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IN THE SUPREME COURT OF THE UNITED STATES

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CORY R. MAPLES, :

Petitioner :

v. : No. 10-63

KIM T. THOMAS, INTERIM :

COMMISSIONER, ALABAMA DEPARTMENT :

OF CORRECTIONS :

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Washington, D.C.

Tuesday, October 4, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of Petitioner.

JOHN C. NEIMAN, JR., ESQ., Solicitor General, Montgomery, Alabama; on behalf of Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-63, Maples v. Thomas.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONER

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Two factors distinguish this case from those in which the Court has found cause lacking to excuse a default: First, the State itself had a direct hand in the extraordinary events leading up to the default in this case; and, second, the actions of Maples's attorneys, which rise to the level of abandonment, are not attributable to Maples under agency law or other principles that this Court has invoked in determining when attorney conduct may be imputed to a client.

For either or both of those reasons, the default at issue in this case is not fairly attributable to Cory Maples, and the contrary decision of the Eleventh Circuit should be reversed.

CHIEF JUSTICE ROBERTS: You talk about the State's role. I assume that you're talking about there is the failure to take action after the return of the

1 notices.

2 MR. GARRE: I think that's -- that's right,
3 Mr. Chief Justice. I would couple that, though, with
4 the fact that the State initially set up a system for
5 the representation of indigent capital defendants that
6 relies extremely heavily on the good graces of
7 out-of-State counsel to represent indigent capital
8 defendants in Alabama.

9 CHIEF JUSTICE ROBERTS: Well, put -- putting
10 that -- that to one side, what if only one of the three
11 notices had been returned?

12 MR. GARRE: I think -- if only one from the
13 out-of-State pro bono counsel?

14 CHIEF JUSTICE ROBERTS: Right.

15 MR. GARRE: I think that would be a
16 different case. I think what's remarkable about this
17 case is you have both out-of-State attorneys, the
18 notices come back marked "Return to Sender -- Left Firm"
19 in an envelope, and the clerk does nothing. And what's
20 extraordinary about that, Mr. Chief Justice, is that the
21 system in this case relies on the out-of-State attorneys
22 to provide --

23 JUSTICE SCALIA: Who says so? Who says so?
24 Who says that they rely on -- you have a local attorney,
25 and you have to have a local attorney for the case,

1 don't you? And -- and you want us to believe that the
2 local attorney is -- has no responsibility for the case
3 at all? Is this really what the -- what the law
4 requires? I -- I think there is a serious ethical
5 obligation when he has the -- when he gets the notice.
6 He is one of the attorneys for your client. And he got
7 the notice, right? That one was not returned.

8 MR. GARRE: That's correct, Justice Scalia.

9 JUSTICE SCALIA: He failed to check with --
10 with the New York lawyers who were working with him.
11 Why is it -- why is the State responsible for that?

12 MR. GARRE: We have three points on the
13 local counsel, Your Honor. First, the record shows that
14 the notice is not attributable to Mr. Maples because Mr.
15 Butler had disclaimed any relationship apart from
16 facilitating the admission of his out-of-State
17 attorneys.

18 JUSTICE GINSBURG: Disclaimed to who? To --
19 I mean, how could a clerk be expected to know that the
20 local counsel really isn't taking any part? I mean --
21 so was the disclaimer to the clerk?

22 MR. GARRE: I think a -- a couple things on
23 the clerk's perspective. First, we do think that it was
24 well known in Alabama that, under this unique system,
25 out-of-State attorneys were doing all the work in these

1 cases, and local counsel were simply facilitating their
2 admission. Second, one of the --

3 JUSTICE KAGAN: Well, who says that, Mr.
4 Garre? I mean, is there anything in the record on that
5 point, on the Alabama system generally?

6 MR. GARRE: A couple of the things, Your
7 Honor. First, we do have the amicus briefs, which
8 discuss that anecdotally. I would say that the State of
9 Alabama in its brief in opposition to this Court a few
10 years back in the Barbour case specifically touted the
11 role of out-of-State attorneys under its system and, as
12 far as I could tell, didn't mention local counsel once.
13 So, I think it was fair to say that it's known that the
14 out-of-State attorneys here were doing all the work.
15 But even if the clerk --

16 JUSTICE SOTOMAYOR: You're begging the
17 question, which is how is the clerk supposed to know
18 this? This is a functionary in the clerk's office who
19 sends out notices, receives back mail that's not
20 returned. There has to be some local counsel that does
21 work.

22 MR. GARRE: Well --

23 JUSTICE SOTOMAYOR: How is he supposed to
24 know the difference between those that do and those that
25 don't?

1 MR. GARRE: What -- what -- I think the
2 clerk would be imputed with knowledge, general knowledge
3 of the system. But beyond that, what the clerk know --
4 knew was this: He knew that two of the three notices
5 that went out were returned, both to the out-of-State
6 attorneys, which ought to be an extraordinary event in
7 the life of any clerk's office.

8 JUSTICE SCALIA: But, you know, even if
9 local counsel is as you -- as you describe it, and
10 nothing in the record establishes it, even if he is a
11 functionary, surely the function would include when he
12 gets a notice, that he makes sure that the -- the people
13 who do the real work know about the notice.

14 MR. GARRE: Of course. But the point is --

15 JUSTICE SCALIA: He didn't perform that
16 function.

17 MR. GARRE: In this case, the local counsel
18 didn't perform as a mail drop, and that was
19 intentionally so. His own affidavit makes that clear.
20 And I think what's important is the State itself must
21 not have viewed him as a meaningful player.

22 JUSTICE KENNEDY: But he didn't have a mail
23 drop? I just didn't hear what you said.

24 MR. GARRE: My point was that ordinarily a
25 local counsel would serve as the mail drop; he would

1 forward notice. In this case, Mr. Butler made quite
2 clear from the outset that he was not even performing
3 that role. The role that he intentionally performed was
4 to admit out-of-State counsel and to let them do the
5 work. But the State itself --

6 JUSTICE SCALIA: To whom did he make that
7 clear? You said he made it clear at the outset. To
8 whom? And where is that in the record?

9 MR. GARRE: It's in his affidavit, Your
10 Honor, the petition appendix page 256.

11 JUSTICE SCALIA: His affidavit after --
12 after the fact, right?

13 MR. GARRE: That's right, Your Honor.

14 JUSTICE SCALIA: Did -- did he tell the
15 clerk of the court that that was the case?

16 MR. GARRE: He did not.

17 JUSTICE SCALIA: Yes, you know, I'm counsel
18 of record. He's the counsel of record, right? I'm
19 counsel of record, but I don't even do so much as to
20 forward notices to the guys that are doing the real
21 work? Did he tell the clerk that?

22 MR. GARRE: He did not tell the clerk --

23 JUSTICE SCALIA: That's extraordinary.

24 MR. GARRE: -- but the State itself, Your
25 Honor must not have viewed him as a meaningful player,

1 because when the default at issue in this case occurred,
2 the State sent a letter -- faxed it -- to Mr. Maples
3 directly on death row in Alabama, without --

4 JUSTICE GINSBURG: You said that even before
5 that. In the rule -- you said the Rule 32 -- didn't you
6 say something about -- the -- the notice that went from
7 the prosecutor to Maples did not go to the local
8 counsel, right?

9 MR. GARRE: The clerk sent out notices to
10 all three attorneys of record, the two out-of-State
11 counsel and Mr. Butler. Mr. Butler did receive the
12 notice. He didn't do anything, both because he hadn't
13 assumed any role beyond facilitating admission --

14 JUSTICE GINSBURG: Did the -- did the
15 prosecutor -- I'm not talking about the clerk now. The
16 prosecutor had a filing in connection with the Rule 32
17 motion. Did the prosecutor send that to, well,
18 everybody? Maples and everybody?

19 MR. GARRE: He did not. The State -- and
20 this is at page 26 of the joint appendix. The State
21 served it on his out-of-State counsel and not Mr.
22 Butler, his local counsel. And when the default
23 occurred, the State contacted Mr. -- Mr. Maples directly
24 in prison, which would have been unethical if the State
25 had known or believed that he was represented by

1 counsel.

2 JUSTICE GINSBURG: But you seem not to rely
3 on what the State as prosecutor did. It seemed to me
4 the State as prosecutor was recognizing that Maples had
5 no counsel; therefore, sent -- said you'd better file
6 your habeas; this is how much time you have -- sent it
7 just to him.

