

No. 10-63

IN THE
Supreme Court of the United States

CORY R. MAPLES,
Petitioner,
vs.

KIM T. THOMAS, Commissioner,
Alabama Department of Corrections,
Respondent.

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

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

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

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

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TABLE OF CONTENTS

Question presented	i
Table of authorities	iv
Interest of <i>amicus curiae</i>	1
Summary of facts and case	2
Summary of argument	4
Argument	5

I

The Court should not alter the balance struck by Congress	5
A. Procedural default before AEDPA	6
B. Congress strikes a new balance	11
C. The overcomplex procedural default rule	15

II

The correct judicial response to the problem of postconviction counsel is to implement the solution enacted by Congress	17
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III

There is no miscarriage of justice in this case	24
A. The relevance of innocence	24
B. Justice in the present case	28
Conclusion	31

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U. S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)	30
Avery v. Georgia, 345 U. S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953)	16
Bousley v. United States, 523 U. S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)	25
Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953)	6, 7, 8
Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)	6, 9, 10, 11
Cullen v. Pinholster, 563 U. S. ___, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)	14
Davis v. United States, 411 U. S. 233, 93 S. Ct. 1577, 36 L. Ed. 2d 216 (1973)	8
Dretke v. Haley, 541 U. S. 386, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004)	13
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Ex parte McWhorter, 781 So. 2d 330 (Ala. 2000)	29
Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963)	8
Felker v. Turpin, 518 U. S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996)	12

Francis v. Henderson, 425 U. S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976)	8
Harrington v. Richter, 562 U. S. ___, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)	12, 14, 15
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Murray v. Carrier, 477 U. S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)	9, 26
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Premo v. Moore, 562 U. S. ___, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011)	28
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United States Statutes

28 U. S. C. § 2243	24
28 U. S. C. § 2244	12, 14, 26
28 U. S. C. § 2254	12, 13, 14
28 U. S. C. § 2261	12
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28 U. S. C. § 2265	22

28 U. S. C. § 2266	21, 22
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**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have filed blanket consents.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the present case, the petitioner seeks to reopen litigation of a murder he undisputedly committed 15 years ago. He wants to litigate over again claims already considered and rejected on the merits. In the process, he seeks to evade rules established long ago by this Court and relied on by Congress when it overhauled the law of habeas corpus. Such a result would cause further delay in the execution of judgments which are already long overdue. This consequence would be contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

After an evening of drinking, playing pool, and riding around with acquaintances Stacy Allen Terry and Barry Dewayne Robinson II in Morgan County, Alabama, Petitioner Cory Maples shot each man twice in the head at close range with a .22 caliber rifle. *Maples v. State*, 758 So. 2d 1, 14-15 (Ala. Crim. App. 1999). Maples fled in Terry's car and was later apprehended in Nashville. *Id.*, at 15. He signed a confession and was subsequently convicted of two counts of capital murder and sentenced to death. *Id.*, at 14. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and death sentence. *Id.*, at 81; *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999).

The events most important to the procedural default issue in this case occurred on this timeline:

September 2000: Clara Ingen-Housz and Jaasi Munanka, associates at Sullivan & Cromwell ("S&C") become involved in the case. See App. to Pet. for Cert. 257a.

July 24, 2001: State collateral relief petition filed in trial court. J. A. 22-24.

Summer 2001: S&C partner Marc De Leeuw becomes “involved in this case.” App. to Pet. for Cert. 257a.

December 7, 2001: Amended petition filed. J. A. 28-142. The signature page lists Ingen-Housz, Munanka, and local counsel John Butler as counsel.

December 17, 2001: Ingen-Housz and Munanka receive the trial court’s order denying the motion to dismiss. “Thereafter, the lawyers working on this case for Mr. Maples prepared for the evidentiary hearing requested in the Rule 32 Petition.” See App. to Pet. for Cert. 258a.

Summer 2002: Associates Ingen-Housz and Munanka leave S&C. J. A. 258a. Although partner De Leeuw and other S&C attorneys are now working on the case, no one notifies the trial court of a change of attorneys or address.

2001-2003: “Mr. Maples periodically met with his lawyers.” J. A. 257.²

May 22, 2003: The trial court reconsiders its denial of the motion to dismiss and enters an order granting the motion. J. A. 146-225. Copies are mailed to Ingen-Housz and Munanka in New York and Butler in Alabama.

Shortly after May 22, 2003: Butler receives his copy of the order and does nothing. App. to Pet. for Cert. 256a. S&C’s mail room returns the copies addressed to Ingen-Housz and Munanka to the court. See App. to Pet. for Cert. 258a.

July 7, 2003: Time to appeal the state trial court’s order expires. Brief for Respondent 9.

2. It would be helpful to know specifically who he met with and when. *Amicus* CJLF has inquired about prison visitor logs and been told they are not retained that far back.

August 13, 2003: The Alabama Attorney General advises Maples of the expiration of time to appeal in order to enable him to meet the federal habeas deadline. App. to Pet. for Cert. 253a-254a. S&C lawyers working on the case learn of the dismissal order after Maples calls his mother who calls S&C. App. to Pet. for Cert. 258a.

Maples sought relief in the state courts, which was denied. See App. to Pet. for Cert. 222a (Circuit Court), 226a (Court of Criminal Appeals), 237a (Supreme Court). This Court denied certiorari. *Maples v. Alabama*, 543 U. S. 1148 (2005).

