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WENDY ZORANA ZUPAC

Mere Negligence or Abandonment? Evaluating Claims of Attorney Misconduct After *Maples v. Thomas*

ABSTRACT. In recent terms the Supreme Court has attempted to carve out remedies for habeas petitioners with negligent lawyers. This Note explores the analysis used by the Court in these cases and applies a novel descriptive model to explain how the Court has applied two different models of analysis, a performance-based model and a relationship-based model, to examine attorney behavior. Over twenty years ago, the Supreme Court applied a rigid relationship-based model in *Coleman v. Thompson*, in holding that habeas petitioners were bound by the acts and omissions of their attorneys because their attorneys were the petitioners' "agents." Last term, in *Maples v. Thomas*, the Supreme Court reaffirmed the application of agency principles in the habeas context, but carved out an exception for clients who are "abandoned" by their attorneys. This Note explores the potential scope of the "abandonment" exception, and argues that federal habeas courts should draw on principles drawn from civil litigation cases and apply a flexible approach to determining when a client has effectively been "abandoned" by his attorney.

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INTRODUCTION

Many habeas petitioners have learned that having a bad lawyer can be worse than having no lawyer at all. Take, for example, the story of Ricky Kerr's near execution. The lawyer appointed to represent Kerr in his state postconviction proceedings filed a three-page habeas corpus application, containing just one legal argument, which did not actually challenge the validity of Kerr's trial or sentence.[1] His application was dismissed summarily by the Texas courts. As Kerr's execution date approached, his lawyer began to suffer severe health problems and stopped working on the case altogether.[2] Eventually, another lawyer stepped in on Kerr's behalf to file an emergency motion with the Texas Court of Criminal Appeals (CCA).[3] The motion contained an affidavit from the previous attorney confessing that he may have committed a "gross error in judgment," and that he was perhaps "not competent to represent Mr. Kerr in a death-penalty case."[4] Nonetheless, the CCA denied Mr. Kerr's application, prompting one judge to proclaim, "If applicant is executed as scheduled, this Court is going to have blood on its hands . . . ."[5]

Other lawyers have ended their clients' hopes of relief by failing to file applications within the statutory deadlines.[6] For example, the lawyers for

1. *Ex parte* Kerr, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting). Kerr's attorney had practiced as a lawyer for less than three years when he was appointed to handle Kerr's state postconviction proceedings. Ken Armstrong & Steve Mills, *Gatekeeper Court Keeps Gates Shut*, CHI. TRIB., June 12, 2000, http://www.chicagotribune.com/news/local/chi-000612dptexas2-story,0,708553,full.story.

2. Janet Elliott, *Habeas System Fails Death Row Appellant*, TEX. LAW., Mar. 9, 1998, at 25-26.

3. *Id.*

4. *Id.*

5. *Kerr*, 977 S.W.2d at 585 (Overstreet, J., dissenting). Two days before his scheduled execution, a federal judge granted Kerr a stay. Armstrong & Mills, *supra* note 1. On November 22, 2011, Kerr entered a guilty plea, and his sentence was reduced to life in prison. *Texas Death Penalty Developments in 2011: The Year in Review*, TEX. COALITION TO ABOLISH THE DEATH PENALTY 10 (Dec. 2011), http://www.tcadp.org/TexasDeathPenaltyDevelopments2011.pdf.

6. *See, e.g.*, *Ex parte* Colella, 977 S.W.2d 621 (Tex. Crim. App. 1998) (dismissing a state postconviction petition filed thirty-seven days late); *Ex parte* Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (dismissing a state postconviction petition filed nine days after the deadline expired; the petitioner had been granted an initial ninety-day extension by the court followed by an additional thirty-day extension, and the lawyer failed to meet either deadline). Article 11.071 of the Texas Code of Criminal Procedure requires that applications for postconviction relief be filed within 180 days after counsel is appointed. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (West 2005 & Supp. 2010).

Roger Keith Coleman, a death-row inmate in Virginia, failed to file a notice of appeal with the Virginia Supreme Court within the required thirty-day window after the state court denied his habeas application.[7] The Supreme Court held that Coleman's lawyers' failure to file a timely notice of appeal foreclosed further review of his constitutional claims.[8]

The *Coleman* Court reasoned that because "the attorney is the petitioner's agent" within the scope of the litigation, "the petitioner must 'bear the risk of attorney error.'"[9] Under this rule, because habeas petitioners do not have a constitutional right to counsel during postconviction proceedings,[10] petitioners whose lawyers filed woefully inadequate or untimely habeas petitions typically did not have any remedy. However, in a trio of recent decisions—*Holland v. Florida*,[11] *Maples v. Thomas*,[12] and *Martinez v. Ryan*[13]—the Court injected some flexibility into the strict *Coleman* rule and fashioned remedies for habeas petitioners with negligent lawyers. Unfortunately, the Court's reasoning from case to case has been inconsistent and murky and has given little guidance to lower courts concerning the scope of the remedy.

7. Coleman v. Thompson, 895 F.2d 139, 142 (4th Cir. 1990), *aff'd*, 501 U.S. 722, 757 (1991).

8. *Coleman*, 501 U.S. at 757.

9. *Id.* at 753 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

10. *See* Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987).

11. 130 S. Ct. 2549 (2010). In *Holland*, a court-appointed attorney failed to file a federal habeas corpus petition within the one-year deadline and also failed to communicate with his client. *Id.* at 2555-56. The Supreme Court held that the one-year deadline is subject to equitable tolling in appropriate cases, *id.* at 2560, and remanded the case to the lower court to determine whether the attorney's misconduct in this case was egregious enough to justify equitable tolling, *id.* at 2564-65.

12. 132 S. Ct. 912 (2012). Corey Maples was represented by two Sullivan & Cromwell attorneys serving pro bono during his state postconviction proceedings. *Id.* at 918. While his petition for postconviction relief was pending in the Alabama trial court, his attorneys left the firm without notifying him or the court. *Id.* at 919. The trial court denied his petition, and Maples's time to appeal ran out without his realizing that he was no longer represented by his attorneys. *Id.* at 920. The Court held that in situations where a client is "abandoned" by his attorneys, he cannot be charged with the acts and omissions of those attorneys. *Id.* at 924.

13. 132 S. Ct. 1309 (2012). Arizona law provided that the petitioner could only raise an ineffective-assistance-of-trial-counsel claim in postconviction proceedings. *Id.* at 1314. Martinez's postconviction counsel failed to raise that claim, choosing instead to file a statement that she could not find any colorable claims for relief. *Id.* The Court reserved the question of whether petitioners have a constitutional right to postconviction counsel in collateral proceedings that provide the first opportunity to raise an ineffective-assistance-of-trial-counsel claim, but held that ineffective assistance of postconviction counsel could provide cause to excuse a petitioner's failure to raise an ineffective-assistance-of-trial-counsel claim in a timely manner. *Id.* at 1315.

This Note offers a new approach to understanding the Court's jurisprudence in this area. I argue that much of the confusion stems from the fact that the Court has vacillated between two different analytic models in evaluating attorney conduct—a performance-based model and a relationship-based model. These models, as explained in Part II of this Note, address different aspects of an attorney's conduct. The performance-based model, which examines a lawyer's efforts on behalf of his client, is more robust because it imposes a baseline standard of reasonableness on an attorney's work. However, it only applies when the Sixth Amendment right to counsel has attached.[14] In circumstances where individuals do not have a constitutional guarantee of counsel, a relationship-based model, which examines the attorney-client relationship through the lens of agency law, governs. Part III of this Note examines how lower courts have alternated between the two models to evaluate attorney misconduct in the collateral-review context, with the Supreme Court attempting in *Maples* to resituate the doctrine firmly within the relationship-based model.

Finally, in Part IV, I argue that federal habeas courts should embrace a flexible application of the relationship-based model to address the misconduct of postconviction attorneys. This portion of my Note offers a novel approach to understanding the consequences and potential of the relationship-based model after *Maples*. The analytic foundation for the relationship-based model derives from agency principles that have governed attorney-client relationships in the civil litigation[15] context. The *Coleman* Court explicitly borrowed these concepts from civil cases and applied them to the procedural-default habeas jurisprudence. However, the *Coleman* Court failed to appreciate that courts hearing civil cases have long applied an extremely flexible approach to agency principles. In a body of cases, civil litigants have sought to reopen cases that trial courts have dismissed due to their lawyers' negligence.[16] The lower courts,

14. The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). This right attaches at a defendant's initial appearance before a judicial officer. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008).

15. The term "civil litigation," as used in this Note, does not include habeas proceedings, even though such proceedings are technically civil in nature. *See* FED. R. CIV. P. 81(a)(4) (providing that the Federal Rules of Civil Procedure apply to habeas corpus proceedings to the extent that they are not inconsistent with federal habeas statutes and rules governing habeas proceedings specifically); Mayle v. Felix, 545 U.S. 644, 654 n.4 (2005) ("Habeas corpus proceedings are characterized as civil in nature.").

16. These litigants relied on Federal Rule of Civil Procedure 60(b)(6), which allows courts to grant relief from a final judgment, such as a dismissal for failure to prosecute, for any "reason that justifies relief." FED. R. CIV. P. 60(b)(6).

in analyzing these cases, have applied the agency principles that the Supreme Court applied in *Coleman*, yet have done so much more flexibly. I argue that these civil cases should guide lower courts attempting to apply the relationship-based model most recently affirmed in *Maples*. By doing so, the courts can create parity between the strictness of agency principles as applied to civil litigants and habeas petitioners and, most importantly, can protect habeas petitioners from suffering the harsh consequences that can result from a negligent attorney's mistakes.

I. THE RIGHT TO COUNSEL

In this Part, I briefly describe how an individual's right to counsel changes at different stages of a criminal case.[17] This discussion provides a context in which to place the two models described by this Note. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[18] In *Gideon v. Wainwright*, the Supreme Court held that states were required to provide counsel in all felony cases.[19] The right to counsel lasts until the trial judge determines the sentence to be imposed.[20] Defendants also have a right to counsel in their first appeals of right (i.e., appeals to which all defendants are entitled under the relevant state statute or federal law).[21] The right to counsel also means that the defendant has the right to the *effective* assistance of counsel.[22] In other words, whenever the Sixth Amendment guarantees

17. A comprehensive description of criminal procedure and right-to-counsel jurisprudence is beyond the scope of this Note.

18. U.S. CONST. amend. VI.

19. 372 U.S. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court held that the Sixth and Fourteenth Amendments require "that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74.

20. *See* Mempa v. Rhay, 389 U.S. 128, 137 (1967) (holding that defendants have a right to counsel at the time of sentencing, even though the defendants' sentencing in the instant case had been deferred subject to probation).

21. Douglas v. California, 372 U.S. 353, 357 (1963).

22. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984). *Strickland* established "a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed." Bell v. Cone, 535 U.S. 685, 695 (2002). A defendant must prove that counsel's "representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at

appointment of counsel, the appointed counsel must meet certain standards of performance. However, the flip side is that the right to effective assistance of counsel is dependent on the defendant having a constitutional right to counsel. There are various critical stages of a criminal case in which a defendant does *not* have a constitutional right to counsel, and these stages are the focus of this Note.