8 MR. GARRE: I absolutely agree with you,
9 Justice Ginsburg. I think that that is further evidence
10 that everybody knew that Mr. Maples didn't have any
11 local counsel in any meaningful sense.

12 JUSTICE SCALIA: Where does the Constitution
13 say, by the way, that you have to give notice, that
14 every judicial action has to be noticed --

15 MR. GARRE: Well --

16 JUSTICE SCALIA: -- to the parties to the
17 case? The Federal rules don't -- don't require notice,
18 do they?

19 MR. GARRE: The Constitution doesn't say
20 that explicitly --

21 JUSTICE SCALIA: And the Federal rules don't
22 say it. You don't have to give notice in the Federal
23 rules, do you?

24 MR. GARRE: We think notice of a
25 postconviction order in a capital case would at least

1 implicate a due process interest in receiving notice,
2 that it's reasonable --

3 JUSTICE SCALIA: Capital cases are
4 different? If you're going to go to jail for life you
5 -- you don't get notice, but if -- if it's a capital
6 case --

7 MR. GARRE: I think under the --

8 JUSTICE SCALIA: No, I mean, it's either a
9 rule for all criminal cases or it's not a rule.

10 MR. GARRE: Well --

11 JUSTICE SCALIA: And if -- if it's a rule
12 for all criminal cases, the Federal rules are
13 unconstitutional, you're saying.

14 MR. GARRE: The Mullane case specifically
15 takes into account the interests of the individual
16 receiving notice. There could be no greater interest of
17 an individual than receiving notice in a capital case
18 where the individual's life is at stake. Ultimately we
19 don't think this Court has to find a constitutional
20 violation. It has to find that the events --

21 JUSTICE SCALIA: Once you're in court and
22 you have a lawyer, it's up to your lawyer to follow what
23 goes on in the court. That's the assumption of the
24 Federal rules. And it seems to me a perfectly
25 reasonable assumption. And I'm not about to hold that

1 -- that they are unconstitutional simply because an
2 extraordinary requirement of notice, which is not
3 required by the Constitution, has gone awry.

4 MR. GARRE: Here Mr. Maples did not have an
5 attorney that was serving in an agency role in any
6 meaningful sense. That's laid out in Ms. DeMott's
7 amicus brief; it's laid out in our case. What's more is
8 the State here didn't simply just, we think quite
9 unreasonably, rely on a role that local counsel was not
10 performing in Alabama --

11 CHIEF JUSTICE ROBERTS: What if -- but --
12 your case it seems to me turns critically on Butler's
13 role. How much, in addition to what he did or didn't
14 do, would he have to do to put him in a position where
15 he was in fact representing Maples in your view?

16 MR. GARRE: I think that the ordinary role
17 of local counsel, which would have been to, at a
18 minimum, forward notice in a proceeding, would be a
19 meaningful relationship. The relationship that -- that
20 Professor DeMott describes here is one of sub-agency.
21 And, in fact, if you look at the Alabama rules, they put
22 the onus on the out-of-State counsel to associate the
23 local counsel. That's at page 365 of the joint
24 appendix. The out-of-State counsel did that. Mr. --
25 Mr. Maples wasn't involved in that transaction.

1 JUSTICE ALITO: Where do we look -- where do
2 we look to see that it's standard practice for local
3 counsel throughout the country to contact out-of-State
4 counsel when something like this is received? I
5 remember a case from the Federal system in which local
6 counsel appeared and did exactly what was done here,
7 moved the admission of an out-of-State criminal defense
8 attorney, who then tried the case for a year, got sick,
9 and the judge said to the local -- local counsel: Come
10 on in; you're going to take over this trial and try it
11 for the next 6 months. And the local counsel said:
12 Whoa, I only signed up to move the admission of this
13 fellow. The judge said: That's too bad; you're counsel
14 of record, and you have to take over the case.

15 I don't understand that what is alleged to
16 have occurred here is that far out of the ordinary.

17 MR. GARRE: I think Mr. Butler -- just
18 simply saying, I'm going to allow -- I'm going to
19 facilitate your out-of-State attorneys to represent you,
20 but that's my role. He had, quote, unquote, "no role"
21 after that.

22 JUSTICE SCALIA: He can't define his role as
23 a lawyer. Once he appears before a court and says, I am
24 counsel of record, he has certain responsibilities.
25 It's not up to him to say what his responsibilities are.

1 MR. GARRE: Well, clearly that's right.

2 JUSTICE SCALIA: And if they don't extend
3 even to forwarding notice, even to making sure that the
4 people who were doing the legwork in the case know that
5 -- that the clock is running, my goodness, I can't
6 imagine what his responsibility is. It's not up to him
7 to define it.

8 MR. GARRE: That's exactly our point,
9 Justice Scalia, which is that he forswore any
10 responsibility. The lawyer in the Holland case just had
11 those responsibilities, too. He abandoned his client.
12 This -- what Mr. Butler here did here was inexcusable.

13 But there's another factor at play here, and
14 that's the confusion that the court itself affirmatively
15 created when it sent an order that, by its term,
16 directed that all counsel of record receive it. And
17 that's what the order said; it's on page 225 of the
18 joint appendix. And --

19 JUSTICE BREYER: Before you get to the
20 court, could I ask you about what the State attorney,
21 the prosecuting attorney, knew? Did the prosecuting
22 attorney know that these two individuals from New York
23 were representing this person?

24 MR. GARRE: Certainly, it knew that they
25 were counsel of record in the proceeding. I'll let my

1 -- my friend answer that question. What we know,
2 though, is when the default occurred, it took the
3 extraordinary step of faxing a letter directly to Mr.
4 Maples in prison, which would have been unethical if it
5 believed he was represented by counsel.

6 JUSTICE BREYER: All right. So you think
7 you have -- in your view, the counsel of record knew
8 that these two people in New York were part of the
9 representation. Did the counsel -- I mean, not the
10 counsel of record; the counsel for the State.

11 Did the counsel know that they hadn't gotten
12 the notice?

13 MR. GARRE: Well, I don't want to speak for
14 my friend. I don't -- there's certainly nothing in the
15 record to -- to establish that they knew that these
16 out-of-State attorneys didn't get notice.

17 JUSTICE BREYER: Is there any reason to
18 think that the State attorney or whoever was prosecuting
19 thought that the local counsel was likely not to do
20 much?

21 MR. GARRE: Yes.

22 JUSTICE BREYER: Yes? Okay.

23 MR. GARRE: The very actions it took,
24 Justice Breyer.

25 JUSTICE BREYER: All right. Now, so it's

1 possible -- we'll find out later -- that the State --
2 the prosecuting attorney who works for the State knew
3 all those things: One, he's represented by counsel in
4 New York; two, they didn't get the notice; three, the
5 local attorney isn't going to do anything; and
6 conclusion: They likely knew he didn't get the notice,
7 but they are asserting that this is an adequate State
8 ground to bar him coming into habeas; is that the
9 correct posture of the case?

10 MR. GARRE: That's true, Justice Breyer.

11 JUSTICE BREYER: So, all we have to decide
12 is whether under these circumstances the State
13 attorney's knowledge of all those facts mean that the
14 State cannot assert this is an adequate State ground.

15 MR. GARRE: Right. And I think the State's
16 actions --

17 JUSTICE SCALIA: Do we know that he knew all
18 of those facts?

19 MR. GARRE: No, Justice Scalia --

20 JUSTICE SCALIA: Of course, we don't know
21 that.

22 MR. GARRE: But we know -- we know what
23 action it took, and that action was an action that
24 assumed that he didn't have meaningful counsel, or else
25 it would have been unethical.

1 JUSTICE KENNEDY: Let me ask you --

2 JUSTICE SOTOMAYOR: Counsel, can I --

3 JUSTICE KENNEDY: Let me ask you this, if I
4 may. I don't know if -- I don't think the briefs
5 covered it. It may be in there. Do you know, in
6 Alabama and/or nationwide, in how many capital cases
7 there is no appeal?

8 MR. GARRE: I don't know that, Justice
9 Kennedy. I think the Alabama system here created a
10 system in which it would allow for appeals, not only in
11 direct appeals, but postconviction proceedings. The
12 extraordinary -- there are several extraordinary
13 features of the Alabama system, and we think that
14 ultimately they helped to facilitate the extraordinary
15 and shocking events in this case.

16 CHIEF JUSTICE ROBERTS: What if -- the New
17 York lawyers did not abandon Mr. Maples prior to the
18 time that they left their law firm in New York, right?