On federal habeas, the District Court denied relief, finding that the ineffective assistance claims in the state collateral petition were procedurally defaulted. The District Court granted a certificate of appealability on this issue alone, and the Court of Appeals affirmed. See *Maples v. Allen*, 586 F. 3d 879, 883 (CA11 2009) (*per curiam*).

Maples petitioned for a writ of certiorari raising two questions: (1) the adequacy of Alabama's procedural default rule, and (2) whether Maples had "cause" for his default. Pet. for Cert. i. This Court granted certiorari on March 21, 2011, limited to the second question.

SUMMARY OF ARGUMENT

When Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it decided to shift the balance in habeas corpus away from the extensive relitigation of state criminal cases and toward a more limited review. The procedural default rules in effect at that time, including *Coleman v. Thompson*, were part of the canvas on which Congress painted AEDPA. Even though most of the procedural

default law was not codified, courts should not change it in a manner that will shift the balance to a point different from the one that Congress chose.

Several briefs in this case raise the issue of the State of Alabama's lack of a formal mechanism guaranteeing appointed counsel in state collateral review in capital cases. Congress has already acted to address this specific problem, based on a recommendation of a committee of the Judicial Conference chaired by Justice Powell. This solution has not worked to date because it has been obstructed, in large part by the very federal courts that were supposed to enforce it. The correct response of the judicial branch of government is to implement the solution Congress enacted. The judiciary should not make up its own solution, and it should definitely not impose the solution Congress considered and rejected—depriving states of the procedural default defenses previously in effect.

In some circumstances, this Court has made exceptions to procedural rules in habeas corpus to correct a miscarriage of justice. This case does not call for making new exceptions, because there has been no miscarriage. Cory Maples committed a callous crime. He gunned down two people who had been his friends for no good reason and apparently just to steal their car and money. He received a just sentence for this crime.

ARGUMENT

I. The Court should not alter the balance struck by Congress.

In 1996, Congress examined the state of the law of habeas corpus, particularly in capital cases, and enacted the landmark reform in title I of the Antiterrorism and Effective Death Penalty Act of 1996. This law was not

enacted in a vacuum. It was enacted in the context of a large body of case law, especially the decisions of this Court. Congress changed some aspects of that case law, codified some, and left some standing.

An important, and controversial, aspect of that case law was this Court's decision in *Coleman v. Thompson*, 501 U. S. 722 (1991). This Court has recently described *Coleman* as holding “*without qualification*, that a petitioner must bear the risk of attorney error.” *Holland v. Florida*, 560 U. S. ___, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130, 146 (2010) (quoting *Coleman*, *supra*, at 752-753) (emphasis added) (internal quotation marks omitted).

Petitioner and supporting *amici* now ask this Court to alter the balance struck by Congress. *Amicus* NAACP is the most candid, expressly asking the Court to shift procedural default law by modifying or even overruling its precedents in reaction to the congressional reforms. See Brief for NAACP Legal Defense and Education Fund as *Amicus Curiae* 7-10, 23-30 (“NAACP Brief”). Petitioner seeks a similar result but cloaks the request in creative interpretations of the Court's precedents. See Brief for Petitioner 35-39 (trying to get around *Coleman*'s unqualified holding). Either way, the request should be rejected.

A. *Procedural Default Before AEDPA.*

The development of the law of habeas corpus has been uneven, to put it mildly. See *Teague v. Lane*, 489 U. S. 288, 308 (1989) (plurality opinion) (quoting *Fay v. Noia*, 372 U. S. 391, 411-412 (1963)). The procedural default doctrine has been a major part of that unevenness.

Brown v. Allen, 344 U. S. 443 (1953), is the case widely understood to have established the rule that

federal habeas courts would review *de novo* questions of law already decided by the state courts. See *Wright v. West*, 505 U. S. 277, 287-289 (1992) (plurality opinion); *id.*, at 300-301 (O'Connor, J., concurring in the judgment) (discussing *Brown* and its interpretation). In the companion case of *Daniels v. Allen*, though, counsel filed required papers for the appeal to the North Carolina Supreme Court a day late, and the appeal was stricken as untimely. See 344 U. S., at 484-485.

The Court noted that habeas is not to be used in lieu of an appeal, but that habeas relief would be available where the defendant was unable to appeal “because of lack of counsel, incapacity, or some interference by officials.” *Id.*, at 485-486. Absent such circumstances, failure to appeal barred habeas relief the same as other well-established forms of default. See *id.*, at 486, and n. 35 (citing *Darr v. Burford*, 339 U. S. 200, 203 (1950); *Ex parte Spencer*, 228 U. S. 652, 660 (1913); *In re Wood*, 140 U. S. 278 (1891)).

“Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. . . . We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 447, *supra*, but clearly the state’s procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state’s available remedy, in the absence of some interference or incapacity, such as is referred to just above . . . , bars federal habeas corpus. *The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*” 344 U. S., at 486-487 (emphasis added).

Brown/Daniels thus simultaneously expanded the scope of habeas review and boosted the importance of the procedural history of the case in state court. The procedural default rule was an aspect of the exhaustion rule. As with the statutory exhaustion rule, see *id.*, at 462-463, n. 17, the exceptions to exhaustion are for external forces that make the state remedy ineffective. The error of a represented defendant's attorney, even such an obvious and egregious one as missing a clear, jurisdictional deadline, is not sufficient.

