declaration was submitted as an attachment to Mr. Myers' Opposition to the State's Motion to Dismiss his petition for federal habeas relief on the ground that it was untimely.

B. Subsequent Litigation

Because Mr. Schwarz had represented Mr. Myers competently for almost five years, and had kept him informed of all developments in the case, Mr. Myers believed that his case remained pending on appeal. As Mr. Myers' deadlines ran

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Declaration of Earle J. Schwarz at ¶ 2, Myers v. Campbell, No. CV-04-C-618-NE (N.D. Ala. Sep. 27, 2004) [hereinafter Declaration of Earl Schwarz].

79. January 31 Letter, *supra* note 78, at 4 ("[i]f relief is denied by the state judge—and you must assume it will be—your firm will be expected to follow the case through proceedings in federal court and, ultimately, clemency if habeas efforts fail").

80. *See* Letter from Elisabeth Semel, Director, American Bar Association, to Earle J. Schwarz (July 13, 1998) (on file with the author).

81. *See* 420 Fed. App'x at 926.

82. 28 U.S.C. § 2244(b)(1)(A).

83. *See* Myers v. State, 699 So. 2d 1281, 1281 (1996).

84. *Id.*

85. Declaration of Earle J. Schwarz, *supra* note 78, at ¶ 6.

86. *Id.* at ¶ 9.

87. *Id.*

88. *See id.*

one after another, he sat on death row unaware of what was happening with his case. While this situation could have been prevented if the state court had sent notice of its decision directly to Mr. Myers, it sent notice only to the volunteer attorney in Tennessee who had already abandoned him.[89] Mr. Myers only learned that that the Alabama Court of Criminal Appeals denied his appeal when he received a letter from the Office of the Alabama Attorney General notifying him that all state and federal deadlines had run.[90]

With the assistance of other prisoners, Mr. Myers obtained new counsel.[91] On March 25, 2004, Mr. Myers filed his initial federal habeas petition in the United States District Court for the Northern District of Alabama.[92] The State moved to dismiss the petition on the ground that it was untimely.[93] The State argued that Mr. Myers' petition was untimely pursuant to 28 U.S.C. § 2244(d)(1)(A) because it had not been filed within one year of the conclusion of direct review in the case.[94] In opposition to the State's Motion, counsel for Mr. Myers argued, *inter alia*, that counsel's abandonment and the failure of the State court to provide direct notice of its decision to Mr. Myers both warranted equitable tolling,[95] and constituted cause for the statute of limitations default.

After several years of litigation, the district court dismissed Mr. Myers' petition for federal habeas relief as untimely. The district court found that the circumstances did not warrant equitable tolling and declined to apply a cause and prejudice analysis to the AEDPA statute of limitations. The Eleventh Circuit affirmed, holding that Mr. Myers had not been diligent in pursuing post-conviction relief[96] despite the fact that he suffers from severe impairments in intellectual functioning and is functionally illiterate. The United States Supreme Court denied Mr. Myers' Petition for a Writ of Certiorari in 2012.[97]

C. Contrast with Maples

As set forth above, Mr. Myers did not receive a letter from the Office of the Alabama Attorney General until after the AEDPA statute of limitations had expired. This fact resulted in his petition for federal habeas relief being filed late. Therefore, under prevailing Supreme Court case law, Mr. Myers was required to satisfy the requirements for equitable tolling, including diligence. The focus of

89. *See* ALA. R. APP. P. 17(a) (service of notice of orders on a party represented by counsel shall be made on counsel).

90. *See* Letter from Office of Alabama Attorney General to Earle Schwarz (Feb. 13, 2004) (on file with the author).

91. *See Myers*, 420 Fed. App'x at 926.

92. *Id.*

93. *See* State's Motion to Dismiss Habeas Petition as Untimely (on file with the author).

94. *Id.*

95. The AEDPA statute of limitations is a non-jurisdictional statute of limitations that can be equitably tolled. *See* Holland v. Florida, 130 S. Ct. 2549 (2010).

96. *See Myers*, 420 Fed. App'x at 928.

97. Myers v. Thomas, 132 S. Ct. 2771 (2012).

the Eleventh Circuit on Mr. Myers' alleged failure to monitor his own case highlights the disparity between the outcome in Mr. Myers' case and in *Maples*. Like Mr. Myers, Mr. Maples took no action to follow his case or find substitute counsel until he received the State's letter.[98] In Mr. Myers' case, the courts saw this as a basis to deny equitable tolling.