19 MR. GARRE: That's right.

20 CHIEF JUSTICE ROBERTS: So, their conduct
21 prior to that time would be attributed to him, right?

22 MR. GARRE: I think that's right.

23 CHIEF JUSTICE ROBERTS: Right. Part of
24 their conduct was setting up their arrangement with Mr.
25 Butler where he would show up as counsel of record but

1 not really do anything. So, why aren't the consequences
2 of that arrangement attributed to Maples as well?

3 MR. GARRE: Well, I don't think they would
4 be attributed. I think what you're looking for is
5 whether the default itself is attributable to Maples.
6 The New York -- what -- what the out-of-State attorneys
7 did is they left the representation without fulfilling
8 their duty to notify the court or Mr. Maples. Mr.
9 Maples was in -- was sitting in a prison cell in Alabama
10 under the reasonable belief that he was represented by
11 counsel who would appeal if an adverse decision was
12 issued.

13 JUSTICE SCALIA: Mr. Garre, can I go back to
14 Justice Kennedy's question? This was not an appeal.
15 The question was how many capital cases is there no
16 appeal. He had been convicted and had appealed, right?
17 The -- this is --

18 MR. GARRE: The direct proceedings had
19 concluded.

20 JUSTICE SCALIA: The direct proceedings were
21 over. He had appealed up to -- up to the State supreme
22 court. Did he seek cert here, too?

23 MR. GARRE: He did, Justice Scalia.

24 JUSTICE SCALIA: He did. And this was a
25 postconviction --

1 MR. GARRE: It was, but when the State sets
2 up that system and allows for appeals, it can't
3 arbitrarily deprive it of an appeal based on the sort of
4 circumstances here.

5 JUSTICE SCALIA: That may be, but I don't
6 think it's extraordinary that there be no appeal, I
7 mean, postconviction.

8 MR. GARRE: I'm not aware of any State that
9 does not allow appeal in postconviction proceedings.

10 JUSTICE SCALIA: It can be allowed, but it
11 would not seem to me extraordinary that it not be
12 sought.

13 MR. GARRE: But I think --

14 JUSTICE KENNEDY: Well, in -- in this -- in
15 this case, there was a direct appeal, and then there was
16 this proceeding that we're talking about here. The
17 trial judge waited for 18 months. So, you would think
18 there's some merit to the underlying claim. Any
19 statistics on whether or not -- on how often an appeal
20 is abandoned or not pursued in this kind of case? No
21 statistics?

22 MR. GARRE: No. I mean, the statistics that
23 I'm aware of are that habeas claims are in a material
24 sense often successful in capital cases. We've cited
25 those in our reply brief. Here we think the underlying

1 claims are quite serious. The question in the case is
2 really not who shot the victims. The question is, was
3 whether Mr. Maples was going to be convicted for capital
4 murder or murder that would result in life imprisonment.

5 JUSTICE KENNEDY: I'm -- I'm aware of the
6 allegations.

7 MR. GARRE: And I think, going back to the
8 court's and the clerk's actions here, one of the things
9 that exacerbated the chain of events here was that you
10 had an order which directed that all parties would be
11 served. Mr. Butler did say that he saw that that order
12 directed that the out-of-State counsel would be served,
13 which created an added risk of the likelihood --

14 JUSTICE SOTOMAYOR: Mr. Garre, I have two
15 questions for you. Is that -- is this State the only
16 one that doesn't appoint counsel in a postconviction
17 capital case?

18 MR. GARRE: Well, I believe that Alabama may
19 appoint them. They don't provide for appointment in all
20 cases. I believe Georgia is another State. But in that
21 respect, I think these States are alone.

22 JUSTICE SOTOMAYOR: But the vast majority
23 do?

24 MR. GARRE: Absolutely.

25 JUSTICE SOTOMAYOR: In capital cases?

1 MR. GARRE: The vast majority do.

2 JUSTICE SOTOMAYOR: All right. Number two,
3 I thought there were two questions in this -- in this
4 part of your case. The first is, don't we have to
5 decide that abandonment, which you have termed, is
6 cause --

7 MR. GARRE: Yes.

8 JUSTICE SOTOMAYOR: -- in a -- to excuse a
9 procedural bar in a State court.

10 MR. GARRE: Right. And that is --

11 JUSTICE SOTOMAYOR: So we have to decide
12 first whether we extend Holland to this setting.

13 MR. GARRE: Well, I think they're
14 independent grounds. If the Court concludes that the
15 State's own actions --

16 JUSTICE SOTOMAYOR: That's the due process.
17 I'm talking about -- yes, both we would have to decide.
18 Assuming -- we have to decide the first question. Is --

19 MR. GARRE: Well --

20 JUSTICE SOTOMAYOR: Will we extend Holland
21 to this type of situation?

22 MR. GARRE: I don't -- I don't -- I just
23 want to be clear on this. They are independent grounds.
24 If the Court concludes that the State's actions --

25 JUSTICE SOTOMAYOR: Yes, I -- I understand.

1 MR. GARRE: But with respect to the
2 attorneys, that's right.

3 JUSTICE SOTOMAYOR: Yes.

4 JUSTICE ALITO: Could we find --

5 JUSTICE SCALIA: What -- what is the line,
6 Mr. Garre, between abandonment and just plain old
7 negligence?

8 MR. GARRE: It would be the line established
9 by agency law going back to Justice Story's time.

10 JUSTICE SCALIA: So, if this local counsel
11 simply goofed in not -- not advising the people that
12 were doing the legwork in the case, why -- why is that
13 abandonment?

14 MR. GARRE: I think it's actually more of a
15 situation where he disclaimed any meaningful role at the
16 outset. I think, you know, the real abandonment going
17 on here was the attorneys in New York who left without
18 notifying the court or their client. But that --

19 JUSTICE ALITO: Putting aside the question
20 of local counsel, could we find that there was an
21 abandonment if the law firm of Sullivan & Cromwell
22 continued to represent Mr. Maples after the two young
23 attorneys left the firm?

24 MR. GARRE: The Court could.

25 JUSTICE ALITO: And does the record show

1 that they -- they did not represent Mr. Maples, that
2 this was done purely by the two attorneys? Is there a
3 finding by a court on that?

4 MR. GARRE: There is not a finding. We
5 think that's the better reading of the record, and I'm
6 happy to explain why. But most importantly, we think
7 it's irrelevant whether he was represented by the law
8 firm in the fictional sense. He was represented by
9 individual lawyers in that proceeding. They were the
10 ones who Mr. Maples agreed to have represent him in that
11 proceeding. The Alabama courts made specific findings
12 that Mr. Maples's lawyers were Ms. Ingen-Housz and
13 Mr. Munanka. It said that after the default. At that
14 time --

15 JUSTICE GINSBURG: But in the -- in the
16 practice of a law firm, these were very junior people.
17 Wouldn't the law firm have to have some involvement in
18 giving them permission to provide this representation?
19 I mean, usually there's something like a pro bono
20 committee and a higher level. Can -- can such junior
21 associates just go ahead and say, we want to spend a lot
22 of our time defending a man on death row? Wouldn't they
23 have to get some kind of permission?

24 MR. GARRE: I think one would ordinarily
25 expect that. And we're not condoning the actions here.

1 I would say that, at the outset of this litigation,
2 there were individuals from the Legal Aid Society who
3 were well familiar with capital cases involved. They
4 apparently dropped out of the case. But we know --

5 JUSTICE KAGAN: Well, what do we know about
6 Mr. De Leeuw's role, Mr. Garre?

7 MR. GARRE: What we know is what Mr. De
8 Leeuw has said, which is that he was involved in the
9 case at some point. It's not clear what his involvement
10 was. At the oral argument in the Eleventh Circuit, he
11 said, on page 302 of the joint appendix, that he was --
12 they were awaiting further action from the court. So,
13 we don't know what his involvement was.

14 JUSTICE SOTOMAYOR: Mr. Garre, we don't
15 know, we don't know. Isn't that just proof that if we
16 were to find that Holland applied, a Holland exception
17 applied, that we would have to remand this case?

18 MR. GARRE: I think that would be
19 appropriate, Your Honor. Of course, we think the Court
20 should find that the Holland -- the Holland exception,
21 or more particularly --

22 JUSTICE SOTOMAYOR: In that regard, there is
23 one part of Holland that you don't really address, which
24 is that Holland contrasted a statute of limitations
25 issue with respect to access to a Federal court with a

1 procedural bar and said that the State's procedural bar
2 had interest of federalism, that we had to be cautious
3 of ignoring a State procedural bar because of
4 federalism. If we were to extend Holland in the way you
5 want, how do we justify ignoring federalism in that
6 situation?