The *Daniels* portion of *Brown* was effectively overruled ten years later in *Fay v. Noia*, 372 U. S. 391, 411-412 (1963) (Clark, J., dissenting). Procedural default was limited to an equitable theory where the petitioner's own conduct has disentitled him to relief. See *id.*, at 438. This was further refined to a test of whether the petitioner "has deliberately by-passed the orderly procedure of the state courts" See *ibid.*

Noia itself was undermined in a series of decisions in the mid-1970s. In *Davis v. United States*, 411 U. S. 233, 234-236 (1973), a federal defendant sought to use *Noia* to get around the requirement of Federal Rule of Criminal Procedure 12(b)(2), that an objection to the composition of the grand jury must be raised before trial, unless cause for raising it later was shown. The Court found it "inconceivable" that Congress could have intended 28 U. S. C. § 2255 to allow such an easy circumvention of a rule that Congress had "adopted." *Davis, supra*, at 241-242. The dissent protested that this was contrary to *Noia*, see *id.*, at 245 (Marshall, J., dissenting), and so it was. *Francis v. Henderson*, 425 U. S. 536, 539-541 (1976), relied heavily on *Davis* in a state prisoner case. *Wainwright v. Sykes*, 433 U. S. 72, 87 (1977), adopted the cause and prejudice test as a

general rule, rejecting “the sweeping language of *Fay v. Noia*.”³

The *Sykes* rule was applied to a claim omitted from an appeal in *Murray v. Carrier*, 477 U. S. 478 (1986). Such an omission can be “cause” if it is “constitutionally ineffective,” if the claim “was not reasonably available to counsel,” or if there is interference by the state. See *id.*, at 488. Mere “ignorance or inadvertence” is not sufficient. See *id.*, at 491.⁴ *Carrier* is also significant for its explicit recognition of actual innocence as a free-standing exception to the procedural default rule, discussed further in Part III, *infra*.

The *Sykes* rule was applied to an attorney’s negligent missing of an appeal deadline in state collateral review in *Coleman v. Thompson*, *supra*. The facts of *Coleman* are strikingly similar to the present case. Following his trial, sentence of death, and direct appeal, Coleman was represented in state habeas by lawyers from one of America’s premier law firms, Arnold & Porter. See Joint Appendix in *Coleman v. Thompson*, No. 89-7662, p. 31. Following denial of the habeas petition on the merits by the trial court, *id.*, at 16-19, Coleman’s lawyers appealed three days late because they had made an unwarranted assumption about the date of the judgment. See *id.*, at 32-33; see also *Cole-*

3. A more complete history of the rule is presented in Part II-A of CJLF’s brief in *Baldwin v. Reese*, No. 02-964, available at <http://www.cjlf.org/briefs/Reese.pdf>.

4. A perfectly valid reason for omitting a claim is that the “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U. S. 745, 751-752 (1983)). This is as true in capital cases, which *Smith* was, as in noncapital ones.

man, 501 U. S., at 727, 752. Regarding Coleman’s claim of attorney negligence as cause, the Court clearly conditioned such a claim on a constitutional right to effective counsel in the proceeding at issue.

“Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U. S. 551 (1987); *Murray v. Giarratano*, 492 U. S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright v. Torna*, 455 U. S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney’s error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must ‘bear the risk of attorney error that results in a procedural default.’ ” 501 U. S., at 752-753.

There is, to be sure, some discussion of agency law in a makeweight argument. See *id.*, at 753-754. However, in conclusion the *Coleman* Court unequivocally limited attorney error as “cause” to those proceedings in which there is a constitutional right to counsel.

“Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the

petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. *In the absence of a constitutional violation*, the petitioner bears the risk in federal habeas for *all* attorney errors made in the course of the representation,⁵ as *Carrier* says explicitly.” *Id.*, at 754 (emphasis added).

This was the state of the law when Congress enacted the landmark habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

B. Congress Strikes a New Balance.

Title I of AEDPA is habeas corpus reform. “This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.” Conference Report, Terrorism Prevention Act, H. R. Conf. Rep. No. 104-518, p. 111 (1996). This goal must be kept in mind when interpreting the statute, see *Williams v. Taylor*, 529 U. S. 362, 404 (2000), but it should also be kept in mind when a proposal is made to alter a part of the case law that Congress chose not to change. When Congress acts to reduce a source of delay, courts should not react by creating new sources or expanding other old ones. Congress believed that the body of habeas law prior to AEDPA allowed too much litigation in review of state criminal convictions (and to some degree federal ones), and it acted to shift the balance.

5. As the timeline in the Summary of Facts and Case, *supra*, shows, Maples was actively represented by counsel at all relevant times. The errors made by DeLeeuw *et al.* are clearly “in the course of the representation.”

Several of the changes made by Congress are bars to relitigation. A limit on successive petitions was already in place under *McCleskey v. Zant*, 499 U. S. 467, 492 (1991), but Congress raised the bar in 28 U. S. C. § 2244(b). This limitation is a “modified res judicata rule.” *Felker v. Turpin*, 518 U. S. 651, 664 (1996). Paragraph (1) bars claims that were litigated in federal court on the first petition, and paragraph (2) bars most claims that could have been but were not litigated on the first petition. The most controversial change, § 2254(d)⁶, is a rule of the same general type. “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Harrington v. Richter*, 562 U. S. ___, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624, 638 (2011).

Congress also strengthened other limitations on habeas corpus. The exhaustion rule was fortified by limiting waiver of it to express waivers. See § 2254(b)(3). A statute of limitations replaced the previous amorphous timeliness rule. Compare § 2244(d), with *Lonchar v. Thomas*, 517 U. S. 314, 327-328 (1996).