As detailed above, Mr. Myers' attorney, Earle Schwarz, was court-appointed and did not follow the rules required for appointed counsel to withdraw.[99] In *Maples*, Justice Ginsberg focused on the fact that Mr. Maples' attorneys were also court-appointed and similarly failed to follow the rules governing withdrawal by appointed counsel.[100] While the Eleventh Circuit acknowledged Mr. Schwarz's "inexcusable abandonment," in Mr. Myers' case, it concluded that Mr. Myers' federal habeas petition was untimely due to his purported lack of diligence.[101]

In *Maples*, Justice Ginsberg also noted the fact that the clerk of court took no steps in order to ensure that Mr. Maples' received notice of a critical decision in his case.[102] As set forth above, the court clerk in Mr. Myers' case did not send a copy of the decision of the Alabama Court of Criminal Appeals directly to Mr. Myers.[103]

In *Maples*, the Supreme Court focused on counsel's abandonment of their client and failed to place the consequences for that abandonment at Mr. Maples' "death-cell door."[104] The Court held that counsel's abandonment of their client in violation of all applicable rules along with the trial court's failure to notify Mr. Maples of a key decision in his case constituted cause for the procedural default of the claims raised in the state trial court in post-conviction but not presented to the State's appellate courts.[105] Not only did the Supreme Court find that counsel's abandonment of their client constituted cause for the procedural default, the Court held this despite the fact that Mr. Maples was also represented by a local attorney.[106] It was undisputed that local counsel received notice of the trial court's decision, but the Supreme Court accepted at face value the representation that local counsel's role was simply to provide a mechanism for

98. *Id.* ("Upon receiving the State's letter, Maples immediately contacted his mother.").

99. *See generally* Declaration of Earle J. Schwarz, *supra* note 78.

100. *Maples*, 132 S. Ct. at 919 (Seven months after the last action taken by the trial court, Mr. Maples' court-appointed attorneys "left [the law firm in New York at which they were associates] . . . Neither attorney told Maples of their departure . . . or of their resulting inability to continue to represent him. In disregard of Alabama law, neither attorney sought the trial court's leave to withdraw. Compounding [the attorneys'] inaction, no other . . . lawyer entered an appearance on Maples' behalf, moved to substitute counsel, or otherwise notified the court of any change in Maples' representation.") (internal citations omitted).

101. *See generally Myers*, 420 Fed. App'x 924.

102. Maples v. Thomas, 132 S. Ct. 912, 919 (2011).

103. *See supra* Part IV.B.

104. *Maples*, 132 S. Ct. at 917.

105. *Id.*

106. *Id.*

the New York attorneys to be admitted *pro hac vice*.[107] Mr. Schwarz did not have a local attorney move his admission *pro hac vice*,[108] therefore, Mr. Myers did not have the extra protection of having his case monitored by a local attorney. In addition, nothing in the Court's opinion in *Maples* indicates that Mr. Maples suffered from the type of severe cognitive deficits that afflict Mr. Myers.

Writing for the majority, Justice Ginsburg held that "[a]bandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door."[109] Despite nearly identical facts, the Court in *Maples* granted relief after focusing on counsel's abrogation of their most basic duties to their client.[110] In stark contrast, the Eleventh Circuit denied relief in Mr. Myers' case because it focused on Mr. Myers' purported failure to monitor his own case. No such duty was imposed on Mr. Maples. "[H]abeas corpus is, at its core, an equitable remedy."[111] The disparate result results in *Maples* and *Myers* highlight the inequitable results that follow when courts apply different tests to procedural and statute of limitations defaults caused by counsel abandonment.

V. THE DOCTRINE OF CAUSE AND PREJUDICE SHOULD BE APPLIED TO THE AEDPA STATUTE OF LIMITATIONS

In *Maples v. Thomas*,[112] the Supreme Court held that counsel's abandonment of a death-sentenced post-conviction petitioner constitutes "cause" for a procedural default under the Court's cause and prejudice doctrine.[113] As described in Part IV, Mr. Myers was likewise abandoned by his attorney. Mr. Myers was not granted relief, however, because, in his case, attorney abandonment caused a statute of limitations default rather than a procedural default.

AEDPA is a non-jurisdictional statute, thus its statute of limitations can be equitably tolled.[114] The Supreme Court held in *Holland v. Florida* that equitable tolling requires that a petitioner demonstrate extraordinary circumstances and diligence.[115] The courts reviewing Mr. Myers case held that, despite significant cognitive impairments, the fact that Mr. Myers did not take any steps to protect his rights until he received a letter from the State informing him that all of his

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107. *Id.* at 919.

108. *See* Order Admitting Earle J. Schwarz to practice *pro hac vice* dated April 23, 1999 (on file with the author).

109. *Maples*, 132 S. Ct. at 917.

110. Holland v. Florida, 560 U.S. 631, 659 (2010) (Alito, J., concurring) ("Common 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.")