7 MR. GARRE: That's right. There are those
8 distinctions.

9 Our point is that Holland recognizes that
10 attorney conduct that amounts to abandonment is external
11 to the client under agency and other principles.
12 Coleman itself recognizes that external conduct is not
13 attributable to the client and can't be a basis for
14 cause.

15 So, the Federal -- federalism interests are
16 simply not implicated in a case where you find that the
17 attorney's actions are external. And we think if you
18 look at the principles you looked at in Holland, agency
19 law going back to Justice Story's time, the principles
20 of professional standards of care, you would find that
21 an abandonment -- of course, that must be external to
22 the client. Justice Alito said in his concurring
23 opinion that where someone is not acting as an agent in
24 any meaningful sense, it would be grossly inequitable
25 and unfair to attribute the agent's conduct to the

1 client.

2 JUSTICE KAGAN: Mr. Garre --

3 MR. GARRE: That's the principle we're
4 asking.

5 JUSTICE KAGAN: Could we go back to the
6 state of the record? You've said a few times, and your
7 brief does, that the record is skimpy on various
8 important matters. Would you go further and say that
9 the record is irretrievably corrupted, tainted by
10 conflicts of interest?

11 MR. GARRE: I think there are conflicts of
12 interest here. They're laid out in the legal ethics
13 briefs. The Sullivan & Cromwell attorneys were
14 representing Mr. Maples up through the argument and
15 decision in the Eleventh Circuit. But I think -- for
16 purposes of what this Court would do, I think a remand
17 would be appropriate, because if you conclude, as we
18 think you should, that abandonment of counsel would be
19 an external factor, then it would be appropriate to
20 remand for further proceedings. We don't know what
21 these other attorneys were doing. The record doesn't
22 show that.

23 JUSTICE GINSBURG: We do know, though, that
24 they were not counsel of record.

25 MR. GARRE: We absolutely know that they

1 were not.

2 JUSTICE GINSBURG: So, we know that the two
3 who were listed as counsel of record --

4 MR. GARRE: They were not.

5 JUSTICE GINSBURG: -- were not representing
6 him, and they hadn't told the court.

7 MR. GARRE: They were not counsel of record.
8 Mr. Maples never agreed to have anyone else represent
9 him in a way that could bind him. The Alabama court
10 specifically found not only that they weren't counsel of
11 record, but they were not authorized to practice in
12 Alabama. This is on page 223 of the petition appendix.

13 JUSTICE SCALIA: But it seems to me it's up
14 to you to produce the facts that would justify our
15 reversing the case that you're asking us to do.

16 MR. GARRE: We asked --

17 JUSTICE SCALIA: And you say, well, we don't
18 have these facts; well, send -- send it back so I can --
19 no, you should have gotten the facts in the first place.
20 If the record doesn't show the things that you need to
21 show to get this case reversed, the case should not be
22 reversed, it seems to me.

23 MR. GARRE: But the petition did include a
24 request for an evidentiary hearing. And I think the
25 problem is that both the district court and the court of

1 appeals short-circuited the inquiry into counsel's
2 actions because it believed that Coleman v. Thompson
3 applied in the abandonment situation. And where a court
4 made that kind of legal error, it would be appropriate
5 for the Court to send it back and say, no, Coleman v.
6 Thompson does not apply in the extraordinary case of
7 abandonment, or an attorney's actions cannot be
8 attributable to a client under agency law.

9 JUSTICE SCALIA: When did you first make the
10 abandonment claim?

11 MR. GARRE: Well, I think we've argued --

12 JUSTICE SCALIA: When was it? Wasn't it
13 first made in the -- in the request for rehearing?

14 MR. GARRE: I think explicitly. Now, we
15 think that -- two points on this. We think --

16 JUSTICE SCALIA: That's rather late.

17 MR. GARRE: We think that all along they
18 argued that the attorneys' actions established cause.
19 That's why both the district court and the court of
20 appeals addressed that and rejected it erroneously under
21 Coleman.

22 JUSTICE SCALIA: That isn't abandonment.
23 That isn't abandonment. The attorneys' actions
24 established cause; that does not mean abandonment to me.

25 MR. GARRE: We think this falls squarely

1 within the rule of Yee v. Escondido, where -- where the
2 party makes the claim below -- which they made the claim
3 here that the attorneys' actions established cause --
4 you can make new arguments, different arguments.

5 And I think, particularly given that
6 Sullivan & Cromwell had been involved early in this case
7 and the possibility of conflicts of interest would make
8 it appropriate for this Court to consider our
9 abandonment issue, which was raised in the petition for
10 rehearing, explicitly raised in the petition for
11 certiorari -- explicitly -- we think it's properly
12 before this Court.

13 If there are no further questions at this
14 time, I'd like to reserve the remainder of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Garre.

17 Mr. Neiman.

18 ORAL ARGUMENT OF JOHN C. NEIMAN, JR.,

19 ON BEHALF OF THE RESPONDENT

20 MR. NEIMAN: Thank you, Mr. Chief Justice,
21 and may it please the Court:

22 In trying to sidestep Coleman, Maples is
23 advocating at least three principles that are
24 incompatible with the way our justice system works.
25 First, Maples is asking this Court to hold that due

1 process required not just actual notice to his attorney
2 of record, John Butler, but in fact something more than
3 that.

4 CHIEF JUSTICE ROBERTS: Let's say the three
5 notices are sent out; all three of them come back, okay?
6 Let's even go further and say the prosecutor knows that
7 nobody representing Mr. Maples received notice. What
8 happens then?

9 MR. NEIMAN: In that case, Your Honor, there
10 would be a much more substantial argument --

11 CHIEF JUSTICE ROBERTS: Yeah, I know it
12 would be more substantial. That's why --

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: My question is what
15 happens? Are you prepared to acknowledge that in that
16 case, Mr. Maples had been abandoned by all of his
17 lawyers, it was known to the prosecution, and,
18 therefore, the failure to file the notice should not
19 constitute an adequate and independent State ground
20 barring collateral relief?

21 MR. NEIMAN: I don't think that the return
22 of all three notices would justify necessarily a finding
23 of abandonment in toto by all the lawyers. It could
24 signify a number of things. I do think that it would
25 raise questions about whether the clerk had a due

1 process obligation to do more under Jones v. Flowers.

2 JUSTICE SCALIA: What does the return mean
3 when you get -- get a notice returned? It just said no
4 longer at Sullivan & Cromwell, is what the two of them
5 said, right?

6 MR. NEIMAN: Yes, Your Honor.

7 JUSTICE SCALIA: Does that necessarily mean
8 that they've abandoned the case? It just means you got
9 the wrong address, doesn't it?

10 MR. NEIMAN: That's correct, Your Honor.

11 JUSTICE SCALIA: Isn't that the only thing
12 it means for sure, these lawyers are no longer here at
13 Sullivan & Cromwell?

14 MR. NEIMAN: Yes, Your Honor.

15 JUSTICE SCALIA: I don't know how that would
16 be an indication of abandonment. Can't you switch a law
17 firm and keep the client?

18 MR. NEIMAN: Absolutely, Your Honor,
19 although the presumption generally is that the client
20 stays with the firm. But that's correct. The client
21 certainly can move firms when the -- when the lawyer
22 moves firms.

23 JUSTICE GINSBURG: Mr. Neiman, I think we're
24 blurring two issues. We're not talking about
25 abandonment in this respect. We're talking about notice

1 going to no one, and a -- and a clock ticking from a
2 certain date that no one knows about.

3 I mean, they were preparing for a hearing
4 before this judge. So they weren't anticipating that he
5 was going to rule without anything further.

6 MR. NEIMAN: That's correct, Your Honor.
7 They certainly were preparing for an evidentiary
8 hearing, and, in fact, contrary to my friend's
9 statements about what we know about Mr. De Leeuw's
10 involvement in this case, on page 228 of the J.A.,
11 Maples expressly alleged that De Leeuw and others at
12 Sullivan & Cromwell were preparing for the evidentiary
13 hearing. But --

14 JUSTICE GINSBURG: But as far as -- as far
15 the record shows, De Leeuw is not on the record at all.
16 There were three counsel of record. Two of them --
17 well, let's go back to this -- this -- the first issue.
18 The State by its own conduct showed it didn't regard
19 Butler as any kind of representative, because it didn't
20 even send its Rule 32 response to Butler; isn't that so?