A new limitation on substantive grounds for habeas relief reinforced the decisions of this Court in *Pennsylvania v. Finley*, 481 U. S. 551 (1987), and *Murray v. Giarratano*, 492 U. S. 1 (1989). In the report that proposed what eventually became Chapter 154, the Powell Committee recommended substantially the language that became 28 U. S. C. § 2261(e). See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 10 (Powell Committee),

6. Section numbers refer to title 28, United States Code, unless otherwise indicated.

reprinted in 135 Cong. Rec. 24694, 24696, col. 1 (1989). This language is expressly based on the holdings of *Finley* and *Giaratano* that there is no constitutional right to counsel in collateral review, and death is not different in this regard. See Powell Committee 13, 135 Cong. Rec., at 24696, col. 3. Congress copied the same language in § 2254(i) to ensure it applied to cases not subject to Chapter 154.

For the most part, Congress chose not to alter the law of procedural default in AEDPA. New § 2254(e)(2) is partly a codification of *Keeney v. Tamayo-Reyes*, 504 U. S. 1 (1992), and partly a raising of its bar. See *Williams (Michael) v. Taylor*, 529 U. S. 420, 433 (2000). Also, Congress repealed the former subdivision (d) that had formed the basis of the *Tamayo-Reyes* dissent. See 504 U. S., at 20 (O'Connor, J., dissenting). The new Chapter 154 has a separate default rule for cases subject to that chapter. See § 2264(a). With these exceptions, Congress left the procedural default doctrine as it existed in case law when AEDPA was adopted. See, e.g., *House v. Bell*, 547 U. S. 518, 539 (2006) (standard for actual innocence unchanged).

The fact that Congress did not codify the rules of *Sykes*, *Coleman*, and other procedural default cases does not mean that this Court should exercise the same latitude in modifying the case law as it exercised before AEDPA. See, e.g., *Sykes*, 433 U. S., at 81. Those cases are threads in the overall fabric, and any substantial alteration risks contradicting the policy decisions made by Congress when it enacted AEDPA.

Although the procedural default rule is no longer part and parcel of the exhaustion rule, the two remain closely connected. *Dretke v. Haley*, 541 U. S. 386, 392 (2004), described the default rule as a “corollary to the habeas statute’s exhaustion requirement.” *O’Sullivan v. Boerckel*, 526 U. S. 838, 848 (1999), noted the default

rule's importance in protecting against evasion of the exhaustion requirement. Given that Congress chose to strengthen the exhaustion rule, any proposal to weaken a corollary rule needed to prevent its evasion must be regarded with caution.

Along with protecting the exhaustion rule from evasion, the procedural default rule now has an additional function of protecting the § 2254(d) bar to relitigation from evasion. Obtaining a state-court ruling on the merits is no longer just a box to be checked as a condition to entering the federal courthouse. After AEDPA, a state-court decision on the merits has a profound effect on *how* the federal court approaches the case. The question of whether one of the two statutory exceptions to the relitigation bar applies, see *Richter*, 131 S. Ct., at 784, 178 L. Ed. 2d, at 638, is a threshold question, decided solely on the record before the state court. See *Cullen v. Pinholster*, 563 U. S. ___, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557, 570 (2011). “This understanding of the text is compelled by ‘the broader context of the statute as a whole,’ which demonstrates Congress’ intent to channel prisoners’ claims first to the state courts.” *Id.*, 131 S. Ct., at 1398-1399, 178 L. Ed. 2d, at 570.

The procedural default rule and § 2254(d) complement each other in much the same way that the two paragraphs of § 2244(b) complement each other. In the case of a successive federal petition, § 2244(b)(1) bars the claims that were made before, and § 2244(b)(2) bars claims that were not made before unless an exception applies. The first federal petition is “successive” to the petition made in state court; § 2254(d) bars the claims adjudicated on the merits in state court, with two exceptions, while the procedural default rule bars those that were not, also with two exceptions. These two rules, applied properly and in conjunction, would

achieve the goal of reserving federal habeas as a “‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Richter*, 131 S. Ct., at 786, 179 L. Ed. 2d, at 641 (quoting *Jackson v. Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). Both the § 2254(d) standard and its broader purpose would be frustrated by an expanded definition of what constitutes “cause” for bringing to the federal court a claim not adjudicated on the merits in state court.⁷

C. The Overcomplex Procedural Default Rule.

Along with respect for the balance struck by Congress, there is an additional, practical reason not to add another wrinkle to the law of procedural default. It is too complex already. The question of whether a claim is barred by failure to assert it in state court in accordance with state rules should be a straightforward one. The rule should expedite federal habeas cases by reducing the claims to be decided to only those decided in state court, most of which should be dismissed at the threshold under § 2254(d) as interpreted in *Richter* and *Pinholster*.

The procedural default rule is riddled with exceptions, and these exceptions have produced much unproductive litigation. See N. King & J. Hoffman, *Habeas for the Twenty-First Century* 77-78 (2011). The decision to place the procedural default rule within the independent state grounds doctrine imported into habeas the very confused jurisprudence of when a state

7. In the present case, there was an adjudication on the merits in the state trial court, but petitioner’s proposal would apply even in cases where there was not and must be evaluated on that basis.

rule is “adequate.” See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris v. Williams*, No. 07-1216, pp. 8-13. That confusion made it very easy to evade the procedural default rule for those who are of a mind to evade, cf. *Avery v. Georgia*, 345 U. S. 559, 562 (1953), and some federal courts launched wasteful and pointless investigations of the homogeneity of state procedural rulings. See Brief for California *et al.* as *Amici Curiae* in *Beard v. Kindler*, No. 08-992, pp. 23-25.

