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Of “Just Systems” and Lotteries: Thoughts and Reflections on Maples v. Thomas

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by: Ryan K. Melcher*

ABSTRACT: In 2012, the Supreme Court handed down its seven-to-two ruling in the case of Maples v. Thomas, a sad tale of attorney-ethics disasters and a seemingly broken (assuming it ever worked) Alabama criminal-justice system. Although the Court held that the “extraordinary” facts of the case warranted excusing Maples’s procedural default in his federal habeas corpus petition (namely, his failure to file a petition in time), it did not make entirely clear whether this was a one-time-only deal or a “template” (as dissenting Justice Scalia asserted) for future petitioners seeking relief based on similar falters of their post-conviction-level attorneys. This Article discusses that remaining ambiguity of the decision and challenges its apparent limitations with some additional questions and hypothetical “extraordinary” situations. It then briefly compares the holding in Maples to that in another recent Supreme Court opinion in Martinez v. Ryan—also concerning post-conviction counsel—and examines what this decision could mean for future, unresolved cases. The Article concludes with a discussion of what the Court meant when it claimed that “no just system” would allow Maples’s claims to fail, given the facts preceding his petition, and how the Court can reconcile this claim with prior cases in which “justness” appeared hard to come by.

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I. Maples v. Thomas — The Tale of the Holographic Counsel

a. Case History

In an Alabama Court in 1997, Cory Maples sat as the Defendant in his trial for capital murder of two of his “friends,” after police had apprehended him in Tennessee two weeks after the shootings had occurred. He wrote a confession that he had “shot and killed two boys while they sat in a car in the driveway of [his] home.” He had been drinking earlier in the day but said he “didn’t ‘know why’” he shot the two. Maples was appointed counsel based on his indigency, counsel that had “relatively scant experience in capital cases” and were eligible under Alabama’s capital defense statutes at the time to receive a total of $1,000 in fees for their work, preparation, and time spent in trial and sentencing. Trial counsel failed to introduce evidence of Maples’s history of drug use; failed to introduce witness evidence that Maples was “doing crystal meth and crack” on the night of the shootings (although they did equivocate during sentencing, where they brought out Maples’s alcohol and drug use on that night); and failed to request an instruction on voluntary intoxication or manslaughter. Unsurprisingly, the jury in Maples’s case found him guilty of both capital crimes and recommended death by a vote of 10 to 2—the slimmest margin by which a jury may recommend death and a judge may

1 Brief for Respondent at 3, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63). Maples later described the two victims as “‘two boys,’” but one can glean no further information from the briefs. Id.
2 Id.
3 Id.
4 Id.
6 Id. at 7.
7 Id. at 7–8 (citing Record of the Circuit Court of Morgan County, Alabama, Case No. CC95-842, at 1894).
8 Id. at 7. Maples’s counsel also shifted possible motives in their opening and closing arguments, at one point “conced[ing]” that “there was a loss of life caused intentionally at the hands of Corey [sic] Maples,” and referred to their own efforts during sentencing as “stumbling around in the dark.” Id. (citing Record, supra note 7, at 2914, 3081–82).
impose it in Alabama.\textsuperscript{9} The Alabama Court of Criminal Appeals and the Alabama Supreme Court both affirmed Maples’s conviction and his sentence.\textsuperscript{10}

Once Maples’s case reached State post-conviction proceedings, the story took a fateful course. Because Alabama does not provide counsel for State post-conviction proceedings,\textsuperscript{11} the prominent New York firm, Sullivan & Cromwell, took his case on an (arguably) individual, \textit{pro bono} basis.\textsuperscript{12} Specifically, Sullivan and Cromwell associates Clara Ingen-Housz and Jaasi Munaka appeared on the record,\textsuperscript{13} although other attorneys from the firm, including Mark De Leeuw (who did not appear on the record), still claimed later to have been “involved in the case.”\textsuperscript{14} In order for these New York attorneys to even work on the case, they had to “associate[]” with local counsel who was licensed to practice in Alabama.\textsuperscript{15} The Sullivan & Cromwell associates “associated” with local counsel John Butler, who appeared, admittedly, solely to allow the New York attorneys to work on the case and was to have “no other role in the case.”\textsuperscript{16} On August 1, 2001, Ingen-Housz and Munaka filed a petition for post-conviction relief on Maples’s behalf under Alabama Rule of Criminal Procedure 32.1, raising several claims including ineffective assistance of counsel at trial.\textsuperscript{17}

\textsuperscript{9} Id.; \textsc{ Ala. Code} \textsection 13A-5-46(f).
\textsuperscript{10} Brief for Petitioner, \textit{supra} note 5, at 9.
\textsuperscript{11} \textit{See} id. at 3.
\textsuperscript{12} Brief for Respondent, \textit{supra} note 1, at 7. There is some disagreement between the parties as to whether Ingen-Housz and Munaka’s representation really was “individual” — that is, they were the \textit{sole} representatives of Maples — or whether other lawyers at Sullivan & Cromwell were also involved in some way. \textit{See} id. at 7–8; Brief for Petitioner, \textit{supra} note 5, at 9–11.
\textsuperscript{13} Brief for Respondent, \textit{supra} note 1, at 8.
\textsuperscript{14} Id.
\textsuperscript{15} Brief for Petitioner, \textit{supra} note 5, at 4 (quoting \textsc{ Ala. R. for Admission to Ala. Bar} VII(C) (1998)). Alabama has since changed this rule, now providing no need to “associate local counsel” under the 2008 version of the rule. \textit{Id.} at 5.
\textsuperscript{16} \textit{Id.} at 10
\textsuperscript{17} \textit{Id.}
The State moved to dismiss Maples’s Rule 32 petition, and although the trial court denied the State’s motion, it dismissed Maples’s petition entirely eighteen inactive months later, on May 22, 2003.18 The order was appealable for only forty-two days;19 Maples never received notice of this order, Ingen-Housz and Munaka never filed any appeal, and the time lapsed.20 Later discoveries revealed that the two associates had left Sullivan & Cromwell during the summer of 2002 but had notified no one in Alabama, including Maples.21 The copies of the Rule 32 Order that the Alabama court clerk had mailed to Ingen-Housz and Munaka were returned clerk with “Returned to Sender—Attempted Unknown” and “Returned to Sender—Attempted Not Known” stamped on the envelopes, and “Return to Sender—Left Firm” written on the front.22 Butler received the Order and, consistent with his “no other role” maxim, did nothing with it.23 The Alabama court clerk, similarly, did nothing.24 Despite the notice of the denied Order reaching the offices of at least three different parties, apathy reigned, and Maples sat in prison, none the wiser.

It was not until the State itself, against ethical rules, directly mailed Maples that he found out about his dismissed Rule 32 petition and quickly lapsing timeline in which to file a federal habeas corpus petition.25 Maples called his stepmother, she called Sullivan & Cromwell,

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18 Id.
19 See Ala. R. App. P. 4(a).
20 Brief for Petitioner, supra note 5, at 10.
21 Id. at 11. The two associates remained on Maples’s case as attorneys of record; no one else from Sullivan & Cromwell was on the case. Id. at 12.
22 Id.
23 Id.
24 Id. Ingen-Housz and Munaka had even left personal telephone numbers and home addresses, and the clerk had access to Maples’s prison address. Id. at 11–12.
25 Id. at 12. In Alabama, attorneys must not communicate with an opposing party known to be represented by counsel. Maples v. Thomas, 132 S. Ct. 912, 926–27 (citing Ala. R. Prof’l Conduct 4.2
and the up-to-this-point dormant De Leeuw “leapt into action.” Joined by new Sullivan & Cromwell associates, none of whom were admitted to practice pro hac vice or otherwise in Alabama, De Leeuw filed an out-of-time appeal of the dismissal of the Rule 32 Order. The Alabama trial court, Alabama Court of Criminal Appeals, and Alabama Supreme Court all denied the Order. The U.S. Supreme Court denied certiorari, propelling the case into federal habeas corpus proceedings.

In federal habeas corpus, the new Sullivan & Cromwell team raised the now-defaulted, and not appealed, ineffective-assistance-of-trial-counsel claims from State post-conviction, as well as Maples’s preserved claims from direct review. The State argued, and the district court agreed and held, that Maples had defaulted on his claims of ineffective assistance of counsel and that federal review of those claims was barred. The district court, however, did “authorize[] an appeal,” noting that it was to be decided whether Maples could establish “cause” to excuse this default “given the extraordinary circumstances underlying the default.”

The Eleventh Circuit Court of Appeals affirmed the district court’s decision, holding that the default was based on an independent and adequate Alabama procedural rule and that Maples

(2003)). As the Court notes, however, that Assistant Attorney General Hayden sent this communication directly to Maples was an indication that Hayden himself believed Maples was no longer represented. Id. 26 Brief for Respondent, supra note 1, at 9.
27 Id. at 10.
28 Id. at 11.
29 Id. The trial court disagreed that the court clerk had made any error, hypothetically asking “How can a Circuit Clerk in Decatur, Alabama[,] know what is going on in a law firm in New York, New York?” Brief for Petitioner, supra note 5, at 12–13.
30 Brief for Respondent, supra note 1, at 11.
31 Id. at 12.
32 Brief for Petitioner, supra note 5, at 13–14.
33 Id. at 14.
had failed to show the requisite “cause” to excuse his default. Judge Barkett in the Eleventh Circuit dissented from this ruling, concluding that the default rule was not adequate, and that, even if it was:

[T]he interests of justice . . . require that Maples be permitted review of his claims when the alleged default of those claims occurred through no fault of his own. Rather, any such default is entirely the fault of his post-conviction counsel, and this court is allowing him to be put to death because of that negligence.