21 MR. NEIMAN: No, Your Honor, I respectfully
22 disagree with that assessment of how we can read the
23 service of the Rule 32 answer. Under Alabama law, a --
24 a pleading or an order may be served on only one counsel
25 of record when a party has multiple counsel of record.

1 So, for example, that answer was served upon Mr. Munanka
2 at Sullivan & Cromwell, but it was not served, expressly
3 at least, on --

4 JUSTICE GINSBURG: What about --

5 MR. NEIMAN: -- Ms. Ingen-Housz.

6 JUSTICE GINSBURG: What about the notice
7 that he's -- he had lost in the Alabama court and he'd
8 better, if he wants to go to the Federal court, do
9 something about it? That notice went only to Maples,
10 right?

11 MR. NEIMAN: That's correct, Your Honor.
12 The -- the State's attorney in that -- in that instance
13 decided to send a letter only to Mr. Maples. Of
14 course --

15 JUSTICE GINSBURG: And Mr. Garre made the
16 point that if Maples were represented, that that would
17 be improper, to -- to send a notice to Maples alone.
18 So, the -- so, the State's attorney must have thought
19 that Maples had been abandoned by his lawyers because he
20 didn't notify any of them.

21 MR. NEIMAN: Your Honor, the record does not
22 reveal why Mr. Hayden decided to send the letter to Mr.
23 Maples alone. One --

24 JUSTICE SCALIA: Of course, he didn't have
25 to send the letter. That letter had no legal effect,

1 did it?

2 MR. NEIMAN: That's correct, Your Honor.

3 JUSTICE SCALIA: I mean, it was just: By
4 the way, your time has expired. I mean, this is not --
5 what could the lawyer do about it?

6 MR. NEIMAN: Well, and it --

7 JUSTICE SCALIA: It wasn't a required notice
8 that he had to give to the lawyer or to anybody else.

9 MR. NEIMAN: That's correct, Your Honor.

10 JUSTICE SCALIA: So he just made this
11 extraneous, volunteered statement to Maples instead of
12 to his lawyer. I don't -- I don't know what that
13 proves.

14 MR. NEIMAN: At that point in time, the
15 State case was over. So, it was hardly clear if Mr.
16 Hayden was going to do something that he didn't have to
17 do under the rules.

18 CHIEF JUSTICE ROBERTS: Why did he do it?
19 Why did he do it, then? Just gloating that -- that the
20 fellow had lost?

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: What was the point
23 of it? He must have thought there was a problem, right?

24 MR. NEIMAN: Your Honor, he certainly was
25 aware that Mr. Maples's lawyers had failed to file a

1 notice of appeal. But -- and his letter reveals that he
2 is very aware --

3 JUSTICE SOTOMAYOR: Is that surprising? I
4 think Justice Kennedy asked your adversary: How often
5 do appeals lie from the denial of State postconviction
6 remedies?

7 MR. NEIMAN: Your Honor, I agree with my
8 friend that we don't have statistics on that front. I
9 think it's fair to assume that, for the most part, when
10 a Rule 32 petitioner loses at the trial stage, they're
11 going to appeal.

12 JUSTICE SOTOMAYOR: In a capital case.

13 JUSTICE KENNEDY: Particularly in a -- in a
14 capital case.

15 MR. NEIMAN: That's correct, Your Honor,
16 although there are some instances in which a capital
17 petitioner or someone on death row decides that they no
18 longer want to invoke the process of the courts, and
19 they're ready for their sentence to be carried out.

20 JUSTICE KENNEDY: I just have two questions
21 going back to the very beginning, when we were talking
22 about the misaddressed or the unreceived mail. When the
23 notices come back "no longer at Sullivan & Cromwell,"
24 that's just as if it said, functionally, don't you
25 think, "wrong address"?

1 MR. NEIMAN: Not quite, Your Honor. I think
2 that -- that the notice saying that the person's no
3 longer at Sullivan & Cromwell indicates that the person
4 is no longer at the firm. I guess the notice could come
5 back --

6 JUSTICE KENNEDY: I mean, it's pretty clear
7 that they didn't get their -- get the mail, get the
8 letter, because it's sent back.

9 MR. NEIMAN: That's correct, Your Honor.

10 JUSTICE KENNEDY: One other thing while I'm
11 talking with you, and it's a tangential point, perhaps.
12 Could the State of Alabama under your laws waive what
13 you allege to be the procedural default? If you thought
14 there was substantial merit to the underlying claims,
15 even though you take the position that they ultimately
16 should be rejected, could you have simply waived the
17 procedural default and allowed the appeal to proceed?

18 MR. NEIMAN: I don't think the law makes
19 that crystal clear, Your Honor. But I certainly know of
20 no law that suggests that the Attorney General of
21 Alabama necessarily has to assert every single potential
22 defense within his or her arsenal.

23 JUSTICE KENNEDY: Has Alabama ever waived
24 lack of timely appeal in a capital case?

25 MR. NEIMAN: I'm not aware, Your Honor.

1 JUSTICE SOTOMAYOR: Counsel, could we go
2 back to the Chief Justice's initial question? Let's
3 assume the two letters went to Sullivan & Cromwell and
4 came back "left firm," as they did, and that the letter
5 to Butler came back "deceased." Would there be cause in
6 that situation to excuse the State's procedural ground?

7 MR. NEIMAN: Perhaps, Your Honor. It -- it
8 would depend on why the letters came back from Sullivan
9 & Cromwell, I suppose.

10 JUSTICE SOTOMAYOR: Well, we -- we know that
11 they -- that both lawyers in this case didn't move to
12 another firm. Both of them took jobs that precluded
13 them from representing this defendant. So, I don't know
14 how I define abandonment other than I take a job where I
15 can't work for you anymore.

16 MR. NEIMAN: The -- the cause argument in
17 that case, Your Honor, would be substantially stronger,
18 as I've said before, in part because death, of course,
19 is an external factor. So --

20 CHIEF JUSTICE ROBERTS: So, you accept -- I
21 don't mean to interfere with the question, but -- so,
22 you accept the idea that there is a distinction between
23 malfeasance and abandonment.

24 MR. NEIMAN: Your Honor, I think we would be
25 prepared to recognize that, in certain cases, an

1 abandonment of a client by an attorney would terminate
2 the agency relationship with -- between the attorney and
3 client. And --

4 CHIEF JUSTICE ROBERTS: Okay. So, then the
5 only thing -- the only thing we're talking about is
6 whether, on these particular facts, there has been
7 abandonment or not. Right?

8 MR. NEIMAN: That's correct, Your Honor.

9 CHIEF JUSTICE ROBERTS: From your
10 perspective.

11 MR. NEIMAN: Yes, Your Honor. But one thing
12 I do want to stress is that my friend has suggested that
13 an evidentiary hearing or further evidentiary
14 proceedings are necessary on this particular question
15 because we don't know what role the other attorneys at
16 Sullivan & Cromwell played in the matter.

17 JUSTICE GINSBURG: But we do know they
18 weren't counsel of record. We do know that the only two
19 counsel of record were no longer representing him, and
20 he had no reason to know that they weren't, but they
21 were not -- they couldn't represent him.

22 The two -- the only two out-of-town counsel
23 were the two who disabled themselves from representing
24 him by taking other jobs.

25 MR. NEIMAN: Your Honor --

1 JUSTICE GINSBURG: So, there was no one from
2 Sullivan & Cromwell other than those two on the record.
3 So, on the record, they had abandoned him, and there was
4 no substitute.

5 MR. NEIMAN: I disagree with that
6 assessment, Your Honor.

7 JUSTICE SCALIA: Well, the argument is that
8 on the record or not is determinative for the out-of-
9 town counsel, but it is not determinative for the
10 in-town counsel. The fact that he is counsel of record
11 doesn't count, but the fact that those two are does
12 count. And only when you combine those two does the man
13 have no counsel. Right?

14 MR. NEIMAN: Yes, Your Honor. There is that
15 inconsistency in Maples's argument. On the one hand,
16 Maples says that Butler -- or that the other lawyers at
17 Sullivan & Cromwell weren't his attorneys because they
18 weren't counsel of record. But Butler was counsel of
19 record, but he wasn't his attorney.