The worst of the abuses should be curbed by the decision last term in *Walker v. Martin*, 562 U. S. ___, 131 L. Ed. 2d 1120, 1127-1130, 179 L. Ed. 2d 62, 71-74 (2011), but many opportunities to litigate whether an omitted claim is barred by procedural default remain. There is the vaguely defined “exorbitant application” exception. See *id.*, 131 S. Ct., at 1128, 179 L. Ed. 2d, at 71, n. 4. There is the perennial assertion of ineffective assistance as cause. See *King & Hoffman, supra*, at 78. There are nondisclosure of evidence cases where the cause and prejudice inquiry largely merges with the merits of the claim. See *Strickler v. Greene*, 527 U. S. 263, 282 (1999).

The exception that causes the least difficulty in practice is the most clearly necessary one—the actual innocence exception. It causes little difficulty because this Court has limited it to cases of innocence of the offense or ineligibility for the punishment and categorically excluded disputes over discretionary sentencing choices. See *Sawyer v. Whitley*, 505 U. S. 333, 347 (1992). Most habeas petitioners are so clearly guilty of the offense and eligible for the punishment that few can even raise a litigable issue under this exception.

Claims of ineffective assistance as cause have been far more problematic, but they have at least been held in check by what has been understood to date as the

bright-line rule of *Coleman*—ineffective assistance as “cause” stops where the constitutional right to counsel stops. Petitioner now seeks to replace the bright-line rule with a fuzzy “abandonment” inquiry. The primary vice of the proposal lies not in the vanishingly small number of cases where such a claim would actually be valid but in the much larger number of cases where a lawyer could craft a claim of abandonment sufficiently plausible to litigate even though ultimately found meritless. Indeed, the present case has come all the way to this Court on certiorari even though the claim of abandonment shrivels upon close inspection. See Brief for Respondent 37-55.

Further complication of the already overcomplex procedural default rule would require compelling justification. There is none in this case, as we will discuss in Part III. First, though, it is necessary to discuss the contention that this Court should reconsider long-settled precedent to address the way Alabama handles appointment of collateral counsel in capital cases. The simple answer is that Congress has already decided how to address this problem, and the duty of the judicial branch is to implement the solution already enacted, something it has failed to do for 15 years.

II. The correct judicial response to the problem of postconviction counsel is to implement the solution enacted by Congress.

Petitioner and *amici* bemoan the fact that the State of Alabama has no formal mechanism for appointing state collateral counsel in capital cases. See Brief for Petitioner 3-6; Brief for Alabama Appellate Court Justices and Bar Presidents as *Amici Curiae* 17-19; Brief for National Association of Criminal Defense Lawyers, American Civil Liberties Union, and ACLU of

Alabama as *Amici Curiae* 22-24. Little of what they say is new. What is remarkable about these briefs is what they fail to mention. The Congress of the United States has already enacted legislation to specifically address this exact problem.

In *Murray v. Giarratano*, 492 U. S. 1, 3 (1989), “[t]he courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief.” This Court reversed. Concurring in that judgment, Justice Kennedy explained,

“Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference of the United States, and Congress has stated its intention to give the matter serious consideration. See 134 Cong.Rec. 33237 (1988) (providing for expedited consideration of proposals of the Judicial Conference committee).

“Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us.” *Id.*, at 14.

Those committees did deliver their reports soon thereafter. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989) (“Powell Committee”), reprinted in 135 Cong. Rec. 24,694 (1989); American Bar Association, *Toward a More Just and Effective System of Review*

State Death Penalty Cases: Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus (Oct. 1989) (“ABA Report”).

While both reports recognized that appointment of qualified counsel in state proceedings was a key reform, the two proposals offered very different approaches to achieve that. The ABA would threaten states with a stick. The federal government would impose “specific mandatory standards.” ABA Report 15. A state that failed to comply would lose some of the protections it had under the law of that time.

“To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding in which the state court, in deprivation of the right to counsel, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner: exhaustion of state judicial remedies, procedural default rules, and the presumption of correctness of state court findings of fact.” *Id.*, at 16.

Yet the state could appoint the best attorney in the world and pay him lavishly and still be stuck with the consequences of his error under this proposal. “Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel” *Ibid.*

The Powell Committee approach was to offer a carrot rather than a stick. The proposal was optional with the states. Habeas Corpus Reform, Hearings

before the Committee on the Judiciary, 101st Cong., 1st & 2d Sess., 42 (Nov. 8, 1989 & Feb. 21, 1990) (S. Hearing 101-1253) (statement of Justice Powell). In return for adopting an appointment of counsel mechanism, review of capital cases would be reduced to “one fair and complete course of collateral review through the state and federal systems.” *Id.*, at 41. This would be achieved by, among other reforms, a strict limit on successive petitions. See *id.*, at 42.

The Powell Committee proposal was introduced by Senator Thurmond as S. 1760. The ABA proposal, as such, was a nonstarter. The Democratic alternative to the Thurmond bill, S. 1757 by Senator Biden, was the Powell Committee proposal amended by inserting some key elements lifted from the ABA proposal. Most pertinent of these for the present case was the “ignorance or neglect” exception to procedural default quoted above, a proposal that would have gutted this Court’s procedural default jurisprudence. See S. Hearing 101-1253, at 46, and n. 6 (statement of Justice Powell).

Habeas reform did not pass in the 101st Congress or in the two succeeding Congresses. In the 104th Congress, on February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitations for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995).