Defendants do not have a right to counsel in their discretionary appeals to the state's highest court or in filing a petition for certiorari to the United States Supreme Court.[23] After a defendant has completed direct-review proceedings, he may file a petition for postconviction relief in state trial court. This is known as a "collateral attack" on the conviction, and each state has different procedures and terminology for this stage of the process.[24] State postconviction proceedings are frequently the first available forum for the petitioner to raise certain constitutional claims, such as ineffective assistance of trial counsel or suppression of evidence.[25] Finally, a prisoner subsequently may file a petition for a writ of habeas corpus in federal district court. Various state and federal statutes provide for the appointment of counsel for indigent petitioners in postconviction or habeas proceedings,[26] but because the petitioner does not have a *constitutional* right to counsel at that stage, he does not have a guarantee of *effective* counsel. The Supreme Court has held that there is no Sixth

688, and also that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. A defendant also has the right to effective assistance of counsel when he has a Sixth Amendment right to counsel on appeal. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

23. Ross v. Moffitt, 417 U.S. 600, 616-17 (1974).

24. *See* Carey v. Saffold, 536 U.S. 214, 219 (2002) ("In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal . . . . Third, a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court . . . ." (citations omitted)). For a survey of postconviction remedies in all fifty states and the District of Columbia, see DONALD E. WILKES, JR., STATE POST-CONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS (2009).

25. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.1(b) (6th ed. 2011). For example, many states require petitioners to wait until state postconviction proceedings to raise claims of ineffective assistance of trial or appellate counsel. *Id.* § 7.1(b) n.77.

26. *See, e.g.*, 18 U.S.C. § 3599 (2006) (providing for the appointment of counsel for all indigent capital prisoners seeking federal habeas corpus relief); *id.* § 3006A (requiring district courts to adopt plans to grant judges authority to appoint counsel for noncapital indigent habeas petitioners).

Amendment[27] or due process right[28] to counsel in habeas or collateral-review proceedings. The remainder of this Note examines the Supreme Court's recent efforts to address the consequences facing habeas petitioners saddled with grossly negligent representation during their postconviction proceedings.

II. PERFORMANCE-BASED AND RELATIONSHIP-BASED MODELS IN THE LAW OF PROCEDURAL DEFAULT

The Supreme Court has vacillated between two models in its decisions addressing the right to counsel and the effect of attorney conduct on a habeas petitioner's ability to present his claims, which I term the "performance-based" model and the "relationship-based" model. In this Part, I describe these models and the analytically distinct foundations of each one. I then examine the role that these models have played in the development of the Supreme Court's procedural-default jurisprudence. Finally, I step back from the theoretical discussion to examine the defects in the system of appointing and monitoring postconviction attorneys to highlight the serious consequences facing habeas petitioners who are bound by the conduct of their attorneys.

A. Two Frameworks for Analyzing Attorney Misconduct

The Supreme Court's jurisprudence concerning when clients should be bound by the misconduct, negligence, or mistakes of their attorneys has utilized two analytically distinct models: a performance-based model and a relationship-based model. The basic distinction between these two models is as follows: the performance-based model evaluates the level and quality of work an attorney has done on a client's behalf, while the relationship-based model examines the nature of the relationship between the lawyer and the client. This Section fleshes out the distinctions between the two in more detail.

The clearest example of the performance-based model is the test used to evaluate whether a defendant's constitutional right to counsel under the Sixth Amendment has been violated. The *Strickland v. Washington* standard for ineffective assistance of counsel imposes a minimum *performance* standard on

27. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (stating that the Court had "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions" in state courts and "declin[ing] to so hold").

28. *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989).

trial lawyers.[29] Under the performance prong of the two-part *Strickland* standard, the "defendant must show that counsel's representation fell below an objective standard of reasonableness."[30]

While an extensive discussion of *Strickland* jurisprudence is beyond the scope of this Note, it is sufficient for the purposes of this discussion to note that the *Strickland* performance standard applies across the board to all attorneys who are appointed to fulfill a defendant's Sixth Amendment right to counsel. Courts applying this standard examine whether the attorney's performance was reasonable "under prevailing professional norms."[31] Several Supreme Court decisions have fleshed out the minimum efforts that attorneys must make in order to fulfill the performance prong of the *Strickland* test. For example, trial lawyers in a capital case must at least investigate the defendant's prior convictions when they know that the state will attempt to use the defendant's prior history as an aggravating sentencing factor[32] and must also present mitigating evidence during sentencing.[33] Courts have also used a performance-based model to evaluate when attorney negligence should be grounds for equitable tolling of the one-year federal habeas deadline, with their analysis focusing on whether the negligence was "ordinary," or "sufficiently egregious" to warrant equitable tolling.[34] I will return to this body of cases in

29. 466 U.S. 668, 687 (1984). The Court has also held that defendants have a constitutional right to counsel on their first appeals as of right under the Fourteenth Amendment. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) (guaranteeing the right to effective assistance of counsel on the first appeal as of right); Douglas v. California, 372 U.S. 353, 355 (1963) (holding that defendants are guaranteed the right to counsel on their first appeals as of right).

30. *Strickland*, 466 U.S. at 688. Defendants must also show that counsel's errors were so serious as to deprive the defendant of a fair trial; this is known as the "prejudice" prong. *Id.* at 687.

31. *Id.* at 688.

32. *See* Rompilla v. Beard, 545 U.S. 374, 383 (2005) (holding that the trial lawyers "were deficient in failing to examine the court file on [defendant]'s prior conviction" when they were on notice that the state intended to use the defendant's prior history as an aggravating sentencing factor).

33. *See* Wiggins v. Smith, 539 U.S. 510, 533-35 (2003) (holding that counsel fell below *Strickland*'s performance standard by failing to adequately investigate the defendant's background to prepare a mitigation case); Williams v. Taylor, 529 U.S. 362, 393-96 (2000) (holding that counsel fell below *Strickland*'s performance standard by failing to prepare for the sentencing phase of the defendant's trial until a week before the trial, by failing to conduct an adequate investigation into the defendant's background, and by failing to introduce available evidence that the defendant was borderline mentally retarded).

34. *See, e.g.*, United States v. Martin, 408 F.3d 1089, 1093 (8th Cir. 2005) ("[S]erious attorney misconduct, as opposed to mere negligence, 'may warrant equitable tolling.'" (quoting Beery v. Ault, 312 F.3d 948, 952 (8th Cir. 2002))); Spitsyn v. Moore, 345 F.3d 796, 800 (9th Cir. 2003) ("Though ordinary attorney negligence will not justify equitable tolling, we have

Section III.A, but it is important to note at this point that the focus of a performance-based inquiry is, unsurprisingly, the attorney's performance. Courts examine the amount and quality of work the attorney performed, such as the level of investigation the attorney undertook.[35] Once the lawyer's work falls below an acceptable level of reasonableness (or alternatively, once the lawyer's negligence becomes "sufficiently egregious"), the client will no longer be bound by that lawyer's acts and omissions.[36]

In contrast, courts applying the relationship-based model examine the nature of the attorney-client relationship. This model is premised on the principle that "the attorney is the [client]'s agent when acting, or failing to act, in furtherance of the litigation."[37] As the Supreme Court explained recently in *Maples v. Thomas*, a "principal bears the risk of negligent conduct on the part of his agent" unless the attorney "abandons" the client and thereby severs the principal-agent relationship.[38] Courts applying the relationship-based model

acknowledged that where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling of AEDPA's statute of limitations." (quoting Stillman v. LaMarque, 319 F.3d 1199, 1202 (9th Cir. 2003); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999))).

35. *See Wiggins*, 539 U.S. at 521-34 (noting that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and holding that under the facts of this particular case, in which counsel had some evidence indicating that their client had a troubled childhood, counsel's failure to investigate further fell below the professional standards that prevailed at the time and therefore was ineffective assistance of counsel within the meaning of *Strickland* (quoting *Strickland*, 466 U.S. at 690-91)).

36. In order to prevail on a *Strickland* claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice resulting from counsel's failures. *Strickland*, 466 U.S. at 687. In *Wiggins*, for example, the Court examined the nature of the mitigating evidence that counsel failed to present during sentencing and "f[ound] there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing," 539 U.S. at 535, as well as that "had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence," *id.* at 536. The Court therefore remanded the case for further proceedings. *Id.* at 538.

37. Coleman v. Thompson, 501 U.S. 722, 753 (1991). "Agency" is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 11 (1958).

38. 132 S. Ct. 912, 922-23 (2012). The term "abandonment," as used by the *Maples* Court, is somewhat vague. The Court noted that Maples was "left without any functioning attorney of record" and later stated that Maples "had been reduced to *pro se* status." *Id.* at 927. The main question courts will face going forward is whether the "abandonment" exception established by *Maples* extends to claims of "constructive" or "virtual" abandonment or is limited to cases involving "actual" abandonment. I argue in Subsection IV.B.3

therefore must examine whether the record demonstrates that the attorney was still functioning as the client's agent at the time of the relevant act or omission. Relevant information includes whether the attorney had acquired an adverse interest or engaged in a serious breach of loyalty to the principal,[39] or other evidence indicating that the attorney was leaving the client virtually unrepresented, such as a lack of communication or actively deceiving the client.[40] Notably, if a court applies the relationship-based model and finds that the attorney's conduct demonstrates the existence of a principal-agent relationship, then the client is bound by his attorney's negligent conduct, however egregious. There is therefore an "essential" analytic difference "between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client."[41] The former claim is relevant under a performance-based standard, while the latter is relevant under a relationship-based standard.

B. The Role of the Two Models in the "Procedural-Default" Doctrine

The consequences of binding a client to an attorney's errors under either model can be severe in large part because of the Supreme Court's "procedural-default" jurisprudence. Before 1977, habeas petitioners were governed by the deliberate-bypass standard described in *Fay v. Noia*.[42] Under this standard, a habeas petitioner could raise claims in federal habeas proceedings even if "because of inadvertence or neglect he r[an] afoul of a state procedural requirement."[43] For example, Charles Noia did not appeal his felony murder conviction to the Appellate Division of the New York Supreme Court.[44] His codefendants appealed their convictions and secured their release on the

that the concept of "abandonment" should be flexible enough to encompass "constructive-abandonment" claims.

39. *See id.* at 924 (noting that Maples's attorneys had severed the agency relationship by accepting new employment that precluded them from continuing to represent Maples and that "[t]he authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal" (quoting RESTATEMENT (SECOND) OF AGENCY § 112 (1957))).

40. For example, in *Community Dental Services. v. Tani*, the Ninth Circuit granted relief under Federal Rule of Civil Procedure 60(b)(6) to a client whose attorneys falsely represented that the litigation was proceeding smoothly up until the client received notice that default judgment had been entered against him. 282 F.3d 1164, 1166-67 (9th Cir. 2002).

41. *Maples*, 132 S. Ct. at 923.

42. 372 U.S. 391, 438-39 (1963).

43. *Id.* at 433.

44. *Id.* at 395.

ground that their confessions had been unlawfully coerced.[45] Noia filed a federal habeas petition in federal district court, seeking to set aside his conviction because his confession had been coerced as well.[46] The district court held that he was not eligible for relief because of his failure to appeal his conviction.[47] The Supreme Court eventually held that federal courts had the power to grant habeas relief notwithstanding the defendant's failure to follow state procedures (also referred to as the defendant's "procedural default"), but that a federal court could, at its discretion, deny the writ to an applicant who had "deliberately by-passed" state procedures.[48]

However, *Wainwright v. Sykes* introduced the strict procedural-default rule.[49] Justice Rehnquist's opinion for the Court, which held that the respondent's failure to comply with the state's contemporaneous-objection rule[50] barred a federal court from hearing his claim, outlined what became known as the cause-and-prejudice requirement for procedural defaults[51]:

45. *Id.*

46. *Id.* at 395-96.

47. *Id.* at 396.

48. *Id.* at 438.

49. 433 U.S. 72, 87 (1977).