111. Schlup v. Delo, 513 U.S. 298, 319 (1995).

112. 132 S. Ct. 912 (2012).

113. *Id.*

114. *See Holland*, 560 U.S. at 644-46.

115. *Id.*

deadlines had run required a finding that he was not diligent. Thus, equitable tolling was denied. Barring clemency or another form of relief in a successor petition, Mr. Myers will be executed without any federal review of his conviction and death sentence. The difference in result between Mr. Myers' case and that of *Maples* demonstrates that the jurisprudence governing post-conviction relief for death-sentenced inmates is still rife with the arbitrariness identified by the Court in *Furman v. Georgia*[116] when it struck down capital punishment in its then-existing form.

Applying a cause and prejudice analysis to the AEDPA statute of limitations would create consistency between the rules governing procedural defaults, decrease the arbitrariness in the system and allow courts to review on the merits claims raised by post-conviction petitioners who were unable to meet the federal statute of limitations because they were abandoned by their attorney. There is no reason a capital post-conviction petitioner should be able to have a procedural default cured due to attorney abandonment but be executed if such abandonment causes a statute of limitations default. This distinction is especially critical in cases in which the petitioner is cognitively impaired because such impairments make it much more difficult—if not impossible—to satisfy the diligence requirement for equitable tolling.

A. Reducing Discrepancies Between Similar Cases

Prior to the enactment of AEDPA, under Supreme Court case law, claims that were procedurally defaulted in state court could be reviewed by a federal habeas court upon a showing of cause and prejudice.[117] While AEDPA did not codify the doctrine of cause and prejudice, courts have continued to apply it to procedural bars post-AEDPA.[118] The reason cause and prejudice was not applied to the statute of limitations prior to AEDPA is simply because that there was no federal statute of limitations prior to AEDPA.[119] Logically, if cause and prejudice applies to a procedural default, there is no reason it should not apply to a statute of limitations default, especially in light of the Supreme Court's holding in *Holland* that the statute is not jurisdictional.[120]

Both *Holland* and *Maples* relied on an agency analysis.[121] Once an attorney abandons her client, she is no longer acting as her client's agent and her acts cannot be imputed to that client. Even though the State does not have a constitutional obligation to provide counsel to indigent post-conviction petition-

116. 408 U.S. 238 (1972).

117. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986).

118. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668 (2004).

119. *See* HERTZ & LIEBMAN, *supra* note 13, at § 5.2 ("Until 1996 [the year AEDPA was enacted], there was no fixed statute of limitations for filing federal habeas corpus petitions.")

120. *See* Holland v. Florida, 560 U.S. 631, 654 (2010) (holding that the AEDPA statute of limitations is non-jurisdictional and may be equitably tolled).

121. *Holland*, 560 U.S. at 659; *Maples*, 132 S. Ct. 912, 915 (2011).

ers, it must "assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process."[122] The Supreme Court has consistently utilized a due process framework to analyze claims concerning access to the courts for indigent petitioners pursuing discretionary appeals and post-conviction relief.[123]

While a State has great discretion in devising means to assure that indigent defendants have an adequate opportunity to present their claims fairly in post-conviction, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accordance with the dictates of the Constitution and, in particular, in accordance with the Due Process Clause."[124] A body of Supreme Court case law demonstrates that state law and procedure governing state post-conviction must comply with the Federal Due Process Clause.

In *Pennsylvania v. Finley*,[125] the Supreme Court reviewed Pennsylvania's post-conviction system. The Court held that the petitioner had not been denied the fundamental fairness guaranteed by the Due Process Clause where appointed post-conviction counsel reviewed the record, consulted with his client, determined that there were no meritorious issues, notified the trial court of his conclusions in writing, and requested permission to withdraw.[126] The petitioner in *Finley* argued that the failure of appointed post-conviction counsel to follow the procedure required by *Anders v. California*,[127] violated his right to due process.[128] In holding that the petitioner had not been deprived of his constitutional rights, the *Finley* Court reaffirmed that post-conviction petitioners have a right to the "fundamental fairness exacted by the Due Process Clause."[129] Because the "respondent [had] received exactly that which she [was] entitled to receive under state law—an independent review of the record by competent counsel—she cannot claim any deprivation without due process."[130]

The Supreme Court held that there was no due process violation in *Finley* because the petitioner "received exactly that which she [was] entitled to receive

122. Ross v. Moffitt, 417 U.S. 600, 616 (1974).

123. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987) (holding that conduct of appointed post-conviction attorney comported with "fundamental fairness" guaranteed by the Due Process Clause); *Ross*, 417 U.S. at 610-11 (holding that Due Process Clause did not require appointment of counsel to indigent defendants to pursue discretionary appeals); Murray v Giarratano, 492 U.S. 1 (1989) (applying due process analysis of *Finley* to death-sentenced, post-conviction petitioners).