In the Senate, the provisions for an effective death penalty were ultimately consolidated with antiterrorism provisions in S. 635 and enacted as the Antiterrorism and Effective Death Penalty Act of 1996. As enacted, some of the provisions of the Powell Committee proposal, including the strict limit on successive petitions, applied to all habeas cases. Additional incentives were

added to the new Chapter 154 to encourage states to opt in by providing the appointment of counsel mechanisms. Among these were time limits to ensure that the reforms really would speed up the process, see 28 U. S. C. § 2266, a feature that the Powell Committee had decided to omit. See S. Hearing 101-1253, at 42 (statement of Justice Powell).

The incentive approach initially succeeded in encouraging some states to adopt appointment of counsel mechanisms, but it utterly failed in its delay-reducing goal due to a hostile reception by the federal courts charged with enforcing it. *Spears v. Stewart*, 283 F. 3d 992 (CA9 2002), exemplifies the problem. In response to Congress's promise of expedited federal review, the State of Arizona established a mechanism for the appointment of counsel. See *id.*, at 1009. After concluding, correctly, that Arizona's mechanism complies with all of the requirements that appear in the text of the statute, see *id.*, at 1012-1016, the Ninth Circuit claimed to find an additional requirement of timeliness of appointment that appears nowhere in the text. See *id.*, at 1016-1017. Arizona was denied the promised benefit of Chapter 154 even though it had done everything the text of the statute requires. With the promised reward snatched away by the federal courts, the states that had not yet created appointment of counsel mechanisms, including Alabama, no longer had the incentive that Congress had intended.

Congress reacted to *Spears* and other decisions in the USA PATRIOT Improvement and Reauthorization Act of 2005, 120 Stat. 192 (2006). By making significant revisions to Chapter 154, Congress demonstrated its determination to see this dormant law implemented. The time limit on District Court adjudication was expanded from 180 days to 450 days in recognition that the earlier limit may have been too severe. See

§ 2266(b)(1)(A). The requirements to qualify for the chapter were expressly limited to those stated in the text, § 2265(a)(3), for the specific purpose of abrogating *Spears*. See 152 Cong. Rec. 2445-2446 (2006) (statement of Sen. Kyl). The decision as to whether a state is qualified was removed from the habeas court, with its conflict of interest, and given to the Attorney General of the United States with review by the Court of Appeals for the District of Columbia Circuit, the one circuit that does not hear habeas petitions from state prisoners. See *ibid.*; § 2265.

Although enacted five years ago, the revised Chapter 154 has not been implemented to date because of an inordinate delay in promulgating the implementing regulations. See § 2265(b). There are multiple reasons for that delay, but it should be near an end. A revised set of regulations has been published in the Federal Register. See Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11705 (Mar. 3, 2011). The comment period ended June 1, 2011.

Although Congress has twice decided that the policy will be to offer states a carrot and not a stick to encourage appointment of state collateral counsel, Petitioner and supporting *amici* urge this Court to apply the stick that Congress rejected. The *amici* appellate justices and bar presidents bemoan the failure to enact reforms in the Alabama Legislature. See Brief for Alabama Appellate Court Justices and Bar Presidents as *Amici Curiae* 17-19. The NACDL and ACLU castigate Alabama's supposed "intransigence." Brief for National Association of Criminal Defense Lawyers, American Civil Liberties Union, and ACLU of Alabama as *Amici Curiae* 22-24. The thrust of all this is to urge this Court to address the problem by expanding the cause and prejudice exception to the procedural default rule, allowing the exception in a case indistinguishable from

Coleman. The ABA recommended that course, Congress considered that course, and Congress rejected that course.

If it was not proper for this Court to craft its own solution to this specific problem while Congress was considering the question, *Murray v. Giarratano*, 492 U. S., at 14 (Kennedy, J., concurring in the judgment), it would be even less proper for this Court to craft its own solution after Congress has enacted one. It would be still more improper for this Court's solution to be along the lines of the one that Congress considered and rejected.

The judiciary does indeed have a role in fixing the problem of appointment of counsel for state collateral review in capital cases. That role is to promptly implement the solution enacted by Congress. As soon as the administrative portion of that process is completed, which should be soon, the D. C. Circuit and this Court should complete their portion of the qualification process expeditiously, and the habeas courts should then implement Chapter 154 faithfully and not grudgingly for those states that qualify.

When capital cases are completed and executions carried out in the time frames specified in Chapter 154, supporters of capital punishment in the states that have not yet established appointment mechanisms will give their enthusiastic support to the needed legislation. That is the solution that Congress enacted, and that is the solution that the judiciary should implement.

III. There is no miscarriage of justice in this case.

A. *The Relevance of Innocence.*

The habeas statute has long required the court to “dispose of the matter as law *and justice* require.” 28 U. S. C. § 2243 (emphasis added). The law in this case, as explained in Parts I and II of this brief and the Brief for Respondent, requires application of the procedural default rule. Given the tone of the briefs of the petitioner and supporting *amici*, it is worth saying a few words about the justice as well.

In the 1960s, it appeared to many that habeas corpus, along with the statutory substitute for federal prisoners, was about procedure and only procedure. Criminals could litigate their claims under the Fourth Amendment exclusionary rule on habeas corpus the same as they could on direct review, despite the complete absence of any question of guilt or even any unfairness in the procedure for determining guilt. See, e.g., *Kaufman v. United States*, 394 U. S. 217, 228-229 (1969). On the other hand, newly discovered evidence of innocence, as such, was not a ground for habeas relief, even in a capital case. See *Townsend v. Sain*, 372 U. S. 293, 317 (1963).