50. The then-existing Florida Rule of Criminal Procedure 3.190(i) provided, in relevant part, that

> [u]pon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant. . . . The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

See id. at 76 n.5 (quoting FLA. R. CRIM. P. 3.190, *In re* Fla. Rules of Criminal Procedure, 272 So. 2d 65, 97 (1972) (amended 2000)). In *Wainwright*, the petitioner, John Sykes, was convicted of third-degree murder. *Id.* at 74. When police arrived at the scene of the murder, Sykes voluntarily told them that he had shot the victim. *Id.* He was immediately arrested and taken to the police station, where he was read his *Miranda* rights. *Id.* Sykes made a statement, which was later admitted into evidence at trial, admitting that he had shot the victim. *Id.* Sykes's lawyer never challenged the admissibility of these statements during trial, nor did Sykes challenge the admission of the inculpatory statements on appeal. *Id.* at 75. In later filings, however, Sykes "challenged the statements made to police on grounds of involuntariness." *Id.* The Supreme Court concluded "that Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here." *Id.* at 86-87.

51. The development of the procedural-default doctrine in federal habeas litigation has had a significant impact on the availability of federal review. One recent study of habeas corpus petitions filed since 1996 found that 42.2% of capital cases had a "ruling that at least one

"[C]ontentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure" shall not be heard by a federal habeas judge "absent a showing of 'cause' and 'prejudice.'"[52] He claimed that the deliberate-bypass rule from *Noia* "may encourage 'sandbagging' on the part of defense lawyers," who would take their chances on an acquittal in state court while planning to present their constitutional claims in federal habeas proceedings if the "initial gamble" failed.[53]

Since *Wainwright*, the Court has struggled to justify why the procedural-default rule should operate to penalize clients for their lawyers' omissions or mistakes, and has used both performance-based and relationship-based understandings of attorney behavior in its analysis. Notably, in his dissent from *Wainwright*, Justice Brennan vigorously argued against reliance on a relationship-based theory to charge clients with the acts and omissions of their lawyers. He noted that clients were not involved in most decisions to circumvent state procedures and argued that it was unfair to hold clients responsible through the use of agency principles for their attorneys'

claim was barred by procedural default." Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, NAT'L INST. OF JUST. 48 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

52. *Wainwright*, 433 U.S. at 87. The Supreme Court has since defined "cause" as a factor external to the defense that prevented an issue from being raised in a timely manner. For example, in *Amadeo v. Zant*, 486 U.S. 214 (1988), the Court found cause for a defendant's failure to raise in the state trial court a challenge to the composition of the grand jury pool after the defendant showed that a memorandum by the state district attorney directing the jury commissioners to underrepresent blacks and women in the master jury lists had been concealed by county officials. *Id.* at 222-24. Because of this misconduct on the part of county officials, the grounds for the challenge were not reasonably available to Amadeo's lawyers at the time they were required to challenge the jury. *Id.* In order to show prejudice, a defendant must establish that the alleged constitutional errors worked to the actual and substantial disadvantage of the defendant, "infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). The test for prejudice derives from the test for materiality of undisclosed exculpatory evidence. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984) ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

53. *Wainwright*, 433 U.S. at 89.

mistakes.[54] Justice Brennan argued that, although agency principles had traditionally provided the justification for binding clients to the actions of their agent-lawyers,[55] "no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney" when fundamental constitutional rights are at stake.[56] This is especially true for indigent defendants given that they are often "without any realistic choice in selecting who ultimately represents them at trial."[57] Despite Justice Brennan's argument, later Supreme Court cases have explicitly adopted agency principles to justify charging criminal defendants and habeas petitioners with the acts and omissions of their lawyers.

A comparison between two key cases, *Murray v. Carrier*[58] and *Coleman v. Thompson*,[59] demonstrates the interplay between the two models. In *Murray*, after Clifford Carrier was convicted by a Virginia jury of rape and abduction, his lawyer filed a notice of appeal to the Virginia Supreme Court, which included seven substantive claims.[60] However, when filing the petition for appeal, the lawyer inadvertently left out one of these claims.[61] The Virginia Supreme Court refused the appeal, and eventually Carrier filed a pro se federal habeas petition, attempting to renew the forgotten claim.[62] He argued that he should not be foreclosed from raising the claim because of his lawyer's mistake during the state direct appeal.[63]

On appeal, the Supreme Court noted that only "some objective factor *external* to the defense" can provide sufficient "cause" to excuse a procedural

54. Justice Brennan argued that "the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel." *Id.* at 104 (Brennan, J., dissenting).

55. *See id.* at 114 n.13. Justice Brennan noted, "Traditionally, the rationale for binding a criminal defendant by his attorney's mistakes has rested on notions akin to agency law." *Id.* He argued that while agency principles may make sense within the context of commercial law, where "the common law established and recognized principal-agent relationships for the protection of innocent third parties who deal with the [agents]," the application of these principles to the criminal law context is inappropriate because "the State, primarily in control of the criminal process and responsible for qualifying and assigning attorneys to represent the accused, is not a wholly innocent bystander." *Id.*

56. *Id.* at 114.

57. *Id.*

58. 477 U.S. 478 (1986).

59. 501 U.S. 722 (1991)

60. 477 U.S. at 482.

61. *Id.*

62. *Id.* at 482-83.

63. *Id.* at 483.

default.[64] It rejected Carrier's claim, holding that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . , [there is] no inequity in requiring him to bear the risk of attorney error that results in a procedural default."[65] The best way to understand the Court's statement is to think of attorney performance along a spectrum. Once an attorney's performance drops below a particular threshold, then the attorney's performance is ineffective under *Strickland*. As long as the attorney's performance remains above the threshold, then the defendant-client will be charged with mistakes made by the attorney. When the lawyer's performance drops below the threshold, however, then there is a *Strickland* violation, and the Sixth Amendment requires that the "responsibility for the default be imputed to the State."[66] *Murray* therefore established that, in contexts in which the Sixth Amendment right to counsel applies, a performance-based standard governs.

Contrast *Murray* with *Coleman v. Thompson*, where the Court held that in contexts in which the Sixth Amendment does not apply,[67] the relationship-based model governs.[68] As discussed in this Note's Introduction, *Coleman* involved a habeas petitioner whose lawyers failed to file a timely notice of appeal during the thirty-day window for state habeas proceedings. The Court invoked agency law to explain why Coleman was bound by his lawyers' procedural default. The Court stated, "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must

64. *Id.* at 488 (emphasis added).

65. *Id.* This standard for showing cause is quite a bit stricter than the one outlined by the Court in *Reed v. Ross*, 468 U.S. 1 (1984). *See id.* at 14 ("[T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests."). This defendant-friendly dictum from *Reed* was written by Justice Brennan, who had rejected agency principles in his dissent in *Wainwright*, arguing that it would be more appropriate to attribute lawyers' mistakes to the state due to its role in training, certifying, and appointing counsel. *See Wainwright*, 433 U.S. at 114 (Brennan, J., dissenting).

66. *Murray*, 477 U.S. at 488. This is a fairly high bar to meet, notably because a single isolated episode of procedural default will not generally give rise to a successful claim of ineffective assistance of counsel. *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 682 (1990).

67. The Court has held twice that the Sixth Amendment does not guarantee counsel to petitioners during state postconviction relief proceedings. *See supra* text accompanying notes 27-28.

68. 501 U.S. 722, 753 (1991).

'bear the risk of attorney error.'"[69] According to the relationship-based model espoused in *Coleman*, "well-settled principles of agency law" require that the principal (the client) bear the risk of harm caused by the agent (the lawyer) in the scope of the agent's employment.[70] Under the *Coleman* Court's strict application of the relationship-based model, even the attorney-agent's negligence is imputed to the client.

C. Postconviction Counsel in the States

This Section briefly describes the disparity among the states concerning the standards for appointing postconviction counsel in order to highlight the consequences that can result from requiring habeas petitioners to bear the risk of their attorneys' mistakes. The Court's awareness of the severe flaws within some states' postconviction systems may have influenced its recent decisions injecting some flexibility into the *Coleman* rule. Notably, Justice Ginsburg's opinion in *Maples v. Thomas* included a lengthy indictment of Alabama's system of appointing counsel to indigent defendants.[71] She noted, among other defects, that Alabama is "[n]early alone among the States . . . [in] not guarantee[ing] representation to indigent capital defendants in postconviction proceedings"[72] and that some death-row inmates in the state receive no postconviction representation.[73]

Of course, Alabama is not alone in failing to provide adequate counsel to defendants during postconviction proceedings. While most states with the death penalty[74] do provide for the appointment of counsel to death-row

69. *Id.* (quoting *Murray*, 477 U.S. at 488).

70. *Id.* at 754 (noting that the "master is subject to liability for harm caused by negligent conduct of [the] servant within the scope of employment" (citing RESTATEMENT (SECOND) OF AGENCY § 242 (1958))).

71. 132 S. Ct. 912, 917-19 (2012).

72. *Id.* at 918.

73. *Id.*

74. Many states with the death penalty require mandatory appointment of postconviction counsel upon request by the death-row inmate. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 app. A (2002) (compiling state statutes). In six states, there is no mandatory provision of postconviction counsel, but either the death penalty is so infrequently imposed that volunteer counsel can handle all cases or the courts "follow a consistent policy of appointing counsel to all indigent" death-row inmates. *See id.* at 16. There used to be a network of federally funded postconviction capital defender organizations devoted to either providing or finding representation for death-row inmates, but Congress acted in 1995 to eliminate funding for these centers entirely. *See* Roscoe C. Howard, Jr., *The Defunding of the*

inmates during state postconviction proceedings, there is a vast disparity in the competency requirements imposed on these attorneys. For example, article 11.071 of Texas's Code of Criminal Procedure requires the appointment of "competent counsel" for death-row inmates during state postconviction proceedings.[75] However, in *Ex parte Graves*, the Texas CCA rejected the argument that article 11.071 imposed a baseline performance standard on habeas counsel.[76] The CCA held that the competency requirement refers only to a "habeas counsel's qualifications, experience, and abilities at the time of his appointment."[77] The statute, according to the CCA, does not indicate that the competency requirement also applies to "the final product or services rendered by that otherwise experienced and competent counsel."[78] In other words, there is no requirement in Texas that a lawyer deemed competent at the time of his appointment actually deliver competent assistance to his client.[79] Given Texas's low standards for attorney performance during state collateral proceedings, as well as the state legislature's refusal to allocate adequate funding to the state habeas representation project,[80] it is no surprise that the record of the appointed article 11.071 attorneys is overwhelmingly dire.[81]

There are several other states that provide for the mandatory appointment of counsel to all death-row inmates, but do not guarantee effective assistance of postconviction counsel. For example, the Nevada Supreme Court held that

Post Conviction Defense Organizations as a Denial of the Right to Counsel, 98 W. VA. L. REV. 863, 865 (1996); Ronald J. Tabak, Commentary, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 524, 540-43 (1996).

75. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a) (West 2005).

76. 70 S.W.3d 103 (Tex. Crim. App. 2002).

77. *Id.* at 114.

78. *Id.* at 116.

79. This result conflicts with the requirements of the Model Rules of Professional Conduct, which provide that a lawyer "shall provide competent *representation* to a client." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) (emphasis added). The commentary to Rule 1.1 further provides, "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." *Id.* R. 1.1 cmt. 5.

80. TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 101 & n.3 (2000) (noting that when article 11.071 was enacted in 1995, the legislature appropriated two million dollars a year for the program, which was less than half the amount requested by the Texas Court of Criminal Appeals).

