"ABANDONED . . . WITHOUT A WORD OF WARNING": PERSPECTIVES ON *MAPLES V. THOMAS*

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I. INTRODUCTION

Many readers—especially lawyers—first learned the facts of *Maples v. Thomas*[1] from an article published in 2010 in the New York Times.[2] On death row in Alabama, Cory Maples sought post-conviction relief in state court,[3] represented *pro bono* by two associate attorneys at the prominent law firm Sullivan & Cromwell. When the trial court denied Maples's petition, it sent notice to the two associates at the firm's street address, which started a forty-two day period for filing a timely appeal to the Alabama Court of Criminal Appeals. But by that time, and unbeknownst either to Maples or the court, the associates had left the firm. Instead of forwarding the notices on to them, or redirecting the notices to other attorneys within

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1. 132 S. Ct. 912 (2012).

2. *See* Adam Liptak, *A Mailroom Mix-Up That Could Cost a Life*, N.Y. TIMES, Aug. 2, 2010, http://www.nytimes.com/2010/08/03/us/03bar.html?_r=0 (providing a brief summary of the situation that led Cory Maples to miss the deadline for filling his appeal).

3. Maples sought post-conviction relief in Alabama state court and subsequently in federal court in his petition for habeas corpus on the grounds that he was denied his right to effective assistance of counsel during the guilt and penalty phases of his trial. *Maples*, 132 S. Ct. at 919. In particular, he alleged "that his inexperienced and underfunded attorneys failed to develop and raise an obvious intoxication defense" to the two murder charges of which he was convicted. *Id.* Trial counsel also allegedly failed to "object to several egregious instances of prosecutorial misconduct, and [were] woefully underprepared for the penalty phase of his trial." *Id.* Perhaps to place these allegations in a broader context, the Court's majority opinion opens with an overview of Alabama practices applicable to indigent defendants—like Maples—in capital cases. *Id.* at 917–18. Eligibility requirements for counsel are low, as is compensation. *Id.* This comment does not explore the issues raised by Maples's allegations in his habeas petition.

the firm, mail room personnel stamped the envelopes that contained the notices "Return to Sender," and sent them back to the trial-court clerk in Alabama.[4] The clerk took no further action when the notices reappeared; local counsel for Maples, who received the notice, did not act on it. Once forty-two days had elapsed, Maples not only lost the right to appeal within the Alabama court system, but also, the State later argued, was chargeable with a procedural default that barred his ability to seek habeas corpus relief in federal court.[5] The federal district court[6] and the Eleventh Circuit agreed with the State.[7] The Supreme Court reversed.[8]

Maples v. Thomas is the Court's first explicit recognition that abandonment by counsel can suffice to excuse a procedural default in the context of a petition for habeas corpus. The Court's early-2012 opinions in *Maples* are significant for several reasons, three of which I discuss in this brief comment. First, Justice Ginsburg's opinion for a seven-to-two majority holds that abandonment by counsel constitutes cause to excuse a procedural default when the client has no notice that he effectively lacks representation by counsel at the relevant time.[9] A procedural default under such circumstances is not attributable to the client because it occurred through no fault of the client.[10] The majority opinion also ventures a generalized formulation of how "abandonment" might be defined and how a petitioner might show its occurrence.[11]

Second, beyond its technical contribution to the law addressing post-conviction relief, *Maples* invites reflection on large law firms, the organization of work within them, the inevitable hand-offs of responsibility that occur when lawyers leave firms, and the

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4. Thus, colloquially, *Maples* is the "Return to Sender" case, also the title of a song written by Winfield Scott and Otis Blackwell and recorded as a single by Elvis Presley in 1962. ELVIS PRESLEY, *Return to Sender*, *on* GIRLS! GIRLS! GIRLS! (Elvis Presley Music 1962). To see Elvis performing the song, see fairytaledreamerx, *Elvis Presley—Return to Sender*, YOUTUBE (Jan. 9, 2008), www.youtube.com/watch?v=Z54-QHEZN6E.

5. *Maples*, 132 S. Ct. at 921.

6. Maples v. Allen, 586 F.3d 879, 885 (11th Cir. 2009) (per curiam), *rev'd sub nom.* Maples v. Thomas, 132 S. Ct. 912 (2012).

7. *Id.* at 890.

8. *Maples*, 132 S. Ct. at 912.

9. *Id.* at 927.

10. *See id.* Six Justices joined Justice Ginsburg's opinion; Justice Alito wrote a separate concurrence but also concurred in the majority opinion; Justice Scalia dissented in an opinion joined by Justice Thomas. *Id.* at 916.

11. *See id.* at 923 (exploring when "abandonment" has occurred, as opposed to simple "attorney error").

responsibility of individual lawyers who are members of teams. Although this brief comment is not the occasion to give this dimension of *Maples* its full due, the case is a useful vehicle for considering how the same organizational complexities that enable teams of lawyers to undertake sophisticated matters may also enable serious errors to go undetected.