That is how it was, but not everyone agreed that was how it should be. Justice Black argued in *Kaufman*, “In collateral attacks . . . , I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.” 394 U. S., at 242 (dissenting opinion). Judge Friendly expanded upon this proposal in his famous law review article the next year. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970) (“colorable claim of factual innocence”).

The evolution of the law of habeas corpus since then has been largely in the direction of increasing the relevance of innocence, albeit slowly and in small steps. *Stone v. Powell*, 428 U. S. 465, 494, 495 (1976), accepted in part the argument rejected in *Kaufman* and treated Fourth Amendment claims as categorically different from other claims. Due to the absence of any impact on the accuracy of the guilt verdict, state court decisions rejecting Fourth Amendment claims no longer needed to be reconsidered in federal court. *Id.*, at 491, n. 31 (“no bearing on the basic justice”). *Withrow v. Williams*, 507 U. S. 680 (1993), declined to extend *Stone v. Powell* to *Miranda* claims, but only after concluding that *Miranda* claims do sometimes impact the reliability of the guilt verdict. See *id.*, at 692.

In modern retroactivity doctrine, substantive changes in the law that render the defendant innocent of the crime or ineligible for the punishment apply retroactively on habeas corpus. See *Bousley v. United States*, 523 U. S. 614, 620-621 (1998). Procedural changes do not, with a theoretical exception for watershed changes with a powerful impact on the truth-determining function of the trial. *Teague v. Lane*, 489 U. S. 288, 313 (1989) (plurality opinion). No new rule created since 1989 has qualified for that exception for the simple reason that all such changes were recognized long before. See *Whorton v. Bockting*, 549 U. S. 406, 417-418 (2007).

Judge Friendly’s proposal was accepted for the limited purpose of successive petitions by a plurality in *Kuhlmann v. Wilson*, 477 U. S. 436, 454 (1986). The proposal was not accepted by a majority, however, and it was subsequently supplanted by the cause and prejudice test in *McCleskey v. Zant*, 499 U. S. 467, 493 (1991). *McCleskey* itself was supplanted by AEDPA, requiring either a retroactive new rule (in practice, a

substantive rule) or a specific type of cause plus actual innocence. See 28 U. S. C. § 2244(b)(2).

The *Townsend* dictum that innocence alone is never a ground for habeas relief has come into question three times in this Court, but it has not yet been necessary to definitively resolve the question. The issue was first taken up in *Herrera v. Collins*, 506 U. S. 390 (1993), but upon a closer examination of the facts it became apparent that Herrera was guilty as sin. See *id.*, at 421 (O'Connor, J., concurring). The issue also arose in *House v. Bell*, 547 U. S. 518 (2006), but again it was unnecessary to resolve it. House had made a sufficient showing of innocence to avoid the procedural default for his underlying constitutional claim, discussed below. See *id.*, at 554-555. Finally, in *In re Davis*, 557 U. S. ___, 130 S. Ct. 1, 174 L. Ed. 2d 614 (2009), this Court took the extraordinary step of transferring an original habeas petition to the District Court for hearing. However, upon hearing the evidence it became apparent that Davis, like Herrera, is truly guilty. *In re Davis*, No. CV409-130, 2010 U. S. Dist. LEXIS 87340, *217 (Aug. 24, 2010), appeal dismissed in *Davis v. Humphrey*, 131 S. Ct. 1788, 179 L. Ed. 2d 651 (2011).

The development of the cause and prejudice test, as described in Part I, *supra*, was based in part on the belief that innocent petitioners would be able to meet that test. See *Murray v. Carrier*, 477 U. S. 478, 495-496 (1986). However, *Carrier* also noted that this was not certain in all cases, and it therefore carved out an additional exception for a miscarriage of justice alone, with no showing of cause required. *Id.*, at 496.

Sawyer v. Whitley, 505 U. S. 333 (1992), considered the application of the “miscarriage of justice” exception to the specific problem of capital sentencing. There were three possibilities as to which decisions might be evaluated for a “miscarriage of justice”: guilt alone,

guilt and eligibility, or guilt, eligibility, and discretionary sentencing choice. The Court chose the middle ground. See *id.*, at 343-347. As noted above, Congress subsequently overrode this choice in the context of the successive petition rule and chose guilt alone, but *Sawyer* remains the law for procedural default.

Defining “miscarriage of justice” to embrace a discretionary sentencing choice would be inherently problematic, because that choice is *always* a matter of opinion, not fact. A recent opinion poll in Connecticut asked, “Which statement comes closest to your point of view? (A) All persons convicted of murder should get the death penalty. (B) No one convicted of murder should get the death penalty. (C) Whether or not someone convicted of murder gets the death penalty should depend on the circumstances of the case.” In response, 10% said all, 16% said none, and 73% said it depends. See Quinnipiac University, Death Penalty Support At New High In Connecticut (Mar. 10, 2011), Question 43, available at <http://www.quinnipiac.edu/x1296.xml?ReleaseID=1566>.⁸ There will always be some disagreement as to whether a sentence was just regardless of the circumstances. In most cases, there will be substantial disagreement. While virtually everyone can agree that conviction of the innocent and acquittal of the guilty are miscarriages of justice, no

8. Although this poll is only for one State, two other more traditionally (and poorly) worded questions indicate that Connecticut voters are representative of the national average on the death penalty. Compare *id.*, Questions 41 and 42, with Newport, In U. S., 64% Support Death Penalty in Cases of Murder (Gallup, Nov. 8, 2010); see also Scheidegger, Death Penalty Support At New High In Connecticut, Crime and Consequences Blog, Mar. 11, 2011, available at <http://www.crimeandconsequences.com/crimblog/2011/03/death-penalty-support-at-new-h.html> (discussing question wording).

such agreement is possible for the choice of sentence for murder.