81. *See* TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS 13-22 (2002) (describing the negative results of a study of the performance of article 11.071 attorneys).

death-row inmates have no guarantee of effective performance of postconviction counsel on the ground that holding otherwise could lead to an endless chain of appeals litigating the ineffectiveness of immediately preceding postconviction counsel.[82] Other states have followed the example of the federal government, providing for the appointment of counsel for death-row inmates, but explicitly foreclosing the possibility of using postconviction counsel's ineffectiveness as a basis for relief in subsequent proceedings.[83] On the other end of the spectrum, several state courts have held that their states' statutory guarantees of counsel necessarily guarantee competent assistance of counsel.[84] Despite these encouraging examples, many death-row inmates are left without a "guarantee of competent performance" in the places where it is most necessary; namely, "the large states of the Deep South that have collectively carried out the overwhelming majority of post-*Furman* executions."[85] Some

82. Bejarano v. Warden, 929 P.2d 922, 925 (Nev. 1996).

83. *See, e.g.*, COLO. REV. STAT. § 16-12-205(3)(f), (5) (2006) ("The ineffectiveness of counsel during post-conviction review shall not be a basis for relief."); N.C. GEN. STAT. § 15A-1419(c) (2011) ("[A] claim of ineffective assistance of prior postconviction counsel [cannot] constitute good cause [to file a successive application]."); OHIO REV. CODE ANN. § 2953.21(I)(2) (West 2010) ("The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal."). For the federal analogue, see 28 U.S.C. § 2254(i) (2006), which instructs that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

84. *See, e.g.*, Grinols v. State, 10 P.3d 600, 620 (Alaska Ct. App. 2000) (relying on the due process clause of the state constitution to guarantee effective assistance of appointed counsel); Lozada v. Warden, 613 A.2d 818, 821 (Conn. 1992) ("It would be absurd to have the right to appointed counsel who is not required to be competent."); State v. Flansburg, 694 A.2d 462, 467 (Md. 1997) (stating that the right to a lawyer would be "hollow indeed unless the assistance were required to be effective" (quoting Wilson v. State, 399 A.2d 256, 260 (Md. 1979))); State v. Rue, 811 A.2d 425, 433 (N.J. 2002) (noting that the New Jersey Supreme Court's rules "state that every defendant is entitled to be represented by counsel on a first [postconviction relief] petition; that if a defendant is indigent, counsel will be assigned; that assigned counsel may not withdraw based on the ground of 'lack of merit' of the petition; and that counsel should advance any grounds insisted on by defendant notwithstanding that counsel deems them without merit").

85. Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 350-51 (2003). The *Furman* decision referred to in the quote is *Furman v. Georgia*, in which the Court held that imposition of the death penalty pursuant to the state statutes at issue in that case was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. 238, 239-40 (1972). *Furman* led to a moratorium on the imposition of the death penalty, which ended with the Court's ruling in *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

academics have called for the Court to constitutionalize the right to counsel in postconviction proceedings in order to address some of the problems discussed in this Section.[86] Thus far, the Court has declined to do so.[87] Instead, as I argue in the next Part, it has vacillated between utilizing the performance-based and relationship-based models to carve out exceptions from the general rule that clients are bound by the mistakes and omissions of their postconviction attorneys, without explicitly imposing a minimum standard of competence on postconviction lawyers.

III. THE COURTS' EFFORTS TO EXEMPT HABEAS PETITIONERS FROM THE MISTAKES OF THEIR ATTORNEYS

This Part examines how lower courts developed a body of case law addressing the consequences of attorney misconduct in the habeas context and how the Supreme Court's recent trio of "bad lawyer" cases clarifies (or muddies) the law in this area. In three recent cases, *Holland v. Florida*,[88] *Maples v. Thomas*,[89] and *Martinez v. Ryan*,[90] the Court held that attorney errors should not necessarily foreclose the habeas petitioners from presenting their claims. However, the analyses underlying these holdings has varied: In *Holland*, the Court employed a performance-based approach,[91] while in *Maples* the Court

86. *See, e.g.*, Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1415-16 (1999); Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in* Maples *and* Martinez *To Restore It*, 45 CREIGHTON L. REV. 185, 213-14 (2011); Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 544 (2009); Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 GEO. J. ON POVERTY L. & POL'Y 247, 249 (2011).

87. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), is the most obvious recent example of the Court ducking the question of whether there is a constitutional right to counsel in any collateral proceedings. Justice Kennedy noted that *Coleman* had left open the possibility that "the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" *Id.* at 1315 (quoting Coleman v. Thompson, 501 U.S. 722, 755 (1991)). However, he went on to state, "This is not the case . . . to resolve whether that exception exists as a constitutional matter." *Id.*

88. 130 S. Ct. 2549 (2010).

89. 132 S. Ct. 912 (2012).

90. 132 S. Ct. 1309.

91. 130 S. Ct. at 2564.

adopted a relationship-based approach[92] and recast *Holland* as a decision grounded in the relationship-based model.[93] Finally, the Court reverted to a performance-based approach in *Martinez*. The Supreme Court has not been alone in vacillating between the two models. Prior to *Holland*, most of the circuits had grappled with the question of whether attorney conduct could justify equitable tolling[94] of the one-year statute of limitations to file a federal habeas petition imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and these courts employed both models in their analyses. This Part tracks the development of the equitable-tolling jurisprudence in the circuit courts and explores the Supreme Court's three recent decisions in this area. In my analysis of *Holland*, *Maples*, and *Martinez*, I also predict the framework the Court will employ in the future to govern its application of the performance-based model versus the relationship-based model.

A. The Development of the Equitable-Tolling Jurisprudence

Five years after the Court held in *Coleman* that agency principles bind clients to the mistakes of their attorneys, Congress instated a one-year statute of limitations for filing federal habeas petitions in AEDPA.[95] This new deadline created a category of potential procedural defaults that had not existed when *Coleman* was decided in 1991. Circuit courts were faced with the question of

92. 132 S. Ct. at 922-23.

93. *Id.* at 923-24.

94. A complete discussion of equitable-tolling jurisprudence is beyond the scope of this Note. Essentially, however, applying this principle to a limitations period, such as the one-year Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deadline, means that a court will pause (or "toll") the running of the limitations period for equitable reasons. The Supreme Court held in *Holland v. Florida* that unlike certain statutory limitations periods, such as the limitations period for tax refund claims at issue in a previous case, the AEDPA one-year limitations period was subject to equitable tolling in part because "'equitable principles' have traditionally 'governed' the substantive law of habeas corpus." *Holland*, 130 S. Ct. at 2561 (quoting Munaf v. Geren, 553 U.S. 674, 693 (2008)).

95. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. The one-year limitations period for state prisoners is codified at 28 U.S.C. § 2244(d)(1) (2006) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."). The statute of limitations for federal prisoners is codified at 28 U.S.C. § 2255. Before the adoption of AEDPA, neither Congress nor the judiciary had ever imposed a deadline on the filing of habeas corpus petitions. *See* Day v. McDonough, 547 U.S. 198, 214 (2006) (Scalia, J., dissenting) (noting that "prior to the enactment of AEDPA," the Court had rejected imposing a time bar on federal habeas petitions due to "habeas courts' traditionally broad discretionary powers"); Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 12 (2004).

whether they could use their equitable powers to "toll" this deadline when attorney error caused petitioners to file untimely petitions, notwithstanding *Coleman*. The courts split not only with regard to their answer to that question, but also with regard to the reasoning they employed to justify their holdings. A majority of the circuits, including the Third,[96] Fifth,[97] Eighth,[98] Ninth,[99] and Tenth[100] Circuit Courts of Appeals, employed performance-based analysis to distinguish between "ordinary" attorney negligence chargeable to the client and "extraordinary" or "gross" negligence not chargeable to the client. However, other judges relied on *Coleman*'s relationship-based agency analysis to support their determinations whether attorney error could be grounds for equitably tolling the AEDPA deadline.[101] I will first discuss the circuits that used the relationship-based model and then contrast that approach with the performance-based analysis that the majority of the circuits employed.

The Eleventh Circuit expressly relied on relationship-based agency principles to toll the statute of limitations for death-row prisoner Ernest Charles Downs, whose postconviction lawyers had lied to him regarding the status of his state postconviction petition[102] and failed to file a timely federal petition.[103] The court noted that while the "your lawyer, your fault" approach was consistent with agency-law principles,[104] the agency rule was not absolute.[105] "[U]nder fundamental tenets of agency law, a principal is not charged with an agent's actions or knowledge when the agent is acting adversely to the principal's interests."[106] In this case, because Downs's lawyers were thwarting his efforts to file a timely habeas petition and "working against his interests at every turn,"[107] it was improper to bind him to their conduct. In

96. Nara v. Frank, 264 F.3d 310 (3d Cir. 2001).

97. United States v. Wynn, 292 F.3d 226 (5th Cir. 2002).

98. United States v. Martin, 408 F.3d 1089 (8th Cir. 2005).

99. Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003).

100. Fleming v. Evans, 481 F.3d 1249 (10th Cir. 2007).

101. I do not claim in this Note that courts evaluating attorney misconduct rely on one model exclusively. These descriptive categories are my attempt to delineate broadly the two main modes of analysis that courts use, but there are examples in which courts blend performance-based and relationship-based analysis.

102. Downs v. McNeil, 520 F.3d 1311, 1314 (11th Cir. 2008).

103. *Id.* at 1316.

104. *Id.* at 1320.

105. *Id.*

106. *Id.*

107. *Id.* at 1322.

Baldayaque v. United States, Chief Judge Jacobs's concurrence also used agency principles to conclude that the client should not be bound by the attorney's failure to file a federal habeas petition.[108] However, the Seventh Circuit relied on *Coleman*'s hard-line application of agency principles to hold that "attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client."[109]

In one case, the lawyer waited until June 25, 1999, to mail a federal habeas petition to the district court.[110] The deadline was June 28, 1999, and the district court received and filed the petition on June 29.[111] The judge dismissed the petition as untimely.[112] Judge Easterbrook wrote:

> No one interfered with Johnson's ability to pursue collateral relief in a timely fashion. He wants us to treat his own lawyer as the source of interference, but lawyers are agents. Their acts (good and bad alike) are attributed to the client's they represent. . . . So it is as if Johnson himself had made the decisions that led to the delay.[113]

108. 338 F.3d 145, 154-55 (2d Cir. 2003) (Jacobs, C.J., concurring). Heriberto Baldayaque was convicted of a drug offense and sentenced to a term of 168 months' imprisonment. *Id.* at 147 (majority opinion). He asked his wife to hire an attorney to file a "2255" (i.e., a petition for habeas corpus pursuant to 28 U.S.C. § 2255 (2006)). *See* 338 F.3d at 148 (majority opinion). His wife hired Burton Weinstein and paid him $5,000 to represent Baldayaque. Weinstein incorrectly told her that it was too late to file a "2255," but he did file a cursory motion for modification of Baldayaque's sentence. *Id.* at 148-49. Once that motion was denied, Weinstein informed Baldayaque's wife that there was nothing more he could do. *Id.* at 149. By this point, the one-year deadline for filing a federal habeas petition had passed. *Id.* While the majority held that Weinstein's incompetent behavior constituted a sufficiently "extraordinary" circumstance to justify equitable tolling of the one-year AEDPA statute of limitations, *id.* at 152-53, Chief Judge Jacobs's concurrence relied on agency principles, arguing that the corollary to the general rule that clients are bound by the actions of their lawyer-agents "is that when an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with the agent's misdeeds,'" *id.* at 154 (Jacobs, C.J., concurring) (quoting Nat'l Union Fire Ins. Co. v. Bonnanzio, 91 F.3d 296, 303 (2d Cir. 1996)). This case demonstrates that different judges on the same panel can reach the same result even as they rely on different models: the majority applied the performance-based model and concluded that the lawyer's negligence was "extraordinary," while Chief Judge Jacobs applied the relationship-based model and concluded that the lawyer's behavior severed the attorney-client relationship.

109. Modrowski v. Mote, 322 F.3d 965, 968 (7th Cir. 2003).

110. Johnson v. McBride, 381 F.3d 587, 588 (7th Cir. 2004).

111. *Id.*

112. *Id.*

113. *Id.* at 589-90 (citations omitted).