Maples petitioned the U.S. Supreme Court for certiorari once again, and this time, on March 21, 2011, the Court granted the petition.  

**b. Supreme Court Decision**

In a seven-to-two decision authored by Justice Ruth Bader Ginsburg, the U.S. Supreme Court reversed the Eleventh Circuit, holding that “on the extraordinary facts of Maples’ case, there is ‘cause’ to excuse the [procedural] default.” The Court noted no lost love for Alabama’s system of indigent capital defense, describing Alabama as “set[ting] low eligibility requirements for lawyers appointed to represent [these] defendants.” The Court recapitulated the lower-court proceedings and Alabama’s rules but pointed out that local counsel, John Butler, should have also accepted responsibility for Maples’s case, rather than the extreme hands-off approach he had taken. The majority also noted that when Ingen-Housz and Munaka had left Sullivan &

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34 *Id.*
35 *Id.*; Maples v. Allen, 586 F.3d 879, 897 (11th Cir. 2009) (Barkett, J., dissenting).
38 *Id.*
39 *Id.* at 918 (quoting Alabama Rule Governing Admission to the Bar VII (2000) (dictating that “local counsel ‘accept joint and several responsibility with the foreign attorney to the client . . . in all matters’” (emphasis added)). According to one *amici* cited by the Court, local counsel rarely associate in any significant way in the case and “most often do nothing other than provide the mechanism for foreign
Cromwell, they failed to seek leave from the trial court to withdraw, adding an additional ethical dimension to their actions. 40

The Court began its analysis by quoting the rule of procedural default: where a state court has declined to hear a habeas petitioner’s claims on the basis of a state procedural default in the preceding proceedings and this default rests on “‘independent and adequate state procedural grounds,’” a federal court may not then review those claims. 41 In most cases, this means the federal reviewing court will examine the law that supported the lower state court’s decision: if the state-court judgment relied entirely on state law, it is considered “independent” of federal law. 42 So long as this State rule serves “a legitimate state interest,” the reviewing court will consider it to also be adequate, and the decision will, thus, be unreviewable. 43 The Maples majority, however, assumed that the Alabama court had rested its decision on an adequate and independent state ground, as the Court had limited its grant of certiorari to the single issue of “whether the uncommon facts presented here establish cause adequate to excuse Maples’ procedural default.” 44 The Court reviewed its precedent regarding what constitutes “cause,” specifically quoting Coleman v. Thompson 45 for the proposition that “[n]egligence on the part of a attorneys to be admitted.” Id. (quoting Brief for Justices at 36, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63)).

40 Id. (citing ALA. R. CRIM. PROC. 6.2, Comment).
41 Id. at 922 (citing Walker v. Martin, 562 U.S. ____, ____, 131 S. Ct. 1120, 1127 (2011); see also Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) (holding habeas petitioner’s claims unreviewable by federal court due to procedural defaults in state proceedings).
43 See Henry v. Mississippi, 379 U.S. 443, 447–48 (1965); see also Lee v. Kemna, 534 U.S. 362, 376 (2002) (noting that even “a generally sound rule” may be found inadequate to bar federal habeas review if it does not serve a legitimate state interest in a specific case).
44 Id.
prisoner’s postconviction attorney does not qualify as ‘cause.’” This is so, spoke the Court, because the attorney acts as the prisoner’s agent, and “under ‘well-settled principles of agency law,’” the prisoner (the principal) “bears the risk of negligent conduct” by his attorney (his agent). Under this “general rule,” the missing of a filing deadline by the attorney is attributed to the prisoner and cannot constitute cause to excuse the procedural default.

But these “general rules” of agency, spoke the Court, do not apply in situations such as the one presented by Maples’s case, where the prisoner’s attorney has effectively abandoned his client. Rather, where the attorney has caused the abandonment, and the subsequent default, he or she no longer serves as the agent of the principal (the prisoner). Citing its 2010 decision in 

Holland v. Florida, and quoting Justice Alito’s concurring opinion therefrom, the Court observed that in “‘extraordinary circumstances beyond [a prisoner’s] control[,] [c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.’” In Holland, the prisoner–petitioner’s attorney had missed the one-year filing deadline for federal habeas corpus petitions under 28 U.S.C. § 2244(d). The petitioner believed that his lawyer “had detached himself from any trust relationship” and “‘ha[d] abandoned [him].’” This abandonment, held the Holland Court, was significant enough “unprofessional conduct” to warrant equitable tolling

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46 Maples, 132 S. Ct. at 922 (quoting Coleman, 501 U.S. at 753) (emphasis added).
47 Id. (quoting Coleman, 501 U.S. at 753–54).
48 Id. (citing Coleman, 501 U.S. at 753–54).
49 Id.
50 Id.
52 Maples, 132 S. Ct. at 923 (quoting Holland, 130 S. Ct. at 2568) (Alito, J., concurring).
53 Holland, 560 U.S. at _____, 130 S. Ct. at 2554.
54 Maples, 132 S. Ct. at 923 (quoting Holland, 130 S. Ct. at 2555).
of the one-year limitations period.\textsuperscript{55} If Maples could show that his attorneys had, indeed, abandoned him—thus “supplying the ‘extraordinary circumstances beyond his control’”—then the procedural bar to his federal petition could be “lift[ed].”\textsuperscript{56}

In Maples’s case, he had three attorneys of record: Ingen-Housz and Munaka from Sullivan & Cromwell and local counsel (however limited his role), John Butler. The problem was that, unbeknownst to Maples, \textit{none} of these three attorneys was “\textit{in fact} serving as his attorney during the 42 days permitted for” his appeal.\textsuperscript{57} The two Sullivan & Cromwell associates “severed their agency relationship with Maples” when they left the firm for new employment—employment that specifically precluded them from representing Maples.\textsuperscript{58} They did not request permission from the Alabama court to withdraw from the case nor did they tell other potentially involved Sullivan & Cromwell attorneys about the situation of Maples’ case, although it would not have mattered if they had as no other Sullivan & Cromwell attorneys were even licensed to practice in Alabama.\textsuperscript{59} Only Butler viably remained on the case. But his participation—or complete lack thereof—in the Court’s view, only “underscore[d] the absurdity of holding Maples barred.”\textsuperscript{60} For Butler, as he had throughout the entirety of Maples’s case, did not act when he received the notice of the Rule 32 petition dismissal—he failed to contact the attorneys at Sullivan & Cromwell or “even . . . place a phone call to the New York firm” at all.\textsuperscript{61}

\textsuperscript{55} \textit{Id}. (quoting \textit{Holland}, 130 S. Ct. at 2554).
\textsuperscript{56} \textit{Id}. at 924.
\textsuperscript{57} \textit{Id} (emphasis added).
\textsuperscript{58} \textit{Id}. Ingen-Housz had taken a position as an employee of the European commission in Belgium, while Munaka had accepted a federal clerkship—both positions that disallowed the former associates from litigating Maples’s case. \textit{Id}.
\textsuperscript{59} \textit{Id}. at 924–25.
\textsuperscript{60} \textit{Id}. at 926.
\textsuperscript{61} \textit{Id}.
The State did not even recognize Butler as a representative of Maples: Assistant Attorney General Jon Hayden addressed his letter of the default “directly to Maples in prison,” not to Butler.62 Not one of these three attorneys was serving as Maples’s agent “‘in any meaningful sense of that word.’”63 Perhaps worst of all, by “staying on” as counsel of record, the three attorneys left Maples without any right to represent himself or seek the aid of new volunteer counsel.64 Maples was effectively left involuntarily and unknowingly pro se and “blocked from complying with the State’s procedural rule”65—his counsel was merely a hologram.