20 JUSTICE KAGAN: The notice inquiry is
21 supposed to be a pragmatic one. As far back as Mullane,
22 we've said that the question that we're supposed to ask
23 ourselves is: Is this what somebody would do if they
24 actually wanted to accomplish notice, if they actually
25 wanted the person to get that letter? So, I'm just

1 going to ask you, General, if you were a lawyer in an
2 important litigation and you send off an important
3 letter to two lawyers, your principal adversaries, as
4 well as to a local counsel who you think may not be
5 involved in the substance of the litigation, you don't
6 know for a fact, but you think that there is some
7 substantial likelihood that he's not particularly
8 involved, as local counsel often aren't -- so, you send
9 off this letter and you get it back from the principal
10 attorneys, and you ask yourself: Huh, should I do
11 anything now?

12 What would you say?

13 (Laughter.)

14 MR. NEIMAN: Your Honor, I suspect that, in
15 those circumstances, I might well personally do
16 something else. But, of course, my prerogatives as
17 Solicitor General of Alabama are quite different from
18 the prerogatives of a clerk in Morgan County, Alabama.

19 JUSTICE KAGAN: But the --

20 JUSTICE SCALIA: Well, as then the clerk has
21 to believe that it's an important letter. Right? It's
22 not important enough to be required by the Federal
23 rules. How important is it?

24 JUSTICE KAGAN: Justice Scalia is right.
25 I'm assuming that a letter disposing of a -- of a ruling

1 in a capital case issued after 18 months when nobody
2 knew that that letter was coming, that that's an
3 important letter for a death row person to get. So,
4 Justice Scalia is right to that effect.

5 So, you get this, and you say, well, you
6 would have. But that's the question that we have to ask
7 about the clerk as well. The clerk -- the question for
8 the clerk is, if he had really wanted the person to get
9 notice, what would he have done?

10 MR. NEIMAN: No, Your Honor, I disagree.
11 The -- as far back as Mullane, this Court has said that
12 at the end of the day, actual notice to a party,
13 particularly within the jurisdiction, is the finish line
14 for due process purposes. Mullane expressly --

15 JUSTICE ALITO: You can see from these
16 questions that the arguments that you're making in this
17 capital case, which is sui generis, are pushing the
18 Court to consider rules that would have far-reaching
19 effect, such as a rule that places upon a clerk of the
20 court a constitutional obligation to serve counsel with
21 important documents in the case similar to the
22 constitutional obligation to serve initial process in
23 the case. And the question that I would like to ask is
24 whether this -- the -- whether you as the Solicitor
25 General or the Attorney General of Alabama have an

1 obligation to push this matter in this way. This is a
2 case where -- as I said, it's a capital case, as we all
3 recognize. Mr. Maples has lost his right to appeal
4 through no fault of his own, through a series of very
5 unusual and unfortunate circumstances.

6 Now, when his attorneys moved to file an
7 out-of-time appeal, why wouldn't you just consent to
8 that? If he did not receive an effective assistance of
9 counsel at trial, why not get a decision on the merits
10 on that? Why push this -- this technical argument?

11 MR. NEIMAN: There are several responses,
12 Your Honor. First, at least at the Rule 32 stage, the
13 -- the notice of appeal deadline was a jurisdictional
14 one. And you're right, the State did oppose the motion
15 for an out-of-time appeal, but there wasn't much the
16 State could have done even if it had consented --

17 JUSTICE ALITO: There's no --

18 MR. NEIMAN: -- on that front.

19 JUSTICE ALITO: There's no possibility under
20 Alabama rules for an out-of-time appeal in this
21 circumstance? No extension?

22 MR. NEIMAN: The holding of the Alabama
23 courts here, as recognized by the Eleventh Circuit, was
24 that this would not be an appropriate circumstance for
25 an out-of-time appeal. Now, as to the question about --

1 JUSTICE ALITO: But is that a discretionary
2 matter or is that a flat rule, once you've passed a
3 certain time deadline, you're out of -- you're out of
4 luck; there's no opportunity where there's good cause
5 for an extension?

6 MR. NEIMAN: There is opportunity where
7 there's good cause for an extension. But the -- what
8 the court held here, what the Alabama court held here,
9 was that this circumstance in which the person had
10 counsel of record, and counsel of record hadn't notified
11 the court of their address -- of their changes of
12 address, and, more importantly, Mr. Butler, who was, in
13 fact, serving as Mr. Maples's agent in this case and
14 received --

15 JUSTICE KENNEDY: Well, this goes to my
16 earlier question, and continuing Justice Alito's line of
17 questioning. If the State of Alabama had told the State
18 court, in all of the circumstances, we think there
19 should be an out-of-time appeal granted -- you're -- are
20 you indicating that the State court said, well, that's a
21 good idea, but we can't do it because it's not
22 appropriate in these circumstances?

23 MR. NEIMAN: That seems to be the holding of
24 the Court of Criminal Appeals in this case, Your Honor.

25 JUSTICE GINSBURG: Did you -- did you oppose

1 it? Did the State oppose the out-of-time appeal?

2 MR. NEIMAN: Yes, Your Honor, the State did
3 oppose the out-of-time appeal, and the State pressed the
4 procedural bar in Federal court in this case. But the
5 State had every prerogative to do so, in part because
6 this Court recognized in Coleman, a case where the
7 petitioner undoubtedly could have said that he lost his
8 right to his appeal through no fault of his own, that
9 the State had the power to do that. There are good
10 reasons for the State --

11 JUSTICE KENNEDY: Could the State in --
12 excuse me. Could the State in the -- in the Federal
13 litigation have waived the procedural default?

14 MR. NEIMAN: Your Honor, I think the law is
15 not exactly clear on that, but I know of no law that
16 would say that the Alabama Attorney General has to press
17 every single non-jurisdictional defense at his or her
18 disposal. But he did not do so here and had good reason
19 not to. That's in part because Coleman says that this
20 is how procedural defaults work. There are good reasons
21 for procedural defaults. They are grounded in the same
22 equitable principles that led --

23 CHIEF JUSTICE ROBERTS: But you agreed with
24 me earlier that abandonment is an exception to the
25 adequate and independent State grounds. So, under your

1 view of the case, Coleman was not necessarily
2 controlling.

3 MR. NEIMAN: Your Honor, if I have suggested
4 that abandonment itself is an exception to the AISG
5 doctrine, let me correct my earlier answer.

6 My suggestion is that abandonment can
7 sometimes allow a court to determine that a particular
8 lawyer has become external to a client, that the agency
9 relationship has been terminated. Of course, merely
10 becoming external to the client doesn't mean that the
11 abandonment itself will constitute cause. The
12 abandonment also -- or the lawyer's ending of the
13 relationship would also have to impede the ability of
14 the remaining members of the defense team or the
15 defendant himself to comply with State rules.

16 And here, even if there is some argument
17 that Ingen-Housz and Munanka abandoned their client,
18 which I don't think there is on this record in light of
19 the way they left the case with Butler, Mr. De Leeuw,
20 and others at Sullivan & Cromwell, even if there were
21 some argument on that front, Butler -- it's not clear
22 that the actions of Ingen-Housz and Munanka actually
23 impeded the ability of the remaining members of the team
24 to --

25 JUSTICE GINSBURG: When -- when lawyers stop

1 representing a client, as the two did, isn't there some
2 obligation of them to tell the client and the court,
3 we're no longer representing you, and arrange for
4 substitutions? There were never any substitutions on
5 the record of the other counsel. The record said these
6 two people are representing Maples, and those two
7 weren't. They never told the court, and they never told
8 Maples. Isn't there some obligation on -- on their part
9 to the court when they stop representing a client to
10 advise the court?

11 MR. NEIMAN: Yes, Your Honor, I think there
12 is. But I don't think that means that what happened
13 here constitutes cause. The record is clear. Mr.
14 Maples himself has alleged, that Ingen-Housz and Munanka
15 arranged for this case to be handled by Mr. De Leeuw,
16 and the record makes clear that Mr. De Leeuw was
17 involved in this case in representing Maples even before
18 the default occurred and even before Ingen-Housz and
19 Munanka were -- well, even at the same -- even before
20 Ingen-Housz and Munanka left, I should say.

21 JUSTICE BREYER: Is it -- is it -- I'm still
22 unclear on one factual thing. Did the State's attorneys
23 know that the letters had come back?