In contrast with this relationship-based analysis, the Third, Fifth, Eighth, Ninth, and Tenth Circuits all relied on performance-based reasoning to hold that attorney misconduct can be grounds to apply equitable tolling to the AEDPA statute of limitations. It is important to note that many of these cases involved indicia of a breakdown in the principal-agent relationship: deception on the part of the lawyer,[114] failure to keep the client informed regarding the status of the case,[115] failure to follow specific client instructions,[116] or abandonment of the client.[117] However, rather than relying on agency principles as the Eleventh Circuit did, these courts reasoned that such misconduct on the part of the lawyers constituted "egregious" negligence warranting equitable tolling.[118]

The Eighth Circuit case of *United States v. Martin* is instructive.[119] The court noted that the lawyer "consistently misled" the client and his wife, including by lying about filing a § 2255 petition on the client's behalf.[120] The lawyer also did not return any of the forty phone calls placed by the client's wife and did not show up to two appointments with the client's wife.[121] The court stated that the lawyer's conduct was "the type of egregious attorney misconduct that may excuse an untimely filing."[122] However, as Chief Judge Jacobs argued in his *Baldayaque v. United States* concurrence, a more analytically sound basis for the court's decision may have been to hold that the

114. *See, e.g.*, United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002) (finding that the client was "deceived by his attorney into believing that a timely § 2255 motion had been filed on his behalf").

115. *See, e.g.*, Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir. 2003) (noting that although the client and his mother tried contacting the attorney numerous times by telephone and in writing, "these efforts proved fruitless," as the attorney failed to file the petition and furthermore failed to return the client's case file to the client).

116. *See, e.g.*, Fleming v. Evans, 481 F.3d 1249, 1255-57 (10th Cir. 2002) (observing that although the client specifically instructed his attorney to withdraw his guilty plea and file an application for postconviction relief, his attorney failed to do so and furthermore falsely represented to the client that he had filed the application).

117. *See, e.g.*, Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001) ("Also troubling is Nara's contention that his attorney . . . effectively abandoned him and prevented him from filing the habeas petition on time.").

118. These courts distinguished "egregious" attorney misconduct from "ordinary attorney negligence," which would not justify tolling the statute of limitations. *See, e.g.*, *Spitsyn*, 345 F.3d at 800.

119. 408 F.3d 1089 (8th Cir. 2005).

120. *Id.* at 1094.

121. *Id.* at 1095.

122. *Id.*

lawyer's failure to communicate with his client or file any documents on his client's behalf meant that the lawyer had effectively stopped functioning as the client's agent.[123] That approach would have been more consistent with the *Coleman* Court's reliance on agency principles. That approach would have been more consistent with the Coleman Court's reliance on agency principles, as the Eighth Circuit could have examined the nature of the relationship between the lawyer and his client as opposed to attempting to draw a line between "ordinary" and "extraordinary" attorney misconduct.

B. Negligent Lawyers Reach the Supreme Court

In recent Terms, the Supreme Court has issued three opinions addressing the core question of this Note: Under what circumstances can petitioners escape the consequences of their postconviction or habeas attorneys' misconduct? This Section describes how the Court's analysis of this issue has vacillated between using the performance-based and relationship-based models.

The first case of the Supreme Court's recent "bad lawyers" trio, *Holland v. Florida*,[124] involved the same issue that had split the lower courts: whether attorney misconduct could be grounds for equitable tolling of the AEDPA statute of limitations. The Court joined the majority of the circuits and held that attorney misconduct *could* be grounds for equitable tolling, but it relied on vague performance-based reasoning that provided little guidance to lower courts and failed to satisfactorily distinguish this holding from the hard-line rule in *Coleman* that attorney negligence in the postconviction context is always chargeable to the client.

Holland involved a death-row inmate, Albert Holland, who received a state-appointed attorney to represent him in state and federal postconviction proceedings.[125] The clock on Holland's one-year window to file a federal petition began running on October 1, 2001.[126] After Holland's attorney, Bradley Collins, was appointed, he waited 316 days to file a motion for postconviction

123. 338 F.3d 145, 153-54 (2d Cir. 2003) (Jacobs, C.J., concurring) ("I am reluctant to create a distinction between malpractice that is extraordinary and malpractice that is not. I think that principles of agency law furnish a superior basis for distinguishing [a prior] case.").

124. 130 S. Ct. 2549 (2010).

125. *Id.* at 2555.

126. *Id.*; *see also* 28 U.S.C. § 2244(d) (2006) (establishing a one-year window for filing a federal habeas petition and providing that this deadline will be tolled during the pendency of state post-conviction relief proceedings).

relief in the state's trial court.[127] This petition stopped the clock on Holland's AEDPA deadline with twelve days to go.[128] Over the course of the next few years, "Holland wrote Collins letters asking him to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review."[129] Once the state trial court denied Holland's state postconviction petition, Collins appealed the denial to the Florida Supreme Court.[130] While his case was pending in the Florida Supreme Court, Holland became unhappy with Collins's lack of communication and twice wrote to the Florida Supreme Court asking to remove Collins from his case.[131] The Florida Supreme Court held that Holland could not file any pro se papers with the court while he was represented by counsel, including papers requesting new counsel.[132]

Collins argued Holland's case before the Florida Supreme Court on February 10, 2005, and that court published its decision denying Holland relief on November 10, 2005.[133] Mandate issued on December 1, 2005, at which point the AEDPA federal habeas clock began to run.[134] The one-year limit expired on December 13, 2005, unbeknownst to Collins, who was unaware that a decision had been rendered.[135] During this period, Holland frequently wrote to Collins requesting status updates on his case, but Collins never replied, and Holland did not learn that the Florida Supreme Court had issued its decision until January 18, 2006.[136] He immediately wrote out his own pro se federal habeas petition and mailed it to the federal district court the next day, but that court dismissed his petition as untimely because he filed it approximately five weeks after the expiration of his AEDPA window.[137]

On appeal from the Eleventh Circuit, the Supreme Court held that a petitioner is entitled to equitable tolling under 28 U.S.C. § 2244(d) if he can "show[] '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing."[138] It

127. *Holland*, 130 S. Ct. at 2555.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 2556.

133. *Id.*

134. *Id.*

135. *Id.* at 2556–57.

136. *Id.*

137. *Id.* at 2557, 2559.

138. *Id.* at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (emphasis omitted)).

further held that in Holland's case, the "extraordinary circumstances" involved his "attorney's failure to satisfy professional standards of care."[139] The Court supported its holding in part by reference to the lower court decisions that had distinguished between "garden variety" or "excusable" attorney negligence and "egregious" negligence sufficient to be an "extraordinary circumstance" justifying equitable tolling.[140] The Court also relied on an amicus brief filed by legal ethics professors, which argued that Collins had "violated fundamental canons of professional responsibility" set forth in case law, the Restatements of Agency, and the American Bar Association's Model Rules of Professional Conduct.[141]

A few things are worth noting about the *Holland* decision. First, the Court's attempt to distinguish *Coleman* (i.e., to explain why attorney misconduct could constitute "extraordinary circumstances" sufficient to justify equitable tolling, but not "cause" sufficient to justify state procedural defaults) was cursory and unsatisfying. The Court stated, "[I]n the context of procedural default, we have previously stated, without qualification, that a petitioner 'must bear the risk of attorney error.'"[142] However, the Court distinguished *Coleman* as being a "case about federalism" and the deference that federal courts owe to a state court's determination that its own procedural rules had been violated, while *Holland* and the equitable-tolling analysis concerned federal courts' ability to excuse a petitioner's failure to comply with *federal* procedural rules.[143] Second, the Court failed to articulate a clear theory for when attorney misconduct would be severe enough to qualify as extraordinary circumstances,[144] referring

139. *Id.*

140. *Id.* at 2563-64.

141. *Id.* at 2564-65.

142. *Id.* at 2563 (quoting Coleman v. Thompson, 501 U.S. 722, 752-53 (1991)).

143. *Id.* Justice O'Connor's opinion for the *Coleman* majority began, "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." 501 U.S. at 726.

144. *Holland*, 130 S. Ct. at 2575 (Scalia, J., dissenting) ("The only thing the Court offers that approaches substantive instruction is its implicit approval of 'fundamental canons of professional responsibility' . . . ." (quoting *id.* at 2564-65 (majority opinion))). The majority opinion had stated, "A group of teachers of legal ethics tells us that [Collins's] various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client." *Id.* at 2564 (majority opinion) (citing Brief for Legal Ethics Professors et al. as Amici Curiae in Support of Petitioner, *Holland*, 130 S. Ct. 2549 (No. 09-5327), 2009 WL 5177143)).

instead to "fundamental canons of professional responsibility"[145] and the various circuit court decisions that had attempted to parse the distinction between ordinary and gross attorney negligence.

Justice Alito, in concurrence, criticized the majority opinion's impractical distinction between ordinary and gross negligence, arguing that the line between the two "would be hard to administer" and "would almost certainly yield inconsistent and often unsatisfying results."[146] He argued that the question instead should turn on whether the missed deadline results from attorney misconduct that is not "constructively attributable"[147] to the client. In this case, because Collins effectively "abandoned" his client, common sense and agency principles dictated that Holland should not be charged with the conduct of an attorney who was "not operating as his agent in any meaningful sense of that word."[148]

In the next case to reach the Court on this issue, *Maples v. Thomas*,[149] the majority opinion adopted Justice Alito's agency analysis to explain why Cory Maples's procedural default should have been excused after his attorneys abandoned his case. Maples is an Alabama death-row inmate whose state postconviction petition was written by two Sullivan & Cromwell associates serving pro bono.[150] While the petition was pending, the two associates left the firm without notifying Maples or seeking the Alabama court's leave to withdraw as counsel.[151] The Alabama trial court denied Maples's petition in May 2003, and its clerk's office mailed notice of the ruling to Sullivan & Cromwell's New York office.[152] These notices were returned unopened, and, with no attorney acting on his behalf, Maples's deadline to appeal the state trial court's denial of his petition expired.[153]

Ordinarily, Maples's failure to appeal would be a state procedural default, barring his ability to petition for federal habeas relief. However, the Supreme Court held that "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him."[154] The Court

145. *Id.* at 2564.

146. *Id.* at 2567-68 (Alito, J., concurring).

147. *Id.* at 2568.

148. *Id.*

149. 132 S. Ct. 912 (2012).

150. *Id.* at 918.

151. *Id.* at 919.

152. *Id.* at 919-20.

153. *Id.* at 920.

154. *Id.* at 924.

claimed that it did not "disturb [*Coleman*'s] general rule" that a petitioner is bound by the mistake of his or her postconviction attorney who misses a filing deadline and cannot use the lawyer's negligent conduct as cause to excuse the state procedural default.[155] No matter how egregious a postconviction attorney's error, a client is bound by the lawyer's conduct unless the attorney has essentially abandoned the client and therefore "severed the principal-agent relationship."[156] The Court's decision therefore definitively established an "abandonment" exception to the agency theory of postconviction representation and recast *Holland* as a decision turning on the lawyer's "abandonment" of his client rather than his egregious negligence.[157]

However, in the final case in this trio, *Martinez v. Ryan*,[158] the Court again applied a performance-based standard to attorney misconduct in the postconviction context. The defendant, Luis Mariano Martinez, was convicted of two counts of sexual conduct with a minor.[159] Arizona law prohibits defendants from arguing ineffective assistance of trial counsel on direct appeal,[160] instead requiring them to present these claims during state collateral proceedings.[161] The attorney appointed to represent Martinez on direct and collateral review began the state collateral proceeding by filing a notice of postconviction relief, but ultimately failed to present an ineffective-assistance-of-trial-counsel claim during the collateral proceedings.[162] The state trial court gave Martinez forty-five days to file his own petition for collateral relief, but Martinez failed to do so, and the court dismissed the action for postconviction relief.[163] He later claimed that he was unaware of the ongoing proceedings and that his attorney had never told him that he needed to file a pro se petition to preserve his claims.[164] Later, while

155. *Id.* at 922.

156. *Id.* at 922–23.

157. *Id.* at 923 ("Justice Alito homed in on the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client. Holland's plea fit the latter category . . . ." (citation omitted)).