Although the Court noted its duty to “[show[] due regard for States’ finality and comity interests,” it concluded that the additional requirement “that ‘fundamental fairness [remains] the central concern of the writ of habeas corpus’” demanded a different outcome.66 These “extraordinary circumstances” went “beyond [Maples’s] control,” and “no just system would lay the default at Maples’ death-cell door.”67 The Court held that Maples had established the requisite “cause” to excuse his procedural default and remanded the case for a determination of whether Maples was prejudiced by this default.68

Justice Samuel Alito concurred in the opinion of the Court but wrote separately to, in a turn, “save face” for the Alabama criminal-justice system.69 In Justice Alito’s view, the Alabama

62 Id. (emphasis added).
63 Id. at 927 (quoting Holland v. Florida, 560 U.S. ____, 130 S. Ct. 2549, 2568 (2010)) (Alito, J., concurring).
64 Id. at 927, 927 n.11 (citing ALA. R. APP. P. 3(c) (2000)).
65 Id.
66 Id. (quoting Dretke v. Haley, 541 U.S. 386, 393 (2004)).
67 Id. at 917, 927.
68 Id. at 927–28.
system had little “if anything to do with [Maples’s] misfortune.”\textsuperscript{70} He pointed out that the errors of Maples’s trial counsel, whatever those may be, were irrelevant to Maples’s post-conviction counsel’s failure to meet the filing deadline for the Rule 32 petition.\textsuperscript{71} And those post-conviction counsel came from Sullivan & Cromwell, “one of the country’s most prestigious and expensive” law firms.\textsuperscript{72} Justice Alito “ha[d] little doubt” that most criminal defendants would feel as if they had “won the lottery” if given the same opportunity.\textsuperscript{73} This case represented to Justice Alito a “veritable perfect storm of misfortune,” culminating in a deprivation of Maples’s legal representation.\textsuperscript{74}

c. Dissenting Opinion

Joined only by his common compadre, Justice Clarence Thomas,\textsuperscript{75} Justice Antonin Scalia wrote a dissenting opinion. He began by reminding the reading audience of the main principle behind the Court’s “doctrine of procedural default” — “that errors in state criminal trials should be remedied in state court.”\textsuperscript{76} He also reviewed one way to overcome a procedural default (meeting the “cause and prejudice” standard) and how this standard may be met only if the

\footnotesize{prosecutorial experience may explain his “face-saving” gesture on behalf of the Alabama criminal-justice system. \textsuperscript{70} Id. at 928 (Alito, J., concurring). \textsuperscript{71} Id. \textsuperscript{72} Id. \textsuperscript{73} Id. at 928–29 (citing Brief for Petitioner, \textit{supra} note 5, at 9). \textsuperscript{74} Id. at 929. \textsuperscript{75} As SCOTUSblog.com has reported, Justices Thomas and Scalia have agreed at least in part in the judgment of cases over the October 2011 Term 93% of the time. \textit{See Stat Pack, October Term 2011, SCOTUSBLOG.COM, http://www.scotusblog.com/statistics/} (last visited Apr. 7, 2012). During the 2010 Term, Justices Scalia and Thomas saw eye-to-eye a total of 86% of the time. \textit{Stat Pack, October Term 2010, Final, SCOTUSBLOG.COM, 19} (June 27, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf. Conversely, Justice Scalia agreed with Justice Ginsberg, author of the majority opinion, only 65% of the time in the 2010 Term. \textit{Id.} Their agreement numbers of the current term are even lower, at a bare 57% agreement, the second-lowest agreement rate between any two Justices at the time of this writing. \textit{Stat Pack, October Term 2011, supra}. \textsuperscript{76} \textit{Maples}, 132 S. Ct. at 929 (Scalia, J., dissenting) (emphasis added).}
petitioner shows “‘something external to [him], something that cannot be fairly attributed to him.’”\textsuperscript{77} The mistakes of the petitioner’s attorney, he noted, “do not meet the standard” due to the agency relationship between the attorney and the petitioner.\textsuperscript{78} This is especially so, Justice Scalia continued, with any attorney errors committed during the post-conviction setting, “when the client has no right to counsel” and “bears the risk of all attorney errors . . . regardless of the egregiousness of the mistake.”\textsuperscript{79}

Justice Scalia did agree that abandonment could meet the “cause” prong of the standard and that Ingen-Housz and Munaka had, indeed, abandoned Maples in this case.\textsuperscript{80} He disagreed, however, that their departure left Maples unrepresented while the forty-two day appeal period lapsed.\textsuperscript{81} Rather, Justice Scalia was sure that Maples would feel as though the entire Sullivan & Cromwell firm were still representing him, despite the firm’s concession that it handles pro bono cases in their office on an individual basis and despite the fact that no other Sullivan & Cromwell attorneys were qualified to represent Maples in Alabama.\textsuperscript{82} Maples’s lack of knowledge, rather, was the fault of his attorneys—his agents—and could not suffice as “cause” to excuse his default.\textsuperscript{83} In addition, Maples still was (technically) represented by Butler—the “associated” local counsel; despite Butler’s refusal to have any “substantial involvement” in Maples’s case,

\textsuperscript{77} Id. (quoting Coleman v. Thompson, 501 U.S. 722, 748 (1991)).
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 930 (citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman, 501 U.S. at 754); but see discussion of Martinez v. Ryan, infra Section II(b).
\textsuperscript{80} Id.
\textsuperscript{81} Id. (calling it “an unjustified leap . . . to conclude” differently).
\textsuperscript{82} Id. at 930, 931 (noting that nothing in the law prevented these other attorneys from representing Maples simply because “they had not yet qualified before the Alabama Court”). Justice Scalia also points out in his sole footnote that “it would have been in Maples’ interest to say he had no lawyers” to better push the abandonment claim. Id. n.*.
\textsuperscript{83} Id. at 932.
his role “surely” involved keeping track of deadlines for the Sullivan & Cromwell attorneys
and, in Justice Scalia’s view, “assum[ing]” those attorneys were still fully informed. Justice
Scalia became especially irked by the majority’s conclusion that Butler’s failures to do seemingly
anything demonstrated his “‘disclaimer of any genuinely representative role,’” seeing this
array of words as a “template for future habeas petitioners seeking to evade Coleman’s holding
that ineffectiveness of postconviction counsel will not furnish cause to excuse a procedural
default.”

Justice Scalia concluded his dissent with a parting shot at the majority for its bemoaning
of the Alabama criminal-justice system, stating that the law “cannot be” that “whenever a
defendant’s procedural default is caused by his attorney,” “fairness justifies excusing [his]
procedural default.”

II. Thoughts and Analysis

The Court raises a number of interesting issues in its opinion. First, did the Court really
create a new standard, a “template” for future relief as Justice Scalia termed it? Or was this
simply an extraordinary case where the Court decided that the facts reached the threshold
needed for it to intervene? The Court’s references to the seemingly narrow holding suggest the
latter, but perhaps not. And if, in fact, Maples is leading the way for future claims of “severed
agencies” creating “cause” for relief of habeas petitioners, what factors matter? What sorts of

84 Id.
85 Id. (quoting Maples, 132 S. Ct. at 926) (majority op.).
86 Id. at 932–33 (Scalia, J., dissenting) (“No precedent should be so easily circumvented by word games.”). Justice Scalia’s inference that such a large number of cases have, or will have, similarly shameful acts of counsel within them is a quizzical one, at best. See infra, Section II(a).
87 Maples, 132 S. Ct. at 934 (Scalia, J., dissenting).
88 Because the amount of information that one could discuss is broad, this Article will limit discussion to criminal and habeas corpus procedural questions, rather than the ethical issues brought up in Maples.
acts, omissions, advocacy failures, or ethical missteps will factor into the calculus of “cause for agency severance” in the future? Does it matter that neither Maples nor his attorneys ever argued that Maples was actually innocent of the crime? Would a believed-innocent client with less-severe facts be more eligible for relief?

Secondly, the Court uses agency principles to achieve its holding, rather than the currently precedent-based position that there simply is no right to counsel during post-conviction hearings, and any attorney error committed therein is simply imputed to the client due to this lack of a right. Justice Scalia in dissent, however, notes the lack of a right, citing Pennsylvania v. Finley. Given the potential shift in the law in this area via future cases, one is left to wonder if this is simply the way the Court chose to rule to further limit its holding or if it is a sign of things to come.

Lastly, the Court holds that “no just system” would allow Maples to lose in his quest for habeas relief on the basis of the exceptional facts presented. Yet, in the past, the Court has refused to give relief to others in similarly perilous factual circumstances. What are, then, the guidelines for this “just system,” and why do some acts of the Court not impinge on this idealistic view of the Justices’ role?

This Article discusses each of these ideas individually. First, Part II(a) questions whether Maples should be seen as a limited holding, specific only to the facts of the case. Part II(b) discusses the question of agency principles versus post-conviction relief, making brief mention of the also-recent decision in Martinez v. Ryan, as that case surely deserves its own scholarly

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90 See Martinez v. Ryan, 131 S. Ct. 2960 (argued Oct. 4, 2011) (No. 10-1001), discussed infra Section II(b).
discussion. Last, Part II(c) asks of what sort of “just system” Justice Ginsburg was dreaming, making reference to other potentially “unjust” decisions gone uncorrected and unabated.

a. **Maples as a Limited Holding or “Template” for Habeas Relief and the Potential Confound of Innocence**

The majority in *Maples* mentions no fewer than four times that the facts of Maples’s case are “extraordinary” or “uncommon.” Yet Justice Scalia, in dissent, claims that the majority has created “a template for future habeas petitioners” seeking relief. So, which is it? If the former, then *Maples* will stand as an anomaly in the world of habeas jurisprudence, silencing Justice Scalia’s concern of future litigation. If the latter, then the Court has created a very open-ended test with seemingly no direction or guidance for those truly remarkable cases in the future. Justice Scalia may then be right about his concern—the majority may have created a loophole for the Court’s holding in *Coleman v. Thompson* that post-conviction-attorney error may not constitute cause to excuse a procedural default.

i. **How to Prove a Holographic Attorney?**

Let us assume the second case—that is, that the Court has established some threshold test whereby attorney error can be so grossly incompetent, ineffective, or unethical that his or her errors in post-conviction proceedings may constitute cause. The Court does not specify

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91 *Id.* at 917, 924, 927.
92 *Id.* at 922.
93 *Id.* at 933 (Scalia, J., dissenting).
95 *Id.* at 752–54. This would be a rare loophole, it seems, if the facts of *Maples* truly are “extraordinary” and/or “uncommon.”
96 In fact, several lower courts have already assumed this is the case. *See, e.g.*, Moormann v. Schriro, ___ F.3d ___, No. 08-99035, 2012 WL 621885, at *2 (9th Cir. Feb. 28, 2012) (distinguishing this petitioner’s situation—where at least one of two lawyers was always representing petitioner and their alleged failures were, at worst, “claim[s] of serious negligence, but . . . not ‘abandonment’”—from that in *Maples*, where
those facts of Maples’s case that would lead a future court to the same conclusion. Was it the failure of Ingen-Housz and Munaka to inform Maples or other attorneys, including local counsel Butler, of their departure, effectively prohibiting Maples from acting pro se while simultaneously forcing him into it, all unbeknownst to him (what this Article has deemed acting as “holographic counsel”)? Was it their failure to request leave from the court to depart? Was it their inability to even have Maples as a client in their new positions? The Court does point to all of these facts as evidence that the two Sullivan & Cromwell attorneys abandoned their client but does not say which, in the future, would be dispositive of a similar finding.