124. *Finley*, 481 U.S. at 558 (quoting *Evitts v. Lucey*, 469 U.S. 387, 401 (1985)).

125. 481 U.S. 551 (1987).

126. *Finley*, 481 U.S. at 553.

127. 386 U.S. 738 (1967) (Counsel seeking to withdraw must seek permission from the court. A brief referring to "anything in the record that might arguably support an appeal" must accompany such request. A copy of the be "should be furnished to the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds . . . .").

128. *Finley*, 481 U.S. at 553-554.

129. *Id.* at 555.

130. *Id.* at 558.

under state law."[131] Mr. Myers, however, did not receive exactly that which he was entitled to receive under state law. Under the Alabama rules, once Mr. Schwarz was appointed to represent Mr. Myers, he was obligated to continue to represent him in the Alabama state courts through all appeals unless he was relieved of this obligation by an order of the trial court.[132] While *pro se* petitioners receive notice of decisions in their cases directly from the court, represented parties do not.[133] In the case of a represented party, only counsel of record receives notice of the decision of an Alabama appellate court.[134] Mr. Schwarz did not withdraw as required under the Alabama rules. As with counsel in *Maples*, he remained counsel of record and the Alabama Court of Criminal Appeals only sent notice of its decision to him. Because Mr. Schwarz simply terminated his representation of Mr. Myers without notice to anyone, Mr. Myers did not learn that his appeal had been denied until he received the State's letter more than one year later. The fact that the state court only sent notice to an out-of-state volunteer attorney who had abandoned Mr. Myers' case in violation of Alabama rules deprived Mr. Myers of precisely what he was entitled to receive under Alabama law: notice of a critical decision in his case.[135]

Cause for a procedural default exists whenever "something *external* to the petitioner, something that cannot fairly be attributed to him" results in the "default."[136] Attorney error at a stage of a criminal proceeding at which counsel is not constitutionally guaranteed cannot constitute cause. This is because an attorney normally acts as the agent of his client. Absent a constitutional violation, the error of the attorney is imputed to the client and is not external.[137] The statute of limitations default here was caused because Mr. Myers never received notice of the decision of the Alabama Court of Criminal Appeals. At the time the court issued its decision, Mr. Schwartz was "no longer representing" Mr. Myers and was not acting as Mr. Myers' agent.[138] Because Mr. Schwarz was not acting as Mr. Myers' agent at the time the Alabama Court of Criminal Appeals issued its decision, his conduct cannot be imputed to Mr. Myers.

In contrast, at earlier stages of the case, where the defendant has a Sixth Amendment right to counsel, "[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that

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131. *Id.* at 558.

132. *See* ALA. R. CRIM. P. 6.2 (requiring appointed counsel to file a motion seeking permission to withdraw); ALA. R. APP. P. 24(b)(1) ("[a]ppointed trial counsel shall continue as defendant's counsel on appeal unless relieved by order of the trial court").

133. ALA. R. APP. P. 17(a).

134. *Id.*

135. *See supra* Part IV (discussing that notices of decisions are only sent to counsel if a party is represented). If a petitioner is proceeding *pro se*, then notices of decisions must be sent directly to him. The rules thus provide that both represented and *pro se* petitioners receive notices of decisions in their cases.

136. Coleman v. Thompson, 501 U.S. 722, 753 (1991) (emphasis in original).

137. *Id.* at 753.

138. Declaration of Earle J. Schwarz, *supra* note 78, at ¶ 9.

responsibility for the default be imputed to the State."[139] It "is not the gravity of the attorney's error that matters, but that it constitutes a violation of the petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.* 'imputed to the State.'"[140] Under *Coleman*, any conduct by an attorney that causes a violation of his client's constitutional rights must be imputed to the State. Because Mr. Schwarz's conduct caused a violation of Mr. Myers' Fourteenth Amendment rights, *Coleman* requires that Mr. Schwarz's conduct "must be seen as an external factor" that is "imputed to the State."[141] That the state court did not send notice of its decision directly to Mr. Myers is external to Mr. Myers.[142]

This reasoning demonstrates that there is no reason a statute of limitations default should be treated differently than a procedural default. Applying a cause and prejudice analysis to the AEDPA statute of limitations would create consistency between the different rules governing different types of defaults, and would decrease the arbitrariness in the system. There is no reason a capital post-conviction petitioner should be able to have a procedural default cured due to attorney abandonment but be executed if such abandonment causes a statute of limitations default instead.

139. *Coleman*, 501 U.S. at 754 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

140. *Id.*

141. *Id.*

142. *Id.* at 752 (defining conduct external to a petitioner as "something that cannot fairly be attributed to him").