158. 132 S. Ct. 1309 (2012).

159. *Id.* at 1313.

160. *Id.* at 1314 (quoting State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (en banc)).

161. *Id.*

162. *Id.* Martinez's attorney ended up filing a statement claiming she could not find any colorable claims for relief. *Id.*

163. *Id.*

164. *Id.* Martinez's brief actually explains the course of events as follows: the attorney sent Martinez a letter explaining that he needed to file his own petition, but the letter was

represented by new counsel, Martinez attempted to present his ineffective-assistance-of-trial-counsel claim in a second collateral proceeding.[165] The state court dismissed his petition in part because of a state procedural rule precluding relief on claims that could have been raised in a previous collateral proceeding.[166]

When the case reached the Supreme Court, the Court could have proceeded in a few different ways. First, the Court could have answered the question presented in the petition for certiorari—whether defendants who are prohibited by state law from raising a particular claim on direct appeal have a federal constitutional right to effective assistance of postconviction counsel with respect to that particular claim[167]—in the affirmative. *Coleman* had noted that many states required defendants to reserve certain claims, such as ineffective assistance of trial counsel, for collateral proceedings, making these proceedings the "one and only appeal" as to these claims.[168] *Coleman* had therefore reserved the question of whether petitioners may have a constitutional right to effective assistance of postconviction counsel for claims that can be raised for the first time during postconviction proceedings, notwithstanding the general rule of no constitutional right to counsel during collateral review.[169] The Court faced this constitutional question squarely in *Martinez* and blinked, stating that "[t]his is not the case . . . to resolve whether [the right to counsel in this context] exists as a constitutional matter."[170]

The Court also could have relied on the relationship-based approach espoused in *Maples* to hold that Martinez's attorney had effectively abandoned him by failing to file a substantive petition for collateral relief and to communicate with him in Spanish regarding the status of his case and the need for him to file a pro se petition to preserve his claims. Instead, the Court held that, even though it had not held that the right to postconviction counsel existed for this class of claims as a constitutional matter, "[i]nadequate

written in English, even though the attorney knew that Martinez did not speak any English. Brief for Petitioner at 7, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 3467246, at *7.

165. *Martinez*, 132 S. Ct. at 1314.

166. *Id.*

167. Petition for a Writ of Certiorari at i, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 398287, at *i.

168. *Martinez*, 132 S. Ct. at 1315 (quoting Coleman v. Thompson, 501 U.S. 722, 756 (1991)).

169. *Id.* The rationale for constitutionalizing the right to counsel during collateral proceedings as to claims for which the collateral proceeding is effectively the first appeal of right is based on *Douglas v. California*, 372 U.S. 353, 355 (1963), which requires states to appoint counsel for defendants' first appeal of right.

170. *Martinez*, 132 S. Ct. at 1315.

assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[171] The opinion therefore granted state postconviction petitioners a *remedy* for ineffective assistance of counsel without explicitly recognizing a constitutional *right* to counsel at this stage.[172] Most importantly for the purposes of this analysis, the Court imposed the performance-based *Strickland* standard on attorney conduct during initial collateral-review proceedings of ineffective-assistance-of-counsel claims.[173] The Court's reasoning for imposing the performance-based standard, even in a context where it refused to hold that the constitutional right to counsel applied, was based largely on two factors: (1) the fundamental importance of the right to trial counsel and (2) the state's decision to bar defendants from raising ineffective-assistance-of-trial-counsel claims on direct appeal.[174]

C. The Law Governing Postconviction Counsel After Maples *and* Martinez

Is there any way to harmonize *Maples*'s relationship-based approach with *Martinez*'s imposition of a performance-based standard? Justice Kennedy presents *Martinez* as a limited qualification to *Coleman*'s holding that attorney "ignorance or inadvertence . . . does not qualify as cause to excuse a procedural default."[175] Yet *Martinez*, unlike *Maples*,[176] is not situated within *Coleman*'s relationship-based agency rationale. The *Martinez* opinion emphasized that "the limited nature of the qualification to Coleman adopted here reflects the importance of the right to the effective assistance of trial counsel and Arizona's decision to bar defendants from raising ineffective-assistance claims on direct

171. *Id.*

172. *See* Steve Vladeck, *Opinion Analysis: A New Remedy, but No Right*, SCOTUSBLOG (Mar. 21, 2012, 10:30 AM), http://www.scotusblog.com/?p=141180.

173. *Martinez*, 132 S. Ct at 1318 (asserting that to overcome a default of an ineffective-assistance-of-trial-counsel claim when the state requires the defendant to raise that claim in a collateral proceeding, the defendant must prove that "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*").

174. *Id.* at 1320.

175. *Id.* at 1315.

176. *See* Maples v. Thomas, 132 S. Ct. 912, 922-23 (2012) (stating that while the Court did not "disturb that general rule" from *Coleman* that a petitioner is bound by his attorney-agent's failure to meet a filing deadline, "[a] markedly different situation is presented . . . when an attorney abandons his client without notice," thereby severing the principal-agent relationship).

appeal."[177] This caveat represents a clue to how the *Martinez* exception may evolve over time. It is possible that the Court will acknowledge in future cases that there are other important substantive claims for which postconviction proceedings serve as the first level of review, such as claims that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*,[178] or claims of ineffective assistance of appellate counsel.[179] If so, then it is possible that the Court will apply the *Strickland* performance-based model to habeas petitioners' claims that ineffective assistance of postconviction counsel provides cause to excuse procedural default of other substantive constitutional claims.

The best reading of *Martinez* is therefore that a performance-based standard will apply to postconviction attorneys' conduct with respect to claims that meet the following two criteria: they concern a constitutional right that the Court determines is as fundamentally important as the right to trial counsel, and they are claims that the state requires defendant to present for the first time at an initial-review collateral proceeding. In all other circumstances, the *Maples* relationship-based "abandonment" standard will apply. This means that as long as an examination of the relationship between the attorney and the client demonstrates the continued existence of a principal-agent relationship, all of the attorney's acts and omissions will be charged to the client, even if the attorney's conduct is so negligent that it would violate the *Strickland* performance standard if that standard were applicable. It remains an open question which case, *Martinez* or *Maples*, will prove more helpful to habeas petitioners. Perhaps courts will expand the scope of *Martinez* by finding that its performance-based approach applies to a significant number of substantive claims beyond ineffective-assistance-of-trial-counsel claims. It is also possible that *Maples* will prove to be a significant gateway if courts adopt a flexible approach to evaluating claims of attorney "abandonment." The next Part explores how such a flexible approach could work, using principles drawn from

177. 132 S. Ct. at 1320.

178. 373 U.S. 83 (1963).

179. This point is borrowed from Justice Scalia's insightful dissenting opinion in *Martinez*, although I do not share his dismay at the thought of future courts broadening the scope of the *Martinez* exception. *See* 132 S.Ct. at 1321 (Scalia, J., dissenting) ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of 'newly discovered' prosecutorial misconduct, . . . claims based on 'newly discovered' exculpatory evidence or 'newly discovered' impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel.").

cases examining claims of attorney abandonment in the context of civil litigation.

IV. THE FUTURE OF THE RELATIONSHIP-BASED MODEL

This Part compares the analytic foundations of the relationship-based and performance-based models and discusses the advantages and disadvantages of each. Given the *Maples* Court's affirmation of *Coleman*'s relationship-based standard, it is important to examine the extent to which this model offers substantive protection to habeas petitioners. I argue that while the performance-based model provides more robust protections for habeas petitioners, the Court's recent reaffirmation of the relationship-based model in *Maples* signals that this is the model that will continue to govern the majority of petitioners, notwithstanding the narrow *Martinez* exception. I further argue that civil cases, such as the ones from which the *Coleman* Court borrowed its agency analysis in the first place, provide federal habeas courts with helpful analytic aids. This body of civil cases concerning lawyer misconduct evinces a much more flexible approach to the relationship-based model, and should be used as guidance by federal habeas courts seeking to apply the relationship-based model to ensure that habeas petitioners do not forfeit potentially meritorious constitutional claims because of the misconduct of their postconviction counsel.

A. A Normative Analysis of the Relationship-Based Model

The *Coleman* Court relied primarily on two previous cases arising in the civil litigation context for the proposition that in a system of "representative litigation" each party is deemed bound by the act of his "lawyer-agent"[180]: *Link v. Wabash Railroad Co.*[181] and *Irwin v. Department of Veterans Affairs*.[182] These cases can therefore aid federal habeas courts in fleshing out the analytic foundation of the relationship-based model. In particular, courts considering

180. Coleman v. Thompson, 501 U.S. 722, 753 (1991) ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 92 (1990); Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962)).

181. 370 U.S. 626.

182. 498 U.S. 89. Because *Irwin* relied on *Link*'s reasoning and did not expand on *Link*'s agency theory of representative litigation, my analysis will focus on *Link*.

Maples claims should be guided by factors the post-*Link* cases have utilized to determine when a "lawyer-agent" has abandoned his or her client.

William Link filed suit against the railroad company for injuries sustained after a collision with one of the company's trains.[183] Six years after the complaint was filed, the district court judge scheduled a pretrial conference for the afternoon of October 12, 1960, in Hammond, Indiana.[184] On the morning of October 12, Link's attorney telephoned the judge from another courthouse in Indianapolis (160 miles away from Hammond) and explained that he was busy filing papers in the Indiana Supreme Court and would not be able to make the pretrial conference unless it was rescheduled for the following day.[185] After the attorney failed to appear at the conference, the district court judge dismissed the action for failure to prosecute the case.[186] The Supreme Court upheld the dismissal, rejected the argument that dismissing the claim because of the attorney's conduct imposed an unfair penalty on the client, and articulated the following view of the attorney-client relationship:

> Petitioner *voluntarily chose* this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this *freely selected* agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . .[187]

For the *Link* Court, the fact that the client had voluntarily chosen his lawyer was an essential underpinning of the lawyer-as-agent relationship model. This critical factor is simply absent from our system of appointing postconviction counsel. Adam Liptak has noted that "clients and lawyers fit the agency model imperfectly [because a]gency law is built on the concepts of free choice, consent, and loyalty, and it is not unusual to find lawyer-client relationships in which some or all of these elements are missing."[188] In a post-*Maples* equitable-tolling case, Judge Barkett of the Eleventh Circuit also criticized the "continued application to death-row inmates of the agency theory of the lawyer-client relationship," arguing that "none of the key assumptions

183. *Link*, 370 U.S. at 627.

184. *Id.*

185. *Id.* at 627-28.

186. *Id.* at 629; *cf.* FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute . . . a defendant may move to dismiss the action.").

187. *Link*, 370 U.S at 633-34 (emphasis added).

188. Adam Liptak, *Foreword*: *Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 MICH. L. REV. 875, 875 (2012).

underlying the application of an agency relationship to a death-sentenced client and his lawyer are valid in the post-conviction context."[189] In particular, she pointed to a death-row inmate's inability to choose his own lawyer or to supervise and communicate with his lawyer as factors that undercut the applicability of the agency model.[190]

It is important to question the legal fiction underlying the application of the agency model to postconviction lawyers and their clients because as a result this model, clients are generally required to "bear the risk"[191] of their attorneys' errors. These errors can result in a client losing his or her chance to present viable constitutional claims to federal habeas courts. While the Court has recognized some limitations to the *Coleman* principle that clients must be charged with all of the acts and omissions of their lawyer-agents, a narrow interpretation of the "abandonment" exception outlined in *Maples* runs the risk of benefiting only a small class of inmates whose lawyers completely abandon them, and leaving unprotected inmates such as the ones discussed in the Introduction, whose lawyers filed woefully inadequate[192] or untimely[193] habeas petitions. A strict application of this exception may even create a "perverse incentive" for attorneys "to abandon their clients' cases, rather than attempt to better understand the law and risk the chance of filing the petitions late."[194]

While it is the case that a performance-based standard operates across the board to police the conduct and efforts of *all* lawyers, as opposed to only those who abandon their clients, the potential of the relationship-based model should not be discounted. In order to see how a flexible relationship-based model can operate to protect defendants in the postconviction context, it is helpful to return to the civil litigation context. As previously discussed, the

189. Hutchinson v. Florida, 677 F.3d 1097, 1104 (11th Cir. 2012) (Barkett, J., concurring in the judgment).

190. *Id.* at 1105; *cf.* Wainwright v. Sykes, 433 U.S. 72, 114 (1977) (Brennan, J., dissenting) ("[N]o fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney. This is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial." (footnote omitted)); Dunphy v. McKee, 134 F.3d 1297, 1300 (7th Cir. 1998) (noting the limitations of the agency theory "under circumstances in which the client had no voice in choosing the lawyer").