It leaves one to wonder: in what types of situations might a court reach this threshold? For example, if counsel is sleeping during parts of the proceeding,97 surely he cannot be said to be acting as his client’s agent. Suppose the jurors are sleeping and counsel fails to object to it98—although not as egregious as sleeping counsel, would not a true agent seek to remedy such an

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97 In the perhaps now-infamous case of Burdine v. Johnson, 231 F.3d 950, 961 (5th Cir. 2000), overruled, 262 F.3d 336 (5th Cir. 2001), counsel for the defendant in a capital trial in Texas was said to have spent “a lot” of time sleeping during the trial and “for long periods of time.” Although overturned en banc, the initial panel of the Fifth Circuit vacated the District Court’s grant of habeas relief and held that sleeping, in and of itself, did not necessarily constitute ineffective assistance of counsel. Burdine, 231 F.3d at 958 (citing “real dangers in presuming prejudice merely from a lack of alertness”); but see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) (concluding that no showing of prejudice is necessary where counsel for the defendant “sleeps through a substantial portion of the trial,” as the conduct is “inherently prejudicial”).

98 See Savajian, 2012 WL 263492, at * 4 (dismissing as precluded all claims of ineffective assistance of trial counsel, with the exception of the claim that counsel failed to notify the judge that two jurors were sleeping during trial proceedings).
event? What if counsel is inebriated during the hearings or in the mornings prior to the
hearings or when he or she goes home at night following them? An intoxicated person could not possibly be functioning properly to represent another in court. Nor could counsel suffering from a mental illness. What if counsel is simply incompetent, completely unqualified,

99 Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (affirming trial court’s finding of counsel competence despite evidence that trial counsel abused drugs “before and during the trials”); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) (affirming trial court’s dismissal of capital-murder habeas petition, concluding that drug use of trial counsel was not “in and of itself, relevant to an ineffective-assistance claim”); Hernandez v. Wainwright, 634 F. Supp. 241, 244–45 (S.D. Fla. 1986) (finding counsel competent and not an alcohol abuser, although he was drunk during pretrial consultations, had alcohol on his breath during the trial, and was a suspected alcoholic), aff’d, 813 F.2d 409 (11th Cir. 1987); but see State v. Vickers, 885 P.2d 1086, 1091 (Ariz. 1994) (finding evidence of errors of trial counsel amply indicative of “drug and/or alcohol [use] during court proceedings” to support defendant’s claim of ineffective assistance).

100 See, e.g., Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) (affirming murder conviction and sentence of death in case where one of petitioner’s two trial counsel had a “decades-long routine of drinking approximately twelve ounces of rum each evening”); Bonin, 59 F.3d at 838 (finding trial counsel’s abuse of drugs both before and during the trial “irrelevant” under an objective standard of competence); Hodges v. State, 949 So. 2d 706, 721 (Miss. 2006) (denying petition for post-conviction relief of capital-murder conviction and sentence of death despite trial counsel’s use of both prescription and non-prescription drugs including marijuana, methamphetamine, and cocaine around the time of trial); State v. Coates, 786 P.2d 1182, 1186–87 (Mont. 1990) (refusing to take into the account of whether counsel was ineffective his cocaine abuse during the trial, which became “public knowledge” afterwards), overruled on other grounds by Porter v. State, 60 P.3d 951 (Mont. 2002).

101 Contra, e.g., Smith v. Ylst, 828 F.2d 872, 875, 877 (9th Cir. 1987) (finding proper trial court’s refusal to conduct an evidentiary hearing on counsel’s competence despite counsel’s “mental incapacity”); Hodges, 949 So. 2d at 721 (findings that trial counsel’s parents sought to have him committed after trial “because of his suicidal thoughts and paranoid delusions” and his subsequent commitment and diagnosis as a “mentally ill person who poses a substantial likelihood of physical harm to himself” only “explain[ed] some of [counsel’s] behavior before and during” the trial (emphasis added)); see Bell v. Bergh, No. 11-10328, 2012 WL 680391, at *3 (E.D. Mich. Mar. 1, 2012) (denying State’s motion for summary judgment and dismissal of habeas petition and granting petitioner equitable tolling where petitioner’s attorney, a sole practitioner, suffered from neurological problems that resulted in “convulsions, loss of memory, and hospitalization” and an inability to work or even “think clearly . . . [for] weeks at a time’’); id. at *4 (describing case of attorney negligence as “not a garden-variety case” and citing Maples v. Thomas, 132 S. Ct. 912, 924 (2012), for the proposition that Petitioner “cannot be faulted for lack of diligence” in pursuing his rights, as he believed he had active counsel). The Bell court, it seems, refused to fault the petitioner for his counsel turning holographic.

102 See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (unanimously holding that counsel had performed deficiently under Strickland v. Washington, 466 U.S. 668 (1984), where counsel seemed to have no grasp of discovery rules, no desire to prepare for the case, and “a startling ignorance of the law”); Scarpa v. Dubois, 38 F.3d 1, 7 (1st Cir. 1994) (reversing trial court’s grant of habeas relief despite trial counsel’s abysmal efforts at trial, where counsel failed to effectively cross-examine the prosecution’s main
wholly unprepared,\textsuperscript{104} entirely inexperienced,\textsuperscript{105} utterly apathetic to the case and its outcome,\textsuperscript{106} or secretly trying to lose the case? Would any of these circumstances qualify for cause under the holding of Maples (assuming such a standard exists)? The Court’s holding in Maples suggests only a flimsy guide. If cause to excuse attorney error in post-conviction may now be attainable, witness, actually solicited the jury to believe that witness, and pursued an entirely incognizable defense that “virtually conceded the elements of the charged offenses”); \textit{but see United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991)} (concluding that defense counsel’s efforts “caused a breakdown in our adversarial system of justice” where he conceded in closing argument that “there was no reasonable doubt” regarding an element of the crime — “that his client robbed the bank”).

\textsuperscript{103} \textit{See, e.g., United States v. Bergman, 599 F.3d 1142, 1147–48 (10th Cir. 2010)} (finding violation of Sixth Amendment rights where defendant was represented at competency hearing by “phony counsel” who had never actually attended law school or graduated from college, despite his assertions to the contrary); In re Docking, 869 P.2d 237, 238–39 (Kan. 1994) (reprimanding with public censure lawyer of less than one-year of experience where he problematically represented three A-felony cases simultaneously, failed to consult with an experienced criminal attorney, and admitted at subsequent disciplinary hearing that he was too experienced in his early years to handle such a case).

\textsuperscript{104} \textit{See, e.g., United States v. Cronic, 466 U.S. 648, 664–65 (1984)} (holding that even where trial counsel was given twenty-five days to prepare a defense for a capital murder trial, evidence against Defendant was indisputable such that “it [could not] even arguably justify a presumption that no lawyer could provide . . . the effective assistance of counsel required”); United States v. Sellers, 645 F.3d 830, 839–40 (7th Cir. 2011) (finding trial court’s denial of Defendant’s motion for a continuance arbitrary where counsel other than Defendant’s first choice failed to prepare for trial in anticipation of Defendant’s first choice taking over, yet Defendant’s first choice was “completely unfamiliar with [the] case and wholly unprepared for trial”).

\textsuperscript{105} \textit{See, e.g., Cronic, 466 U.S. at 665} (refusing to presume ineffectiveness of capital-murder defense counsel due to lawyer’s youth, primary work in real estate cases, or fact that this case was his first jury trial); Fields v. Gibson, 277 F.3d 1203, 1215 n.7 (10th Cir. 2002) (refusing to find guilty plea of defendant involuntary due to counsel’s inexperience, as inexperience “is not the equivalent of incompetence”) (quoting United States v. Helwig, 159 F.2d 616, 617–18 (3d Cir. 1947) (internal quotation marks omitted)).

\textsuperscript{106} \textit{See, e.g., Frazer v. United States, 18 F.3d 778, 783 (9th Cir. 1994)} (finding a Sixth Amendment violation but remanding to determine prejudice where lawyer appointed to indigent client called him a “stupid n[*****] son of a bitch” and threatened to perform poorly if the defendant chose to take his case to trial); State v. Harvey, 692 S.W.2d 290, 292–93 (Mo. 1985) (reversing sentence of death and remanding for new trial where counsel for defendant refused to even participate in the trial in any way, “effectively boycot[ting] the trial”); People v. Coss, 359 N.E.2d 1172, 1174 (Ill. App. Ct. 1977) (concluding that refusal of counsel to “take any further part in the trial” after court denied his motion to dismiss was violation of right to counsel and not “a tactical consideration”).