24 MR. NEIMAN: Your Honor --

25 JUSTICE BREYER: Should they have known?

1 MR. NEIMAN: Your Honor, the record is not
2 clear on that point. I can represent to the Court that
3 the State's attorney did not know that the letters had
4 come back. I --

5 JUSTICE BREYER: Do they check the -- do
6 they check the docket every so often to see what's
7 happened?

8 MR. NEIMAN: Most -- most attorneys have an
9 obligation at some point to check the docket, and that's
10 -- that's one problem with the position that Mr. Maples
11 has taken regarding Mr. Butler here and the ability of
12 these parties to obtain information from the court.

13 But in this case, it's my understanding --
14 and this is not on the record. But it's on the record
15 obviously before this Court now. But it's my -- it's my
16 understanding that the State had no idea that Mr.
17 Maples's attorneys had not -- Mr. Maples's two attorneys
18 in New York had left their firm or had --

19 JUSTICE BREYER: Why did --

20 JUSTICE GINSBURG: Then why did they -- why
21 did they send to Maples alone the notice, you'd better
22 file your Federal habeas? They didn't send it to those
23 counsel. Where did they -- what made them send it --
24 send that notice directly to Maples and not to either of
25 the Sullivan & Cromwell lawyers?

1 MR. NEIMAN: Again, this is -- this is
2 information that's not in the record, Your Honor. But
3 it's my understanding that counsel looked at -- looked
4 at -- figured out what had happened, figured out the
5 appeal had been missed, had calculated how much time Mr.
6 Maples had to file his 2254 petition and, based on his
7 20 years of experience, said that in light of the fact
8 that the State court proceedings were over, the most
9 prudent thing for him to do would be to send the letter
10 to Maples himself.

11 JUSTICE SOTOMAYOR: So, he had figured out
12 that something had terminated the relationship between
13 Mr. Maples and his lawyers?

14 MR. NEIMAN: No, Your Honor, I don't think
15 that's -- I don't think that's an accurate
16 characterization of --

17 JUSTICE SCALIA: Well, even --

18 MR. NEIMAN: -- of what exactly happened in
19 this case, but in the very least, his lawyers had missed
20 -- had missed the deadline.

21 JUSTICE SCALIA: Even if you assume that he
22 had figured it out, that -- you would have to impute his
23 knowledge to the clerk of court to -- to find the -- the
24 fault on the part of the State that's alleged here.

25 MR. NEIMAN: Well, more so than that, Your

1 Honor.

2 JUSTICE SCALIA: Did he tell the clerk of
3 court that he was only going to send it to Maples?

4 MR. NEIMAN: As far as I know, no, Your
5 Honor. But, of course, the clerk -- the notices came
6 back to the clerk long before the State's attorney sent
7 the letter in this case.

8 But that's an important point, I think, both
9 with respect to the clerk issue and also the abandonment
10 issue. The relevant question here is not what the
11 Assistant Attorney General of Alabama thought had
12 happened in this case. The relevant question on the
13 clerk issue is what the clerk knew, and that of course
14 is governed by Rule 7 of the rules governing admission
15 to the Alabama bar.

16 The relevant question on abandonment is, had
17 Maples in fact been abandoned? Had -- had these
18 attorneys left him completely without counsel? And the
19 record definitively establishes that that had not
20 happened, both because Mr. Butler remained counsel here
21 and in a much more meaningful way, I think, than my
22 friend suggests. And --

23 JUSTICE SOTOMAYOR: Counsel, could you tell
24 me -- I'm assuming you've practiced in your State for a
25 while.

1 MR. NEIMAN: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: How frequent is it in
3 the Alabama capital system that local counsel takes the
4 laboring oar, or even an active participation, in the
5 defense or actions of a capital defendant?

6 Your -- the amici here says generally they
7 did what Mr. Butler did; they just facilitated the --
8 the admission of the volunteer attorneys. Was that your
9 experience?

10 MR. NEIMAN: Your Honor, of course, that
11 information's not in the record. We respectfully
12 disagree, as a factual matter, with the factual
13 assertions made by the amici on that front.

14 JUSTICE BREYER: All right. If we have to
15 send it back, I guess we'd have to say what the rule is.
16 So, what -- what is the rule? What about a rule that
17 says, where in fact attorneys do abandon the client and
18 the local attorney does as a matter of practice in the
19 State do virtually nothing except to facilitate foreign
20 representation, and where the State had cause to
21 believe -- cause to believe -- that all that was true,
22 then the State cannot assert this as an adequate ground.
23 That's all.

24 MR. NEIMAN: Your Honor, a remand would not
25 be appropriate in this case on those -- on those grounds

1 for a number of reasons.

2 JUSTICE BREYER: Because?

3 MR. NEIMAN: One is that Rule 7 of the rules
4 governing admission to the Alabama bar made emphatically
5 clear that the role of local counsel was not simply --

6 JUSTICE BREYER: Irrespective of what the
7 rules were, you'd have to show -- he would have to show
8 that, in fact, in the State it is a practice such that
9 the local counsel doesn't do much of anything except
10 facilitate, because this is a state of mind as to
11 whether the State -- and the State knows that.

12 If he shows both of those things and shows
13 that the letter came back and shows this was abandonment
14 or close thereto, then the State ought to know that this
15 individual has no idea about filing a piece of paper and
16 thinks somebody else is doing it. And that's enough to
17 say this is not adequate State ground that would block
18 Federal habeas. Now, your argument against that is
19 what?

20 MR. NEIMAN: At least twofold, Your Honor.
21 One, as a simple matter, those factual assertions were
22 not made below. So, in order for the Court to remand on
23 that particular issue, it wouldn't be a remand for an
24 evidentiary hearing, on whether those allegations --

25 JUSTICE BREYER: It seems in the briefs --

1 there's certainly a lot in the briefs that seemed to say
2 that.

3 MR. NEIMAN: There's certainly a lot in the
4 briefs that says that. But one problem Mr. Maples faces
5 here is that he had the burden as the petitioner in this
6 habeas proceeding to make the requisite factual
7 allegations that he believed would establish cause.

8 JUSTICE SCALIA: Mr. Neiman, am I correct
9 that under the Alabama rules when an attorney is
10 represented by more than one attorney, the notice does
11 not have to go to all of them?

12 MR. NEIMAN: That is correct, Your Honor.

13 JUSTICE SCALIA: It can only go to one,
14 right?

15 MR. NEIMAN: Yes, Your Honor.

16 JUSTICE SCALIA: So, as far as local counsel
17 knew, he was the only one to receive notice of this
18 thing, right?

19 MR. NEIMAN: That's correct, Your Honor.

20 CHIEF JUSTICE ROBERTS: Is it correct or
21 does the notice -- most of the notices I see list the
22 people who have been served. Were the New York people
23 listed on the notice that went to Butler?

24 MR. NEIMAN: Yes, Your Honor. The notice --

25 CHIEF JUSTICE ROBERTS: Well, then he knew

1 he wasn't the only one getting notice.

2 MR. NEIMAN: Right.

3 CHIEF JUSTICE ROBERTS: Or he knew that he
4 was the only one who was supposed to get notice.

5 MR. NEIMAN: Well, the -- the cc line in
6 this case cannot establish cause and cannot be deemed
7 State interference for any number of reasons. The first
8 is that -- I suppose it could only be held to establish
9 cause if it would have been reasonable for Mr. Butler to
10 assume that the cc line communicated a message that it
11 was perfectly okay for him to do nothing and to not take
12 further action, based on what is in the cc line. And
13 there are at least three reasons why that would not be a
14 reasonable reading of the cc line.

15 The first is that the cc line doesn't
16 communicate that Ingen-Housz and Munanka, who were the
17 people listed on the cc line, will in fact receive the
18 order. All it says is that the order will be sent to
19 Ingen-Housz and Munanka.

20 The second is that the -- even if it would
21 have been reasonable for him, for Mr. Butler, to assume
22 that Ingen-Housz and Munanka would receive the -- the
23 order in this case, it would not have been reasonable
24 for him to have done nothing, given that Rule 7 of the
25 Alabama rules made him jointly and severally responsible

1 for -- to the client and to the court in this case.

2 JUSTICE SOTOMAYOR: I guess the problem is,
3 accept the rule; it exists. But if a lawyer says, I
4 don't care, I'm not going to do whatever the rules
5 required me to do, what more do you need for
6 abandonment?

7 If a lawyer comes in and says, I understand
8 this is a rule of the court; I understand that I'm
9 supposed to do x, y, and z; I don't care; I'm just
10 not -- that's the question.