191. Murray v. Carrier, 477 U.S. 478, 488 (1986).

192. *See supra* note 1 and accompanying text (discussing inmate Ricky Kerr, whose lawyer filed a three-page habeas petition).

193. *See supra* note 6 and accompanying text.

194. Marni von Wilpert, Comment, Holland v. Florida*: A Prisoner's Last Chance*, *Attorney Error*, *and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORDHAM L. REV. 1429, 1467 (2010).

Coleman Court borrowed the lawyer-agent relationship model from *Link*, a civil case. However, the Court failed to acknowledge that by the time *Coleman* was decided, subsequent decisions had loosened *Link*'s mechanical rule that clients are bound by their lawyers' conduct, with most circuit courts agreeing that in the context of civil litigation, judges may use their equitable powers to unbind clients from their lawyer-agents' acts or omissions. The next Section explores these cases and argues that these cases should serve as interpretive aids for federal habeas courts trying to apply the relationship-based standard. In particular, I argue that they demonstrate extremely flexible applications of the relationship-based model. Federal habeas courts should adopt the same flexible approach to provide substantive protection from negligent postconviction lawyers.

*B. Post-*Link *Applications of the Relationship-Based Model*

The *Link* rule was contested at the time it was adopted. In dissent, Justice Black argued that agency principles were not enough to justify a "mechanical rule" that clients must always be punished for the conduct of their lawyers—and that this case, in which a severely injured man was barred forever from seeking compensation for his injuries, was "a good illustration of the deplorable kind of injustice" that could result from adopting such a rule.[195]

Subsequent courts have in fact injected flexibility into the Supreme Court's "mechanical rule." Their instrument for doing so has been Federal Rule of Civil Procedure 60(b), which allows a court to "relieve a party or its legal representative from a final judgment, order, or proceeding,"[196] such as an order dismissing an action for failure to prosecute under Rule 41(b). Rule 60(b) has been described as "a grand reservoir of equitable power to do justice in a particular case,"[197] which enables courts "to vacate judgments whenever such action is appropriate to accomplish justice."[198] While Rule 60(b) lists several reasons for which judgments may be vacated, courts have relied on the catchall provision of Rule 60(b)(6)—relief may be granted for "any other reason that justifies relief"[199]—to relieve clients from the consequences of their lawyers' conduct.

195. Link v. Wabash R.R. Co., 370 U.S. 626, 645 (1962) (Black, J., dissenting).

196. FED. R. CIV. P. 60(b).

197. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981) (quoting Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968)).

198. Klapprott v. United States, 335 U.S. 601, 615 (1949).

199. FED. R. CIV. P. 60(b)(6).

Many circuits have held that, notwithstanding *Link*,[200] courts may use Rule 60(b)(6) to award relief to clients for their lawyers' misconduct.[201] While each determination of whether relief is warranted under Rule 60(b)(6) is necessarily very fact intensive, certain principles may be drawn from the cases in which the plaintiff successfully secured relief. Federal habeas courts should keep these principles in mind when applying the relationship-based model to *Maples* claims: (1) courts focused on the communication between lawyers and clients, with several cases involving lawyers who actively misled their clients or failed to communicate with their clients at all; (2) courts weighed the harm to the plaintiff from dismissal against the prejudice that would be suffered by the defendant by reopening the case; and (3) courts found that clients were "abandoned" when they received virtually no representation, even if the attorney continued to function officially as the attorney of record.

1. Communication

Evidence regarding the communication between a lawyer and his client is often crucial, with courts looking particularly sympathetically on clients whose lawyers actively deceived them. For example, *Jackson v. Washington Monthly Co.*

200. The *Link* Court had itself noted that Rule 60(b) provided a "corrective remedy" allowing for the "reopening of cases in which final orders have been inadvisedly entered," but that the petitioner had never sought to avail himself of that "escape hatch." 370 U.S. 626, 632 (1962).

201. *See* Lal v. California, 610 F.3d 518 (9th Cir. 2010); Cmty. Dental Servs. v. Tani, 282 F.3d 1164 (9th Cir. 2002); Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, 977-78 (3d Cir. 1978) (awarding relief in a circumstance when the particular lawyer had failed to file responsive pleadings in fifty-two separate cases, and noting "[t]his egregious conduct amounted to nothing short of leaving his clients unrepresented"); Jackson v. Wash. Monthly Co., 569 F.2d 119, 122 (D.C. Cir. 1977); United States v. Cirami, 563 F.2d 26 (2d Cir. 1977); Vindigni v. Meyer, 441 F.2d 376 (2d Cir. 1971); L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964); Primbs v. United States, 4 Cl. Ct. 366, 370 (1984) ("The usual understanding of the attorney-client agency relationship, however, should not bar relief under Rule 60(b) when the evidence is clear that the attorney and his client were not acting as one."). Notably, the Seventh Circuit has maintained a hard-line approach to the *Link* rule in the civil litigation context, just as it had maintained a hard-line approach to *Coleman*'s rule in the equitable tolling context. *See* Dickerson v. Bd. of Educ., 32 F.3d 1114, 1118 (7th Cir. 1994) ("[T]his court has recently held that counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief."); *supra* notes 109-110 and accompanying text (discussing the Seventh Circuit's equitable-tolling decisions). The Eighth Circuit has also held that "ordinary" attorney misconduct cannot form the basis for relief under Rule 60(b)(6). *See* Heim v. Comm'r, 872 F.2d 245, 247 (8th Cir. 1989) ("We have 'generally held that neither ignorance nor carelessness on the part of an attorney will provide grounds for 60(b) relief.'" (quoting United States v. Thompson, 438 F.2d 254 (8th Cir. 1971))).

involved a lawyer who, when instructed by the district court to file a pretrial status report within thirty days, failed to do so.[202] The district court then dismissed the case with prejudice.[203] Even though the client had repeatedly asked his lawyer about the progress of the case,[204] the lawyer failed to tell the client about the dismissal and may have "misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention."[205] The D.C. Circuit noted that "so serious a dereliction by an attorney" could be grounds for relief under Rule 60(b)(6) and remanded the case to the district court to afford the client an opportunity to apply for relief under Rule 60(b)(6).[206] Several other civil cases involved similar fact patterns.[207]

Federal courts sitting in habeas should follow suit and examine the nature of the communication between the lawyer and habeas petitioner as one facet of the relationship-based inquiry. A breakdown in communication can be one strong signal that the principal-agent relationship has collapsed. Evidence that the lawyer has avoided his or her client, failed to respond to direct inquiries from his or her client, or has deceived his or her client outright should weigh heavily in favor of finding attorney abandonment. Take the *Holland* case: Albert Holland had written to the Florida Supreme Court asking for a new lawyer because he was "unhappy with [the] lack of communication"[208] between himself and his lawyer, and despite Holland's frequent entreaties, his lawyer failed to keep him informed regarding the status of his case. Other

202. 569 F.2d at 120.

203. *Id.*

204. *Id.* at 122 n.16.

205. *Id.* at 122.

206. *Id.* at 122–23.

207. *See, e.g.*, Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1167 (9th Cir. 2002) (noting that the attorneys "represented to Tani that the litigation was proceeding smoothly," and that Tani relied on his attorneys' assurances until "he received the order for default judgment"); L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir. 1964) (noting that the client "made numerous inquiries of his former counsel who refused to answer such inquiries and assured appellee from time to time that the case was proceeding," even though it had been dismissed for failure to prosecute (internal quotation marks omitted)); Primbs v. United States, 4 Cl. Ct. 366, 370 (1984) (noting that the "agency analysis is particularly inappropriate when the plaintiff [as in this case] has proven that his diligent efforts to prosecute the suit were, without his knowledge, thwarted by his attorney's deceptions and negligence").

208. Holland v. Florida, 130 S. Ct. 2549, 2555 (2010).

habeas cases also demonstrate a clear lack of communication[209] or even outright deception[210] on the part of the lawyer.

2. *Weighing the Harm to the Plaintiff Against the Prejudice to the Defendant*

As the Third Circuit noted in *Boughner v. Secretary of Health, Education, & Welfare*, the general purpose of Rule 60 "is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done."[211] To that end, courts handling civil litigation have weighed the consequences of dismissing a suit for lack of prosecution against the prejudice that reopening the litigation would inflict upon the defendant. *Lal v. California*[212] represents this sort of balancing. The plaintiff's husband was shot and killed by two California Highway Patrol officers, and she brought a tort suit against them on behalf of herself, her son, and her husband's estate.[213] The district court dismissed her suit for failure to prosecute after her attorney failed to provide required disclosures and missed several case management conferences.[214] The Ninth Circuit reopened her suit after weighing the prejudice that would be suffered by the defendants (i.e., the possibility that their memories of the event had significantly deteriorated due to the lengthy delay) and deciding that this type of prejudice was not significant enough to outweigh the equitable reasons for granting the Rule 60(b)(6) motion.[215] In reinstating cases, other courts have emphasized the

209. *See, e.g.*, Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir. 2003) (involving a lawyer who failed to answer numerous telephone calls and letters from the client and his mother).

210. *See, e.g.*, United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002) (noting that the prisoner alleged he had been "deceived by his attorney into believing that a timely § 2255 motion had been filed on his behalf").

211. 572 F.2d 976, 977 (3d Cir. 1978).

212. 610 F.3d 518 (9th Cir. 2010).

213. *Id.* at 521.

214. *Id.* at 521-22.

215. *Id.* at 526-27; *see also* Jackson v. Wash. Monthly Co., 569 F.2d 119, 122 (D.C. Cir. 1977) ("We in this circuit have held that so serious a dereliction by an attorney, when unaccompanied by a similar default by the client, may furnish a basis for relief under Rule 60(b)(6). That is the more so where, as apparently here, *little if any prejudice has befallen the other party to the litigation*." (footnote omitted) (emphasis added)).

strict economic penalties facing defendants as a result of having their cases dismissed.[216]

Courts applying Rule 60(b)(6) in civil suits have been sympathetic to clients facing monetary and other losses as a result of their attorneys' negligence. Therefore, these courts have interpreted Rule 60(b)(6) liberally in order to avoid these harsh consequences. Federal courts hearing habeas cases should keep in mind that the consequences facing habeas petitioners are far harsher than mere financial costs. The procedural-default jurisprudence operates to preclude a court from hearing a petitioner's potentially substantive claim if his lawyer fails to present it at the proper juncture. Therefore, the reasons for adopting a flexible approach to the relationship-based model in the habeas context are even more compelling than the reasons for adopting a flexible approach to this model in civil litigation.