\textsuperscript{107} \textit{See, e.g., Abu-Jamal v. Horn, No. CIV. A. 99-5089, 2001 WL 1231822, at *4 (E.D. Pa. 2001)} (rejecting petitioner’s claim of “knowing and intentional sabotage” by his post-conviction counsel due to lack of right to counsel and failure to show deficient performance to support claim); Brown v. State, 589 S.W.2d 368, 369 (Mo. Ct. App. 1979) (rejecting Defendant’s motion to set aside conviction of narcotics possession on grounds that his counsel “did intentionally sabotage his case” by failing to file a motion for a new trial in time).
and if it is limited to “extraordinary” case facts, the Court has not given any real suggestions one way or the other of which facts would have to be alleged, shown, pled, or proven.

Some lower courts, however, seem to suggest that some situations are, indeed, egregious enough to grant relief, habeas or otherwise,108 and others view Maples as creating a threshold test, rather than as a one-time-only escape from procedural default.109 The “trick” may not be, as Justice Scalia suggests, to allege that counsel’s efforts were so deficient as to belie his or her role as the “agent” of the client.110 Rather, the “trick” will be to simply have facts that establish that such a role could not have existed. The few “lucky” habeas petitioners who allege truly agency-severing acts of their attorney will be the ones who get relief, which, given some of the examples courts have seen in the past, they sometimes do deserve.

ii. Innocence as Agency-Severing?

Problems of proof and indeterminacy in the holding of Maples as they are, what if a new factor is added into the equation, one not argued in Maples111: what if Maples, in addition to having ineffective counsel in post-conviction proceedings, also claimed he was actually innocent of the crime? Currently, the Court has refused to recognize a substantive claim of actual innocence—that is, a claim that because this particular petitioner is actually innocent of the crime for which he has been found guilty, the Court must release him.112 But would a feasible claim of

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109 See supra note 96, discussing some such cases.
111 The Government even made it a point to mention this absence. See Brief for Respondent, supra note 1, at *2 (“Maples makes no claim of actual innocence . . . .”).
innocence in Maples’s case alongside the unfortunate facts of his case have been more persuasive than the facts alone? Or, alternatively, could the facts have then been less “uncommon” and still enough for the Court to grant review?

Innocence is not a one-use term—a person may be “actually” or “factually” innocent, meaning that he or she is, in fact, not actually the person who committed the crime at all.113 Distinguishable from this innocence is that of the person who may have committed the act in question but was falsely convicted through some means, persons whose innocence will not be brought to light by means of DNA (as may those in the “actually innocent” category)—the “legally” innocent.114 The difficulty, as Professor Hughes explains, is that the public, media, and courts rarely consider those in the latter category as innocent at all.115 Instead, they are only considered “wrongfully convicted.”116 Such a focus on only those “actually” innocent, Hughes argues, may have “diluted the core conception of innocence,” such that those with constitutional claims may become stigmatized and looked over, despite the “warrant[ed] reversal[s] of their wrongful convictions.”117

114 Id. at 1087–88; see also Nicholas Berg, Note, Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 122 (2005) (explaining the difference between “legal innocence [where] . . . not enough proof of guilt was introduced at trial to establish that a defendant is guilty beyond a reasonable doubt” and “actual innocence [which] means simply that the defendant did not commit the offense in question”). These two definitions do differ from Professor Hughes’s which suggests legal innocence as a case where although the defendant “did commit [the] crimes, . . . [they] are wrongly convicted . . . because of constitutional violations involved in their conviction.” Hughes, supra note 113, at 1087–88.
115 Hughes, supra note 113, at 1088.
116 Id. at 1089. Others likely use different, cynical terms to describe these persons, such as “lucky.”
117 Id. at 1089–90.
Maples did not argue, at least in his appeal to the Supreme Court, that he was actually innocent, although he could be in the category of “legally” innocent under Professor Hughes’s definition. Given that Maples’s counsel deserted him, failed to inform him of the departure, and then left intending-to-be-uninvolved local counsel to clean up the mess, it could be said that Maples was “legally innocent” due to various Constitutional violations that permeated his proceedings. But in a case where the petitioner has a cognizable claim of actual innocence, perhaps less emphasis should be placed on how “extraordinary” or “uncommon” the facts need be. If counsel simply fails to raise any arguments of innocence, again assuming a viable case of innocence, should that be enough to meet the threshold of a severed agency relationship as in Maples? If counsel does not argue to the court that her client did not commit the crime, but there is persuasive evidence that that is actually the case, can it really be said she is acting on the client’s behalf? Or should this just work into a claim of ineffective assistance of counsel and require, as other ineffectiveness claims, that the petitioner meet the Strickland standard for ineffectiveness? Especially in cases where there is a feasible, viable showing of “actual” innocence.

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118 Id. at 1088.
119 For example, in Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court reviewed, at great length, the facts presented in the capital-murder trial of a man claiming he was innocent of the crime. The Court’s analysis turned primarily on exculpatory evidence that the prosecution had failed to disclose and whether the “cumulative effect” of that evidence was sufficient to warrant reversal of Kyles’s conviction. Id. at 420. The three-justice dissent sharply criticized the majority’s view of the evidence and engaged in a review of its own, finding no justification for the reversal of Kyles’s conviction. Id. at 464–75 (Scalia, J., dissenting). Following the Court’s remand for a new trial, Kyles was tried an additional three times, each time resulting in a mistrial. See Hughes, supra note 113, at 1087 n.10 (citing Nina Rivkind and Steven F. Shatz, Cases and Materials on the Death Penalty 396 (2001)).
120 See Jones v. Barnes, 463 U.S. 745 (1983) (refusing to require defense counsel to raise every issue on appeal on command of client, including frivolous claims).
innocence, courts should not simply pass along the case so easily, for we know now of the consequences such indifference may bring.\textsuperscript{122}

Most recently, the Supreme Court passed on a case that once again raised the possibility of establishing a freestanding claim of actual innocence.\textsuperscript{123} The petition for certiorari describes the case as one in which the Fifth Circuit granted the Petitioner, Larry Ray Swearingen, leave to file a successive habeas petition in both state and federal court;\textsuperscript{124} where concurring Judge Wiener of the Fifth Circuit noted that, “this might be the very case for this court . . . or the U.S. Supreme Court . . . to recognize actual innocence as a ground for federal habeas relief”;\textsuperscript{125} where the facts demonstrated that, due to the “undisputed science today,” it was impossible for Swearingen to have committed the murder in question;\textsuperscript{126} and in which the evidence of “innocence is so compelling that [Petitioner’s] execution would violate the Constitution.”\textsuperscript{127} The Petition makes familiar arguments—that such an execution would violate the Eighth Amendment’s “proscription against cruel and unusual punishment and the Fourteenth Amendment’s due process” clause\textsuperscript{128}—and points out the discrepancy in the circuit courts of

\begin{itemize}
  \item \textsuperscript{122} See Hughes, supra note 113, at 1093 n.41 (citing Richard Rosen, Innocence and Death, 82 N.C. L. REV. 61, 73–74 (2003) (positing that hundreds or thousands of actually innocent persons may remain in jail “for every defendant who is exonerated [based on] DNA evidence”).
  \item \textsuperscript{123} See Petition for Writ of Certiorari, supra note 112.
  \item \textsuperscript{124} Id. at 19.
  \item \textsuperscript{125} Id. at 20.
  \item \textsuperscript{126} Id. at 13. This claim is based on the reports of six scientists, including the one that initially testified against Swearingen, that the body of the victim was left in a forest at a time when Swearingen was already incarcerated. Id. at 14–17.
  \item \textsuperscript{127} Id. at 23.
  \item \textsuperscript{128} Id. at 24. See also Herrera v. Collins, 506 U.S. 390, 431 (1993) (Blackmun, J., dissenting) (expressing belief that “the execution of an innocent person is ‘at odds with contemporary standards of fairness and decency’” recognized under the Eighth Amendment) (quoting Spaziano v. Florida, 468 U.S. 447, 465 (1984)); Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam); id. at 241 (Douglas, J., concurring) (expressing belief that “the exaction of the death penalty does violate the Eighth and Fourteenth Amendments”); id. at 290 (Brennan, J., dissenting) (contrasting sentence of life imprisonment, where the
appeals in approaching this issue. Perhaps worst of all among these upsetting events is that this may be the case hypothesized above: there is overwhelming evidence of innocence, and yet, Swearingen’s appointed trial counsel hired an incompetent, “bland,” so-called “expert”; failed to counter the State’s expert on several debatable points and glaring omissions; and focused solely on the “weak and tentative[ly]” supported aggravating charges. The Fifth Circuit affirmed the trial court’s denial of Swearingen’s successive habeas corpus petition on, inter alia, grounds of failure to demonstrate ineffective assistance of counsel, suggesting that the deficiencies in counsel’s performance in this case did not rise to a similar level as those of counsel in Maples or even that a cognizable claim of actual innocence will not allow lesser facts to still meet a similar standard. Whatever the case is, the Court was not convinced by the Petition that it was “the very case” in which it could decide the fate of the freestanding claim of actual innocence. Thus, the Court denied certiorari.