In summary, an underlying trend in the evolution of habeas law from the mid-1970s to the present has been to increase the importance of actual innocence and reduce the importance of other issues. To the extent that the evolution can continue via case law without new statutory enactments, *amicus* CJLF submits that this Court should continue on that path. Repeated, prolonged, and expensive litigation over the discretionary sentencing choice—a choice that can never be universally agreed to be a miscarriage of justice no matter which way it goes—is one of those other issues that should be deemphasized.

B. Justice in the Present Case.

Despite the melodramatic tone of his brief, Maples does not claim the miscarriage of justice exception to the procedural default rule. The reason, obviously, is that he does not remotely qualify for it. He received a just and legal sentence for a callous crime that he surely committed.

There is no dispute that Stacy Terry and Barry Robinson were murdered. They were each shot twice in the head with a .22 in a manner that caused instant death despite the small caliber of the weapon. J. A. 16; cf. *Premo v. Moore*, 562 U. S. ___, 131 S. Ct. 733, 742, 178 L. Ed. 2d 649, 662 (2011) (location of wound as indicative of *mens rea*). There is no dispute that Cory Maples is the one who shot them. There is no dispute that he was found a month later in a motel in Tennessee in possession of Mr. Terry's new Camaro. J. A. 15-16. The powerful inference is that he callously gunned down two men who thought he was a friend just to take their car and money, see J. A. 291 (Maples's statement), and he has offered no credible alternative explanation.

Maples's guilt phase claim against his lawyers is that they did not attempt the notorious "too drunk to form intent" defense. See Brief for Petitioner 7. This defense rarely succeeds for the very valid reason that it is rarely or never true. "Alcohol may loosen behavioral controls through a variety of biologically-induced psychological mechanisms, but intoxicated persons still know what they are doing and intend to do what they do. They might not have committed the same acts if they had been sober, but they still intended to do what they did when intoxicated." Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 45 (1984).

The traditional view is that intoxication is aggravating, not mitigating. See 4 W. Blackstone, *Commentaries* 25-26 (1st ed. 1769). A State may, if it wishes, define *mens rea* so as to completely eliminate this defense, and a "significant minority of the States" have done so. See *Montana v. Egelhoff*, 518 U. S. 37, 58-59 (1996) (Ginsburg, J., concurring in the judgment). Alabama has not gone that far, but it has raised the bar on this defense so high as to virtually eliminate it. "[T]he intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity." *Ex parte McWhorter*, 781 So. 2d 330, 341 (Ala. 2000). According to Maples's own submission to the postconviction court, the evidence of his intoxication was that he was "loud in general," "a little hyper," and not shooting pool as well as he usually did. See J. A. 36. That is, he was the kind of obnoxious drunk that bartenders must deal with on a regular basis. This level

of intoxication does not come remotely close to negating guilt.⁹ See J. A. 157 (postconviction court decision).

Eligibility for the death penalty is also quite clear. Maples killed two people rather than one, the most objective of all eligibility circumstances. See *Tuilaepa v. California*, 512 U. S. 967, 969-970 (1994) (requirements for eligibility circumstances). He is not retarded or a juvenile, and he is not a minor accomplice swept up in the felony-murder rule. Cf. *Atkins v. Virginia*, 536 U. S. 304, 321 (2002); *Roper v. Simmons*, 543 U. S. 551, 575 (2005); *Enmund v. Florida*, 458 U. S. 782, 799-801 (1982).

For the penalty phase, Maples claims that trial counsel failed to present evidence that has no direct connection to the crime and that many people would consider weak, irrelevant, or even aggravating. See Brief for Petitioner 9. “Background” evidence makes no difference to the majority of jurors and only a slight difference to most of the rest. See Garvey, *Aggravation and Mitigation in Capital Cases, What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1571 (1998). Drug addiction is also considered irrelevant by the majority, and among those who consider it relevant more consider it aggravating than mitigating. See *ibid.*

The bottom-line justice of this case does not call for a change in the law in Maples’s favor. Quite the contrary, he is clearly guilty of a brutal and callous

9. Even in the penalty phase, it is entirely reasonable for local lawyers in rural north Alabama to conclude that jurors in their community would take the Blackstone view of alcohol intoxication being aggravating rather than mitigating, and they might well take an even dimmer view of the illegal drugs of crack cocaine and crystal methamphetamine. See J. A. 36. The fact that the prosecution introduced the evidence of intoxication and the defense tried to play it down is unremarkable.

crime, and there is no mitigation that most people would regard as compelling.

Maples has already received review of his claims. He had an appeal for his claims on the record and a state postconviction petition for his claims outside the record. For the latter, he had representation by a premier law firm that few Americans could afford. What is at stake here is only reconsideration by additional courts of weak claims already considered and rejected. *Carrier*, *Sawyer*, and *House* properly acknowledged that the usual rules on procedural default may be bent to correct a miscarriage of justice, but there is none in this case.

CONCLUSION

The decision of the U. S. Court of Appeals for the Eleventh Circuit should be affirmed.

July, 2011

Respectfully submitted,

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