3. Effective or Virtual Abandonment

Many of these cases also involved attorney behavior that courts have deemed to be abandonment. For example, the attorney in *Vindigni v. Meyer*[217] failed to respond to interrogatories, and the record showed that the attorney "was no longer attending to his practice and had reportedly 'disappeared.'"[218] Because of the "complete disappearance" of the plaintiff's attorney, the court granted the plaintiff's Rule 60(b) motion to vacate the order of dismissal. Another Second Circuit case involved an attorney who failed to file an opposition to the government's motion for summary judgment against his clients.[219] The court noted that the attorney was "allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it," and this "constructive disappearance" of the attorney distinguished the case from *Link*.[220]

216. *See, e.g.*, Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1171-72 (9th Cir. 2002) (noting that Tani faced a two-million-dollar default judgment and the loss of the intangible business benefit associated with the name of his dental practice); United States v. Cirami, 563 F.2d 26, 35 (2d Cir. 1977) (noting that reopening the case would allow the Ciramis to defend themselves against a "severe financial blow").

217. 441 F.2d 376 (2d Cir. 1971). This case involved a suit by a longshoreman who claimed to have sustained injuries while working aboard the defendant's vessel. *Id.* at 377.

218. *Id.*

219. *Cirami*, 563 F.2d at 29. *Cirami* involved an action commenced by the government against the Ciramis seeking to recover unpaid taxes. *Id.*

220. *Id.* at 34.

Other courts have termed the failure of lawyers to meaningfully advocate for their clients "virtual abandonment." For example, the Ninth Circuit in *Community Dental Services v. Tani* noted that the attorney had "virtually abandoned his client by failing to proceed with his client's defense despite court orders to do so."[221] Such conduct that "results in the client's receiving practically no representation at all," the court held, "clearly constitutes gross negligence, and vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney."[222] It is not necessary for a lawyer to *completely* abandon the client in order to sever the agency relationship. The attorney in *Tani*, for example, appeared on behalf of his client at a preliminary case management conference and a hearing, but failed to answer written motions filed by the plaintiff.[223] The plaintiff's attorney in *Carter v. Albert Einstein Medical Center* failed to answer the defendant's interrogatories in a timely manner, but eventually filed a Rule 60(b) motion on her client's behalf after the court dismissed the action because of her lateness.[224]

These cases demonstrate that there is a spectrum of attorney behavior that will cause courts considering Rule 60(b)(6) motions to conclude that the lawyer has abandoned the client and severed the agency relationship. Federal habeas courts should follow suit and not necessarily require abandonment as obvious as that exhibited by Cory Maples's attorneys when they left Sullivan & Cromwell to take jobs that precluded them from continuing their representation of Maples.[225] One theme running through a number of habeas cases is a lawyer's failure to file a habeas petition despite a directive from the client to do so.[226] This fact pattern should weigh heavily in favor of finding that the attorney has abandoned the client—a lawyer-agent's failure to follow an express instruction from the principal-client is a strong indication that the agency relationship has been vitiated.

221. 282 F.3d at 1170.

222. *Id.* at 1171.

223. *Id.* at 1166-67 (describing the history of the litigation).

224. 804 F.2d 805, 806 (3d Cir. 1986).

225. *See* Maples v. Thomas, 132 S. Ct. 912, 924 (2012).

226. *See, e.g.*, Dillon v. Conway, 642 F.3d 358, 363-64 (2d Cir. 2011) (finding "extraordinary circumstances" warranting equitable tolling of the AEDPA deadline after the attorney "failed to follow his client's instruction" to file a timely petition); Baldayaque v. United States, 338 F.3d 145, 152 (2d Cir. 2003) (finding "extraordinary circumstances" after the attorney failed to file a federal habeas petition "[i]n spite of being specifically directed by his client's representatives to file" one).

C. Application of Rule 60(b)(6) Principles to Habeas Cases

These cases provide federal courts with some standards for evaluating whether postconviction counsel's negligence was such that the client was effectively abandoned. The conceptual connection between the Rule 60(b)(6) civil cases and habeas cases is strengthened by the fact that federal habeas petitioners can use Rule 60(b)(6) directly as an avenue for relief.[227] The Supreme Court confirmed in *Gonzalez v. Crosby* that habeas petitioners could file motions for relief under Rule 60(b)(6) to challenge the integrity of a federal court's habeas proceedings.[228] In *Gonzalez*, the petitioner pleaded guilty in a Florida state court to one count of robbery with a firearm.[229] In 1982, he began serving a sentence of ninety-nine years.[230] Twelve years later, "he filed two motions for state postconviction relief, which the Florida courts denied."[231] In 1997, he filed a federal habeas petition, "alleging that his guilty plea had not been entered knowingly and voluntarily."[232] The district court dismissed the petition as untimely under AEDPA's statute of limitations.[233] In 2001, Gonzalez filed a motion under Rule 60(b)(6), contending that under recent Supreme Court precedent, the district court had incorrectly determined that his petition

227. Even before the Court decided *Gonzalez v. Crosby*, the Second Circuit had held that "relief under Rule 60(b) is available for a previous habeas proceeding only when the Rule 60(b) motion attacks the integrity of the previous habeas proceeding rather than the underlying criminal conviction." Harris v. United States, 367 F.3d 74, 77 (2d Cir. 2004). *Harris* also articulated an abandonment standard almost eight years before the Court decided *Maples*:

> [W]e hold that: an attack on the integrity of a previous habeas proceeding using subsection (6) of Rule 60(b) is viable only in "extraordinary circumstances," and that such circumstances will be particularly rare where the relief sought is predicated on the alleged failures of counsel in a prior habeas petition. That is because a habeas petitioner has no constitutional right to counsel in his habeas proceeding and therefore, to be successful under Rule 60(b)(6), must show more than ineffectiveness under *Strickland v. Washington*. To obtain relief under Rule 60(b)(6), a habeas petitioner must show that his lawyer abandoned the case and prevented the client from being heard, either through counsel or *pro se*.

Id. (citations omitted).

228. 545 U.S. 524, 538 (2005).

229. *Id.* at 526.

230. *Id.*

231. *Id.*

232. *Id.* at 526-27.

233. *Id.* at 527.

was time barred.[234] When his case reached the Supreme Court, the Court had to decide whether this Rule 60(b)(6) motion should be construed as a habeas corpus petition; if it was, Gonzalez's motion would be barred by AEDPA's prohibition on second or successive habeas petitions.[235] The Supreme Court ultimately held that when a Rule 60(b) motion attacks the integrity of the habeas proceedings, as opposed to "the substance of [a] federal court's resolution of a claim on the merits," such a motion should *not* be treated as a second or successive habeas petition.[236] It further noted, "Rule 60(b) has an unquestionably valid role to play in habeas cases. The Rule is often used to relieve parties from the effect of a default judgment mistakenly entered against them, a function as legitimate in habeas cases as in run-of-the-mine civil cases."[237]

A recent case, *Mackey v. Hoffman*, illustrates the potential for application of Rule 60(b)(6) principles to a habeas petitioner's motion for relief under the Rule.[238] Andrew Mackey was convicted of attempted murder in California state court.[239] LeRue Grim represented Mackey in his direct appeal and state postconviction proceedings.[240] In August 2007, Grim filed a timely federal habeas petition, asserting that Mackey had been denied effective assistance of counsel.[241] The district court issued a routine order directing the state attorney general to show cause why the writ of habeas corpus should not be granted, which he did.[242] However, Grim failed to file a traverse by the March 2008 due date.[243] In June 2008, Grim wrote Mackey, stating that Mackey's case was before the federal court, that they were waiting for a trial date to be set, and telling Mackey to ask his parents to pay his legal bill.[244] On July 13, 2009, the

234. *Id.* The state court had dismissed Gonzalez's second state postconviction proceeding as procedurally barred. *Id.* The district court held that, as a result, AEDPA's statute of limitations was not tolled during the 163-day period while Gonzalez's second state postconviction petition was pending. *Id.* In 2000, the Supreme Court held "that an application for state postconviction relief can be 'properly filed' even if the state courts dismiss it as procedurally barred." *Id.* (quoting Artuz v. Bennet, 531 U.S. 4, 8-9 (2000)).

235. *See* 28 U.S.C. § 2244(b) (2006).

236. *Gonzalez*, 545 U.S. at 532, 538.

237. *Id.* at 534 (citation omitted).

238. 682 F.3d 1247, 1248 (9th Cir. 2012).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

district court denied Mackey's habeas petition on the merits and entered judgment against Mackey.[245] Although Grim received notification of the entry of judgment, he failed to notify Mackey and did not file a notice of appeal.[246] Eight months after the entry of judgment, Mackey wrote a letter to the district court inquiring about the status of his case.[247] When he found out that his petition had been denied, Mackey wrote to the district court again, stating that his lawyer had told him that he had a court date coming and expressing concern about his appellate rights.[248]

In April 2010, Grim filed a declaration with the district court, stating that although Mackey's parents had retained him for state postconviction proceedings, they had not paid him in full for those services.[249] Grim claimed that although he had prepared and filed the federal habeas petition pro bono, he had informed his client that he would not handle further federal habeas proceedings without receiving payments.[250] The district court, although it expressed concern about the "failure of communication" resulting in Mackey being unaware that his petition had been denied, ruled that it did not have authority pursuant to Rule 60(b) to vacate its July 2009 judgment.[251] On appeal, the Ninth Circuit applied its holding in *Community Dental Services v. Tani*—a conventional civil case—that gross negligence by counsel resulting in "virtual[] abandon[ment]" could be an extraordinary circumstance justifying relief under Rule 60(b)(6).[252] It remanded to the district court to make a finding as to whether Grim's acts and omissions constituted abandonment, and if so, whether to grant Mackey relief pursuant to Rule 60(b)(6).[253]

245. *Id.*

246. *Id.* at 1248-49. Federal Rule of Appellate Procedure 4(a) requires litigants to file a Notice of Appeal within thirty days of a judgment from which an appeal is taken. FED. R. APP. P. 4(a).

247. 682 F.3d at 1249.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1250.

252. *Id.* at 1251 (alteration in original) (quoting Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1169-71 (9th Cir. 2002)).

253. *Id.* at 1254. On remand, the district court found that Mackey was abandoned by his lawyer and therefore was eligible for relief under Rule 60(b)(6). Mackey v. Hoffman, 2012 WL 4753512 at *1 (N.D.C.A. Oct. 4, 2012). The district court focused on the lack of communication between Grim and Mackey, stating, "Mr. Grim did not keep petitioner apprised of the status of this case, and most importantly, he failed to inform petitioner that the petition had been denied and that judgment had been entered." *Id.*

District courts facing claims such as the one described in Mackey should apply the following principles derived from the relationship-based model. First, examining the communication between the lawyer and client is key, and evidence that a lawyer avoided responding to or actively deceived the client should weigh heavily in favor of finding abandonment. Second, actual abandonment of the sort exhibited by Maples's lawyers when they left their law firm without notifying Maples is not required — courts applying Rule 60(b)(6) in the civil litigation context have found virtual or constructive abandonment in situations when lawyers have completed *some* work on the client's case, but fail to complete a critical portion of the litigation process. Third, evidence that a lawyer failed to follow an express directive from a client also would be strong evidence that the lawyer abandoned the client. While the abandonment inquiry will necessarily vary depending on the facts and circumstances of each case, district courts should keep these principles in mind when faced with claims under *Maples*.

CONCLUSION

The Supreme Court's recent trio of "bad lawyer" decisions — *Holland*, *Maples*, and *Martinez* — demonstrates how uncomfortable the Court has become with the harsh consequences of binding habeas petitioners to the mistakes and negligence of their attorneys. Without explicitly recognizing a right to effective assistance of habeas counsel, the Court has attempted to carve out remedies for petitioners after their lawyers' mistakes resulted in a procedural default of their claims. This Note has outlined how lower courts moving forward should borrow the flexible analysis employed in civil cases applying Rule 60(b)(6) to ensure that the *Maples* remedy serves as a viable remedy for habeas petitioners. An overly strict application of the *Maples* attorney-abandonment exception to agency principles would unfairly punish petitioners who have little choice in selecting their attorneys, little ability to communicate with or supervise their attorneys while incarcerated, and little hope for justice if their attorneys and the courts fail them.