“prisoner retains . . . the constitutional rights . . . to treatment as a ‘person’ for purposes of due process of law” from a sentence of death which “involves . . . a denial of the executed person’s humanity”); id. (commenting that due to the “recognition of human fallibility” involved in the imposition of the death penalty, “the punishment of death must inevitably be inflicted upon innocent men”); id. at 291 (noting lack of hesitancy to hold, solely because “the deliberate extinguishment of human life by the State is uniquely degrading to human dignity, . . . that death is . . . a ‘cruel and unusual’ punishment”); id. at 359 (Marshall, J., concurring) (concluding that in any situation, “[t]here is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.”).

129 Id. at 26 (noting that “the First, Fourth, Eighth, Ninth, and Eleventh Circuits have assumed . . . a freestanding claim of actual innocence may warrant habeas relief” while the Seventh and Tenth have refused to even accept that such a claim could be established at all).
130 Id. at 9 (describing the “retort” that defense’s expert forensic pathologist gave to the State’s Medical Examiner—Expert regarding the date of the victim’s death based on her autopsy report).
131 Id. at 9–11 (including the State’s expert’s focus “almost exclusively” on the victim’s head, lack of body-weight loss over the course of the purported time the body had been in the forest, and lack of bloating—a normal occurrence in deceased bodies within a few days—among those points).
132 Id. at 11 n.4 (quoting Swearingen v. State, 101 S.W.3d 89, 96 (Tex. Crim. App. 2003)).
133 Id. at 2a–3a (appendix containing unpublished Fifth Circuit opinion in Swearingen v. Thaler, No. 09–70036 (5th Cir. Apr. 7, 2011)).
134 A contention which does hold merit.
The future of Maples’s holding is to be seen—including whether Justice Scalia’s fears of a Coleman-evading template to relief materialize. With any luck, however, the Court will not again have to face such an embarrassing case of attorney–client-relationship destruction. Whether or not innocence could play a role in the calculus of agency severance is another interesting consideration that, although not present in Maples’s case, could lead the Court to repeat its holding in a future case where the petitioner–defendant has been plagued by “extraordinarily” disconcerting facts and does have such a viable claim of actual innocence.

b. Agency Principles and the Right to Counsel in Post-Conviction Proceedings

In Pennsylvania v. Finley, the Supreme Court held that there is no right to counsel in post-conviction proceedings, and thus, neither the Due Process nor Equal Protection clause of the Fourteenth Amendment are violated by an attorney’s poor performance in those proceedings.\textsuperscript{135} The majority in Maples, however, relied on the nature of the attorney–client privilege as one of principal and agent in holding that abandonment by Maples’s attorneys constituted the requisite cause to excuse his procedural default, despite the seemingly universal holding to the contrary in Coleman v. Thompson.\textsuperscript{136} Justice Scalia, of course, made sure to note reference to Pennsylvania v. Finley\textsuperscript{137} and the fact that at stages such as post-conviction proceedings, where there is no right to counsel, the client must bear any and all errors of counsel, “regardless of the egregiousness.”\textsuperscript{138} While one could debate whether this has to do only with the Court’s

\textsuperscript{138} Id.
presumed-limited holding in *Maples*, the choice of rationale could also be commensurate with a case undecided at the time *Maples* came down.

In *Martinez v. Ryan*, a habeas case argued the same day as *Maples* during the October 2011 Supreme Court Term, the petitioner claimed that the right to counsel should exist in post-conviction proceedings where those proceedings are effectively the first opportunity (and thus, the “first appeal”*) to bring claims of ineffective assistance of trial counsel. The main question for the Court was whether the holding in *Finley* stood categorically to preclude counsel in any situation in post-conviction relief or whether, as Martinez argued, there should be some sort of exception cut out for situations such as his. Before the Court handed down its own opinion, one was left to wonder: did the majority’s careful choice of language and rationale in *Maples* relate in any way to its future holding in *Martinez*? That is, did the Court choose not to simply hold Maples accountable for his attorneys’ errors due to the lack of a right to counsel because it would soon be noting a situation where that was not the case? Did Justice Scalia mention *Finley* because he would be on the dissenting end in the *Martinez* opinion, as well?

An answer came March 20, 2012, when the Court, via the same seven-to-two breakdown from *Maples*, handed down the opinion in *Martinez v. Ryan*. Without discussing the holding or rationale in too much detail, the Court held that whether or not a right to counsel exists

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139 See Section II(a)(i), supra.
140 See Douglas v. California, 372 U.S. 353, 356, 357–58 (1963) (finding a right to counsel for defendants in direct appeal, which serves in most cases as a defendant’s “first appeal, granted as a matter of right”).
142 That is, Justice Scalia dissenting, joined by Justice Thomas. Here, however, Justice Kennedy wrote the majority opinion, and no other Justices wrote concurring opinions as did Justice Alito in *Maples*.
during post-conviction proceedings in these limited situations is still an unanswered question.\textsuperscript{144} Instead, the Court held that in these particular situations, where the “initial-review collateral proceeding” is the petitioner’s first opportunity to raise a claim of ineffective assistance of trial counsel, the complete lack of counsel or, alternatively, representation by only “substantial[ly]” ineffective counsel, may “establish cause for a prisoner’s procedural default” of failing to raise the “claim of ineffective assistance at trial.”\textsuperscript{145} Thus, the Court did not recognize a constitutional right to have effective counsel during collateral (or “initial review”) proceedings where it is the first available opportunity to raise a claim of ineffective assistance of trial counsel. If, however, counsel was constitutionally ineffective in or entirely absent from the “initial review” stage regarding only the ineffective-assistance-of-trial-counsel claim,\textsuperscript{146} then federal habeas courts would be available to hear that claim.\textsuperscript{147}

Justice Scalia’s dissent showed the rhetorical frustration of an outraged Justice.\textsuperscript{148} Among the problems Justice Scalia found with the majority opinion, that most pertinent to the discussion here is his citation, once again, to \textit{Pennsylvania v. Finley}, which he states “quite clearly

\textsuperscript{144} Id. at *5 (noting that “This is not the case . . . to resolve whether that exception exists as a constitutional matter.”).

\textsuperscript{145} Id. at *5, *7 (emphasis added).

\textsuperscript{146} See id. at * 10 (noting that the “rule of Coleman [that attorney error may not constitute cause] governs in all but the limited circumstances recognized here”).

\textsuperscript{147} In other words, although the Court passed on whether such a constitutional right should or does exist, it created a new “equitable” remedy for petitioners who were without counsel or “substantially” incompetent counsel. See id. at *8; Steve Vladeck, Opinion analysis: A new remedy, but no right, SCOTUSBLOG (Mar. 21, 2012, 10:30 AM), http://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right/ (discussing “the narrowness of the majority’s ‘equitable,’ rather than ‘constitutional’ rule”). By only creating a new remedy, rather than announcing a new constitutional rule, the Court also avoided the bar on retroactivity it would have faced due to its decision in \textit{Teague v. Lane}, 489 U.S. 299 (1989), noticeably absent from the \textit{Martinez} opinion. See discussion of \textit{Teague}, infra Section II(c).

\textsuperscript{148} See \textit{Martinez}, 2012 WL 912950, at *12 (Scalia, J., dissenting) (beginning his dissent with the words, “Let me get this straight . . . .”).
foreclosed” the argument that any exception to the “no right to counsel at post-conviction” rule could exist.\(^{149}\) One may suppose that his cite to Finley in Maples was indeed no fluke, although the majority neither cited Finley nor disturbed that ruling with its narrow holding.\(^{150}\)

Now that the Court has delivered its opinion in Martinez v. Ryan, it seems clear that Maples rested on agency principles specifically because the Court was not planning to create or announce any new right to support an argument that Maples was denied the right to counsel. The Court in Martinez does cite Maples, but only for the propositions that Maples itself rested on from the Coleman opinion.\(^{151}\) Perhaps this critical reading was only smoke and mirrors, the product of an over-active enthusiasm rather than any viewings into a crystal ball, but Martinez does widen the opening for habeas petitioners that Maples initiated, perhaps signaling a different direction for habeas jurisprudence in general. Maples may have created a “template”\(^{152}\) to bypass Coleman and the attorney-as-agent bar to relief, as Justice Scalia clearly fears. By Justice’s Scalia’s continued concerns, the Court’s holding in Martinez “repudiate[d]” the rule of procedural default entirely and “closed” the “principal escape route from federal habeas [for the State]—existence of an ‘adequate and independent state ground.’”\(^{153}\) If this is so, habeas petitioners now have at least two new claims that they can argue to achieve relief: petitioners can claim that their attorney “abandoned” them, severing the attorney–client agency; or

\(^{149}\) Id. at *16. Justice Scalia also cites Murray v. Giarratano, 492 U.S. 1 (1989), which extended the rule from Finley to capital cases. Id. (following his cites to both cases with the assertion that the Court “stated unequivocally that prisoners do not ‘have a constitutional right to counsel when mounting collateral attacks upon their convictions.’”).

\(^{150}\) Justice Scalia did point out, however, that the majority’s avoidance of creating a constitutional rule “did avoid the . . . need to confront the established rule” of Finley and Giarratano.

\(^{151}\) See id. at *6 (majority opinion).