11 MR. NEIMAN: Yes, well --

12 JUSTICE SOTOMAYOR: What's the difference
13 between "I don't care" and abandonment?

14 MR. NEIMAN: I -- Your Honor, I guess I
15 should just make -- just make a couple points in
16 response to that. The first is that, as I understood
17 the question posed about the cc line, that is all about
18 not abandonment, but whether the clerk -- the clerk's
19 actions can be blamed for -- or the default can be
20 blamed on the clerk.

21 JUSTICE SOTOMAYOR: We're not talking about
22 the notice issue; we are talking about the abandonment
23 question.

24 MR. NEIMAN: On the abandonment question, if
25 it really were -- if it really is true that Butler had

1 decided he was going to do nothing in this case and not
2 represent his client and not be an attorney for the
3 client, then there might be a viable argument that
4 Butler was not -- was not -- had abandoned the client in
5 some way, but that is not the -- a reasonable reading of
6 the record in this case.

7 JUSTICE SCALIA: If we find --

8 MR. NEIMAN: Butler --

9 JUSTICE SCALIA: If we find that these
10 lawyers did abandon their client, will there be some
11 sanction imposed upon them by the bar? I often wonder,
12 just as when we find that there's been inadequate
13 assistance of counsel in a capital case, does -- does
14 anything happen to the counsel who have been inadequate
15 in a capital case?

16 MR. NEIMAN: Your Honor, I suppose it would
17 depend on exactly what the allegations are --

18 JUSTICE SCALIA: Have you ever heard of
19 anything happening to them? Other than they're getting
20 another capital case?

21 (Laughter.)

22 MR. NEIMAN: Your Honor, I have not.
23 Certainly the rules would provide that a breach of the
24 rules of professional responsibility would be
25 sanctionable by the State bar, both against the Alabama

1 attorney here and the New York attorney.

2 CHIEF JUSTICE ROBERTS: You said a few
3 moments ago that Butler did more than your friend
4 suggested. What more did he do?

5 MR. NEIMAN: Well, of course, we discussed
6 in the briefs the very -- the undisputable fact that
7 Butler filed numerous things, and after the default
8 occurred in this case. But even --

9 CHIEF JUSTICE ROBERTS: Well, after the
10 default, sure. But what did he do before?

11 MR. NEIMAN: Butler's affidavit certainly --
12 that was filed in the State court proceedings certainly
13 doesn't say: I'm -- I was in this only to swear these
14 people in or move for their admission and nothing else.

15 What Butler says --

16 CHIEF JUSTICE ROBERTS: What did he do more
17 than that?

18 MR. NEIMAN: Butler said -- says, on page
19 255a of the petition appendix, that he agreed to serve
20 as local counsel. "Local counsel" has a specified
21 meaning under Alabama law.

22 CHIEF JUSTICE ROBERTS: Well, you made a
23 fairly serious suggestion that your friend had not
24 accurately represented what Butler did. And you still
25 haven't told me one thing he did more than move the

1 admission of the out-of-town attorneys.

2 MR. NEIMAN: Well, let me withdraw any
3 suggestion that I am saying that Butler had in fact done
4 something that's -- that's clear on the record.

5 And my time is up. May I finish?

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. NEIMAN: The -- my point was that Butler
8 did not simply agree just to move these people -- move
9 these people's admission. Butler said he would be local
10 counsel. And local -- the role of local counsel is
11 defined by Rule 7. It includes an obligation to attend
12 hearings, conferences, and the like. It also --

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Thank you.

15 Mr. Garre, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT BY GREGORY G. GARRE

17 ON BEHALF OF THE PETITIONER

18 MR. GARRE: Thank you, Mr. Chief Justice.

19 We agree that this is a sui generis case.
20 The facts are extraordinary, the facts are shocking, and
21 our position is simply that under this Court's
22 precedents and the extraordinary facts here, Mr. Maples
23 has established cause to excuse the default.

24 With respect to local counsel, apart from
25 the fact that the State communicated directly with Mr.

1 Maples, an extraordinary step after the default, maybe
2 the other telling thing is that in 2006, Alabama itself
3 eliminated the local counsel requirement for pro bono
4 proceedings, recognizing that it could only create
5 problems; it didn't add anything.

6 With respect to abandonment, I understood at
7 times my counsel -- my friend, to acknowledge that
8 abandonment may establish an external event with respect
9 to the client. If that's so, then I think it's clear
10 that we're at a minimum entitled to a remand. There
11 were statements about what was clear from the record. I
12 think, at a minimum, the record is not clear on a number
13 of things that this Court would have to get into if it
14 were going to consider adopting the State's position
15 that Mr. Maples was not abandoned. Mr. Maples was in a
16 prison cell. His attorneys of record did not tell him
17 that they had left the firm. They were required not
18 only to tell the court --

19 JUSTICE SCALIA: We don't have to adopt the
20 State's position that he was not abandoned. We have to
21 adopt your position that he was abandoned.

22 MR. GARRE: And you have a record of the
23 attorneys leaving with not only not notifying Mr.
24 Maples, not notifying the court, and not obtaining the
25 court's approval, which is required by Rule 6.2 of the

1 Alabama Rules of Criminal Procedure.

2 JUSTICE ALITO: What is troubling to me
3 about the abandonment argument is that -- is the fear
4 that if the Court says that abandonment is cause, there
5 will be many, many cases in which the allegation is: My
6 attorney wasn't just ineffective and negligent; the
7 attorney was so bad that the attorney in effect
8 abandoned me.

9 And that will substantially change existing
10 law. Now, how can that be prevented?

11 MR. GARRE: Working through agency
12 principles that go back to Justice Story's time, working
13 through the principles established in this Court's
14 decision in Holland and that will be applied in Holland.
15 The lower court in Holland issued its decision on remand
16 and found that Mr. Collins had abandoned Mr. Holland,
17 using this Court's precedent as a guide.

18 So, I think Holland already recognizes that
19 attorney abandonment can be external. We're just asking
20 the Court to apply the same principles and recognize
21 that what's external in one context cannot be not
22 external in the other context.

23 JUSTICE SOTOMAYOR: Counsel, do you know how
24 often Holland relief has been granted -- since it's very
25 recent, but how -- how frequently Holland relief has

1 been granted by the courts below?

2 MR. GARRE: I don't know the answer to that
3 question. I'm not aware of any flood of relief in such
4 cases. I expect that this would be very extreme. I
5 think the facts here are about as extreme as you can
6 get.

7 JUSTICE KAGAN: Mr. Garre, how do we
8 distinguish between abandonment and simply a botched, a
9 very botched, transfer of responsibility within a law
10 firm?

11 MR. GARRE: Well, where you have counsels of
12 record leaving without obtaining the approval that
13 they're required or telling the Court, I think that is
14 abandonment pure and simple. Beyond that, you would
15 look to agency principles, whether there's a breach of
16 loyalty. This is going to be a fact -- you would want
17 to get into the facts, although I think it is a very
18 high bar. I think the Holland decision makes clear it's
19 a high bar. I think this case clearly passes that bar,
20 but it's something that the courts will work out
21 applying agency principles, applying the Court's
22 decision in Holland.

23 Recognizing what Holland said in this case
24 isn't going to create any new rule; it's simply going to
25 extend logically the recognition that attorney

1 abandonment is external to the client as it always has
2 been under agency principles.

3 With respect to notice, this Court doesn't
4 have to find a constitutional violation on the State's
5 part. It's enough for cause that the Court finds that
6 the State's actions are external. And I think the key
7 inquiry is what Justice Kagan recognized, which is you
8 look to what a person who is actually desirous of
9 providing notice would do. In this situation, the clerk
10 got two notices back, "Left Firm." It opened it up; it
11 would have seen this is an order in a capital case, and
12 it did nothing. I don't think anyone who actually
13 desired to provide notice of an inmate with his life on
14 the line would do nothing, reasonably, in that
15 situation.

16 Mr. Maples is not asking to be released from
17 prison. He's asking for an opportunity to present
18 serious constitutional claims of ineffective assistance
19 of counsel to a Federal habeas court on the merits.

20 If the claims are as meritless as the State
21 suggests, that clearly will have little burden on it.
22 But simply allowing those claims to be adjudicated on
23 the merits in Federal court will go a long way to
24 preserving the legitimacy of the system of criminal
25 justice in a case in which a man's life is at stake.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Counsel.

4 The case is submitted.

5 (Whereupon, at 11:04 a.m., the case in the
6 above-entitled matter was submitted.)

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