\(^{153}\) Martinez, 2012 WL 912950, at *13, 14 (Scalia, J., dissenting) (emphasis in original).
petitioners can claim, regardless of procedural default, that in their one and only chance to raise their claims of trial-counsel ineffectiveness, their appellate counsel was also ineffective or simply not there. Future criminal-defense and post-conviction attorneys, thy name be diligence.

c. **What of this “Just System”?**

The majority in *Maples* stated early in its opinion that, due to the particular circumstances of the case, the Eleventh Circuit decision below must be reversed, as “no just system would lay the default at Maples’ death-cell door.”\(^{154}\) With this line, the Court appeared poised to deliver a decision promoting our criminal-justice system as one based on justness and rightness under law. But given the history of the Court’s rulings in both direct review and federal habeas cases, the “just system” revered in *Maples* seems much more an anomaly than an axiom. This final Part explores some of those cases, concentration primarily in the realm of habeas and capital cases, and questions just what “just system” Justice Ginsburg was referring to in her majority opinion in *Maples*.

In *Herrera v. Collins*\(^{155}\) the Court held, by a six-to-three margin, that Leonel Herrera was not innocent of the death penalty; that is, the Court refused to allow him to make a freestanding claim of actual innocence.\(^{156}\) Perhaps most unbelievable, however, was Chief Justice Rehnquist’s assertion that “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”\(^{157}\) As one of the questions up

\(^{154}\) *Maples*, 132 S. Ct. at 917.


\(^{156}\) Id. at 404–05.

\(^{157}\) Id. at 401. Although the Chief Justice did later note that “a truly persuasive claim of ‘actual innocence’ . . . could render the execution of a defendant unconstitutional,” he qualified this availability as one requiring an “extraordinarily high” evidentiary showing, one that has since been shown to be virtually impossible to present. *Id.* at 417. For the later proposition, see Berg, *supra* note 114, at 132 n.61 (citing 173
for the Court’s review was whether the Eighth and Fourteenth Amendments of the U.S. Constitution permitted the execution of an innocent person, this statement boils down to an assertion that the Constitution does not prohibit such an execution.\textsuperscript{158} Although the then-Chief Justice appeared to be joined by no more than two other Justices in that belief,\textsuperscript{159} the idea that any Supreme Court Justice, not to mention any legal scholar or student, would approve of such a statement is, in this author’s view, absolutely unacceptable and in no way representative of a “just [legal] system.”

A second instance of perhaps questionable justness, and likely the key source of Justice Scalia’s discontent with the \textit{Maples} majority’s opinion, is the Court’s holding in the 1991 case \textit{Coleman v. Thompson}.\textsuperscript{160} Prior to Coleman, the Court had held in \textit{Fay v. Noia}\textsuperscript{161} that a procedural default would only bar federal habeas review if a prisoner “understandingly and knowingly”

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\textsuperscript{158} See In re Troy Davis, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting from transfer of habeas corpus) (“This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent.”).

\textsuperscript{159} See \textit{Herrera}, 506 U.S. at 428 (Scalia, J., concurring, with whom Thomas, J., joins) (“I . . . join the entirety of the Court’s opinion.”); \textit{id}. at 419 (O’Connor, J., concurring, joined by Kennedy, J.) (“I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.”); \textit{id}. at 429 (White, J., concurring) (“I assume that a persuasive showing of ‘actual innocence’ . . . would render unconstitutional the execution of petitioner in this case.”); \textit{id}. at 430 (Blackmun, J., dissenting, with whom Stevens, and Souter, J.J., join) (“Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent.”).


waived his right to the use of a certain state rule. Noting first that the earlier case *Wainwright v. Skyes* had “limited Fay to its facts” by replacing the *Fay* “deliberate bypass” test with the still-used “cause and prejudice” standard, the Court in *Coleman* explicitly overruled *Fay*, holding, *inter alia*, that the errors of counsel during post-conviction proceedings could not constitute “cause” to excuse the petitioner’s procedural default. This is the likely, and somewhat admitted, source of Justice Scalia’s comment in *Maples* that all attorney error is to be imputed to the client, “regardless of the egregiousness.” Counsel for petitioner Coleman had filed Coleman’s notice to appeal three days late under Virginia court rules. Although not inherently egregious violations of the Sixth Amendment right to effective representation, the actions of Coleman’s counsel made way for a Supreme Court opinion that has prevented many habeas petitioners from gaining any real headway in their quests for relief. Given these long-

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162 Id. at 395–96. Later cases deemed this the “deliberate bypass” test. See, e.g., *Harris v. Reed*, 489 U.S. 255, 280 (1989); *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Noia was convicted and sentenced to life in prison. *Fay*, 372 U.S. at 440. The failure of Noia to appeal the use of his coerced confession in the trial against him, for example, could not be seen as a waiver of his right to appeal because if he had appealed, he very likely could have been convicted and sentenced to death at a later retrial. *Id.* No one, the Court held, could see this choice as a “deliberate circumvention of state procedures.” *Id.*


164 *Coleman*, 501 U.S. at 747.

165 *Id.* at 750.


167 *Coleman*, 501 U.S. at 727.

168 Coleman’s case was a capital-murder case, which potentially makes his counsel’s failure to file a notice of appeal in time more egregious than would be the case if his client had not been facing the death penalty.

169 See Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICKINSON L. REV. 557, 578–79 (1994) (referring to the decision in *Coleman* as creating “a ‘lose–lose’ situation” and as “the Court add[ing] another lock on the federal courthouse door”); *cf. Coleman*, 501 U.S. at 758–59 (Blackmun, J., dissenting) (describing the majority’s opinion as a “crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims” and prophesying “that the Court [has] creat[ed] a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . . .”).

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lasting effects, reconciling the effect of Coleman with the proclamation of Maples is difficult to do, perhaps one reason for Justice Scalia’s displeasure with the opinion.

Compounding the rule in Coleman, the Court made habeas corpus an even less likely success with its holding in Teague v. Lane. In Teague, the Court uprooted its once commonly used method of announcing rules of criminal procedure and entirely revamped its approach to the question of retroactivity. To this end, the Court held that “new constitutional rules” would not apply retroactively on collateral review to cases that had become final unless that rule fell within one of two narrow exceptions. This holding limited the Court’s creation of any new constitutional rule of criminal procedure when the rule was requested on collateral attack to situations where one of those two exceptions was met. Other than those two narrow exceptions, the only route for any such new rule was limited to direct review. Effectively, the ruling in Teague eliminated the ability of any habeas petitioner to argue the unconstitutionality of his or her confinement based on a rule not-yet recognized by the Court. Even a rule based

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170 489 U.S. 299 (1989). Teague was not a capital case, and the Court did not address the effects of its holding on capital cases. Id. at 314 n.2. Cases since 1989, however, have applied the Teague retroactivity rule to capital cases, and the rule’s effect seems to be no different than in the non-capital context. See infra note 178.


172 Teague, 489 U.S. 310. The two exceptions cover situations where the rule “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,’” i.e., where it is substantive in nature, and where the rule “requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty,’” id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692–93 (1971) (Harlan, J., concurring in judgment in part and dissenting in part)). The Teague Court clarified the second exception as reserved for “watershed rules of criminal procedure” and “combine[d]” it with the “accuracy element” of Desist v. United States, 394 U.S. 244, 256–269 (1969), requiring “an impermissibly large risk” of wrongful incarceration. Id. at 311–12.

173 Id. at 316.

174 This is so because, to date, no proposed new rule has met the standards of the second exception (“implicit in the concept of ordered liberty” plus “impermissibly large risk” of inaccurate verdict), see Whorton v. Bockting, 549 U.S. 406 (2007) (rejecting argument that new rule announced in Crawford v.
on circumstances that resulted in “a guilty verdict delivered by a jury whose impartiality might have been eroded by [e.g.] racial prejudice,” a “fundamentally unfair” result, are forbidden from introduction on federal post-conviction.175 What once was a fruitful avenue for rules and potential relief based on those rules176 was reduced to little more than a technical hurdle to finality of judgments, unlikely to vindicate the petitioner’s claims.177

Outside the procedural realms of Coleman and Teague, the Court has also faced factually disconcerting issues and come up similarly unfair. In 1983, Professor David C. Baldus, along with Charles A. Pulaski and George Woodworth, published a study examining the appearance of racial disparities in the capital punishment sentencing scheme in Georgia in the 1970s.178 This study suggested that “Georgia’s death-sentencing system has continued to impose . . . inconsistent, arbitrary death sentences . . . condemned in Furman v. Georgia [408 U.S. 238 (1972)].”179 In numerical values, the study found a 2.7 times higher chance of reaching the

Washington, 541 U.S. 36 (2004), meets second exception in Teague to apply retroactively to cases final on direct review); id. at 417 (noting that second exception “is ‘extremely narrow’” and “that it is ‘unlikely’” that any such rules “‘ha[ve] yet to emerge’”) (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)); id. at 418 (“[I]n the years since Teague, we have rejected every claim that a new rule satisfied the requirements for watershed status.”); id. (citing cases between 1990 and 2002 that rejected new rules as “watershed”); and it is incredibly unlikely that any new substantive rule (thus, meeting the first exception) even exists that the Court has not yet recognized, see generally Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 25.7 (6th ed. 2011).

179 Id. at 730.
penalty phase of the trial (that is, obtaining a guilty verdict) if the victim of the crime was white;\textsuperscript{180} a six percent rate of the jury voting for a death sentence for black-victim cases versus a twenty-four percent rate for white-victim cases;\textsuperscript{181} and a twenty-two percent higher likelihood of a death sentence overall, controlling for fifty mitigating factors, if the victim of the homicide was white.\textsuperscript{182} In \textit{McCleskey v. Kemp}, the Supreme Court considered the information of the Baldus study in the case of a black Georgia man accused of robbing a store and killing a white police officer at the scene.\textsuperscript{183} The Court reviewed the study, noting itself the 4.3 times increased chance of a death sentence where the case involved a white victim versus those with a black victim\textsuperscript{184} and the finding that black defendants charged with killing white persons were given the death sentence in twenty-two percent of the cases assessed compared to \textit{one percent} of cases involving black defendants and black victims and \textit{three percent} of cases involving white defendants and black victims.\textsuperscript{185} Despite these alarming statistics, the Court held that the Baldus study, “[a]t most, . . . indicate[d] a discrepancy that appears to correlate with race. Apparent discrepancies in sentencing are \textit{an inevitable part} of our criminal justice system.”\textsuperscript{186} To five of the nine Justices, this discrepancy did not “demonstrate a constitutionally significant risk of racial bias.”\textsuperscript{187} A positive factor of twenty-two based on the randomness of race was insignificant for

\textsuperscript{180} Id. at 709.
\textsuperscript{181} Id. Professor Baldus, et al., described this discrepancy in the Georgia system as “a dual system, based upon the race of the victim.” Id. at 709–10.
\textsuperscript{182} Id. at 710.
\textsuperscript{183} 481 U.S. 279, 283 (1987).
\textsuperscript{184} Id. at 287.
\textsuperscript{185} Id. at 286.
\textsuperscript{186} Id. at 312 (emphasis added).
\textsuperscript{187} Id. at 313.
constitutional purposes when deciding who lives and who dies at the hands of the criminal
“justice” system.

As a final case for contention, consider Payne v. Tennessee. In Payne, the Court
performed a 180-degree turn from its jurisprudence of the past four years and held that
“victim-impact evidence” was permissible during the sentencing phase of a capital murder case,
so long as the State has a rule permitting it, and the evidence goes to the moral culpability or
blameworthiness of the defendant, overruling both Booth v. Maryland and South Carolina v.
Gathers on its way. While this rule may not seem so inequitable, the truly problematic
elements of it are two-fold. First, the raison d’être of the sentencing scheme in capital cases, and
of criminal sentencing phases in general, is the individualized consideration of the defendant, not of
the victim in the case. The point is that through jury sentencing, the defendant and his actions

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189 See Booth v. Maryland, 482 U.S. 496, 507 (1987) (holding that victim-impact evidence was per se
inadmissible during sentencing of capital trial under Eighth Amendment); South Carolina v. Gathers, 490
U.S. 805, 811–12 (1989) (extending Booth rule to prosecutorial statements made to sentencing jury about
personal qualities of the victim).
190 Payne, 501 U.S. at 827 (“[I]f the State chooses to permit the admission of victim impact evidence and
prosecutorial argument on that subject, the Eighth Amendment erects no per se bar.”).
191 See Smith v. Texas, 543 U.S. 37, 46 (2004) (reaffirming that the jury must be allowed “an adequate
vehicle for expressing a ‘reasoned moral response’ to all of the evidence relevant to the defendant’s
culpability”) (quoting Penry v. Johnson (“Penry II”), 532 U.S. 782, 796 (2001); Caldwell v. Mississippi, 472
believe that the responsibility for determining the appropriateness of the defendant’s death rests
elsewhere,” thus highlighting the importance of the jury’s individualized consideration of the “specific
death-penalty scheme that allowed a sentencing jury to exclude mitigation “evidence from their
consideration” and noting that the rule from Lockett, infra, “requires the sentence to listen”); Lockett v.
Ohio, 438 U.S. 586, 608 (1978) (reversing imposition of death penalty and mandating that, to meet
constitutional muster, a sentencing scheme “must not preclude consideration of relevant mitigating
factors” of the defendant); Woodson v. North Carolina, 428 U.S. 280, 301, 303–04 (1976) (discussing
society’s “rejection” of mandatory death-penalty scheme for certain crimes in favor of one in which
“particularized consideration” is given the “character and record of each convicted defendant”); Proffitt
v. Florida, 428 U.S. 242, 258 (1976) (“[T]he requirements of Furman are satisfied when the sentencing
are judged; that the determination of whether he or she is put to death is not based on arbitrary or capricious factors (such as who he or she killed); and that random factors should not enter into this decision, as they essentially allow the jury to consider the “good” or “worth” of the victim in making its decision. The end result is the potential biasing of the sentencing jury based on whether it thinks the victim was a “better person” and that because this person was the victim, the defendant is less worthy of continued life on this planet.

Second, this change in the Court’s jurisprudence was not based on an awakening of reason among its Justices. Rather, it came about due to a change in the arrangement of them.
The five-Justice majority in *Booth* consisted of the three dissenters in *Payne* plus Justices Brennan and Powell. A year later, in 1988, Justice Kennedy took the place of retiring Justice Powell. A year after that, the five-Justice majority in *Gathers* consisted of the same three Justices from the *Payne* dissent, plus Justices Brennan and White (who, for whatever reason, changed his view between *Booth* and *Gathers*). The newly appointed Justice Kennedy joined the dissent. By the time of *Payne*, Justice Brennan, who was in the majority in both *Booth* and *Gathers*, left the Court and was replaced by Justice Souter. The six-Justice majority in *Payne* consisted of the dissenters from both *Booth* and *Gathers* (Chief Justice Rehnquist and Justices O’Connor and Scalia), plus Justice White (who switched votes again), Justice Kennedy (who was in the *Gathers* dissent two years earlier), and the newly appointed Justice Souter. The four-Justice dissent from *Booth* and *Gathers* finally had the fifth (and even sixth) vote it needed to turn the course of the law its way.

The Eighth Amendment had not simply changed in meaning—it was not rewritten between 1989 and 1991. Rather, the prevailing *interpretation* of the law was the source of the change. This was not about reason; this was not about law; this was about personal politics and policy preference. How can the “just system” that refused to “lay” the unforgiveable errors of Maples’s

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195 See *Payne*, 501 U.S. at 850 (Marshall, J., dissenting) (“It takes little real detective work to discern just what has changed since this Court decided *Booth* and *Gathers*: this Court’s own personnel.”)

196 Id. at 858–59 (Stevens, J., dissenting) (noting how the majority opinion “rel[ied] on nothing more than [the] dissenting opinions” in *Booth* and *Gathers* to reach its conclusion).
attorneys “at [his] death-cell door” be the same as the system that simply had to wait for the right alignment of Justices\textsuperscript{197} to put the law its preferred way?

Admittedly, some of the above-named cases are not as damning of justice or rightness as others. Some have become embedded into our modern culture as accepted methods of police conduct and criminal law\textsuperscript{198} But the overall effect on criminal defendants, and federal habeas corpus petitioners in particular, has been to make the burden of proof of (unreasonable) trial error much more difficult to meet, a showing of “prejudice” or “unjustness” nearly unattainable, obtainment of federal habeas corpus relief effectively implausible, and a “just system” much more of a fiction than a reality.

III. Conclusion

The Court’s decision in Maples v. Thomas was the just one. Although the holding may be limited to that one case or, alternatively, may have created an unshaped and undefined rule, it shows that at a certain point, at a certain level of complete ethical and legal failure and indifference, the Court will step in and right a wrong within this “just system,” one in which the client had no part creating and from which he has no respite. Despite his disastrous trial and

\textsuperscript{197} No pun intended. 

\textsuperscript{198} For example, in Terry v. Ohio, 392 U.S. 1, 5–6 (1968), Officer McFadden, an officer of thirty-nine years, saw two men pacing back-and-forth past a few stores, frequently looking into the window, and walking away and at one point speaking briefly with a third man. Officer McFadden’s years of experience aroused his suspicions that the two men were “casing a job, a stick-up.” \textit{Id.} at 6. When he followed his suspicions, approached the men, and patted them down in what is now the infamous “Terry-frisk,” he discovered weapons on two of the three men. \textit{Id.} at 7. It is quite likely that Officer McFadden’s actions prevented these men from committing a robbery of some sort. Subsequent allowance of such probable-causeless frisks may have prevented many similar crimes. See Joseph Margulies, \textit{Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists}, 101 J. CRIM. L. \& CRIMINOLOGY 729, 765 (2011) (noting how \textit{Terry} and other restrictive criminal procedure rules have “accommodated the growing clamor for public safety . . . justified . . . by [an] emphasis[ed] need for public safety”); \textit{but see} Devon W. Carbado \& Cheryl I. Harris, \textit{Undocumented Criminal Procedure}, 58 UCLA L. REV. 1543, 1551, 1565–78 (2011) (discussing “the ways in which \textit{Terry} [v. \textit{Ohio}] . . . eviscerates the Fourth Amendment and facilitates racial profiling”).
appellate-level proceedings, his interminable runaround, and his at best “holographic counsel,”
given his second chance at presenting his claims, maybe Maples really did win the lottery.