Third, and most broadly, *Maples* affords an occasion to reconsider the extent to which it is fair to charge clients with the consequences of errors made by their lawyers.[12] So long as a lawyer had authority to act on the client's behalf, the client is ordinarily bound by her lawyer's actions—even when the client is unaware of the error.[13] As Justice Scalia's dissenting opinion points out, the majority's opinion requires drawing a fine line between ordinary ineffectiveness of counsel and ineffectiveness that demonstrates "he was not a genuinely representative agent."[14] However, to draw such distinctions is consistent with basic principles of agency law, which operate less mechanically than many believe. Moreover, perhaps doctrines external to agency law itself could usefully be applied in some specific settings, including post-conviction proceedings, in which the stakes are high for the client and many circumstances may undermine the quality of legal representation.

II. *MAPLES* AND EXCUSES FOR PROCEDURAL DEFAULT

A. Agency Law's Implications for Post-Conviction Relief

The specific doctrinal question addressed in *Maples* requires some initial framing. In *Maples* and other cases in which lawyers erred in seeking post-conviction relief for imprisoned clients, analysis begins by acknowledging the absence of a constitutional right to effective assistance of counsel in the post-conviction context.[15] When a defendant has this right, the state, and not the client, is chargeable

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12. *See* Adam Liptak, *Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 MICH. L. REV. 875, 878–84 (2012) [hereinafter Liptak, *Agency and Equity*] (discussing the facts of *Maples v. Thomas* after asking, "why not?" to the question of whether clients should be notified of an impending dismissal).

13. For the general point that lawyers are treated as their client's agents, see Deborah A. DeMott, *The Lawyer as Agent,* 67 FORDHAM L. REV. 301, 301 (1998).

14. *Maples*, 132 S. Ct. at 933.

15. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Johnson v. Avery, 393 U.S. 483, 488 (1969).

with lawyer errors that amount to ineffective assistance of counsel.[16] Thus, when the client has a right to receive effective assistance of counsel, the lawyer's error is deemed to be external to the client.

Separately, a prisoner convicted in state court may not pursue habeas corpus relief in federal court when a state court has declined to address the prisoner's claims because he "failed to meet a state procedural requirement" and "the state judgment rests on independent and adequate state procedural grounds."[17] In contrast, a state-level procedural default does not bar federal review when a prisoner can show "cause" for the default and "actual prejudice" as a result of the violation of federal law alleged in the habeas petition.[18] Such cause is constituted by the occurrence of "something *external* to the petitioner . . . that cannot fairly be attributed to him" and that "impeded [his] efforts to comply with the State's procedural rule."[19]

However, ordinary negligence by the petitioner's counsel is not "external to the petitioner" and thus does not constitute "cause" for this purpose. The Court reasoned in *Coleman v. Thompson*[20] that, as the principal in an agency relationship with his counsel, the petitioner bore the risk of his agent's negligence.[21] Put differently, negligence on the part of the petitioner's lawyer is not defined as "external" to the petitioner because the petitioner is charged with it, just as any principal is charged with the conduct of an agent acting within the agent's scope of actual or apparent authority. An agent's negligent conduct that inflicts loss on the principal breaches the agent's duties to the principal, giving the principal a claim against the agent to be indemnified against the loss.[22] Those consequences are internal to the

16. *Maples*, 132 S. Ct. at 930 (Scalia, J., dissenting).

17. Walker v. Martin, 131 S. Ct. 1120, 1127 (2011) (quoting Coleman v. Thompson, 501 U.S. 722, 729–30 (1991)). Whether the Alabama judgment rested on such an "adequate and independent ground" was raised by Maples in his petition for certiorari. *See* Petition for a Writ of Certiorari at 2, *Maples*, 132 S. Ct. 912 (No. 10-63). The Court did not grant certiorari on that question. *See* Maples v. Thomas, 131 S. Ct. 1718 (2011) (granting certiorari limited to Question 2). Question 2 asked, "[w]hether the Eleventh Circuit properly held . . . that there was no 'cause' to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default." Petition for a Writ of Certiorari at *i, *Maples*, 132 S. Ct. 912 (No. 10-63).

18. Coleman v. Thompson, 501 U.S. 722, 749–50 (1991).

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

20. 501 U.S. 722 (1991).

21. *Id.* at 753–54.

22. RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. b (2006).

principal-agent relationship and, at least usually,[23] they do not impair the legal consequences for the principal vis-à-vis third parties that stem from the agent's conduct. However, *Coleman* also recognized that the agency relationship between them is severed once a lawyer withdraws from representing a client, and the lawyer's subsequent actions are not fairly attributable to the client.[24] This leaves the question of whether (or when) a lawyer's breaches of duty to the client in an ongoing lawyer-client relationship effectively sever the relationship and might constitute cause. Does *Coleman* require judicial indifference to the character, quality, gravity, or consequences of a lawyer's breach of duty?

Maples was not the Court's first encounter with these questions. Two years before its opinion in *Maples*, the Court considered possible distinctions among lawyers' breaches of duty in *Holland v. Florida*.[25] In *Holland*, the petitioner missed the one-year deadline for filing a federal habeas petition prescribed by 28 U.S.C. § 2244(d).[26] The Court held that the statutory time limit could be tolled for equitable reasons and that a lawyer's unprofessional conduct could be treated as an extraordinary circumstance that would warrant equitable tolling.

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23. *But see infra* text accompanying notes 101–105 (noting that agent's serious disloyalty may terminate agency relationship or defeat imputation of agent's knowledge to principal).

24. *Coleman*, 501 U.S. at 753.

25. 130 S. Ct. 2549 (2010).

26. Under 28 U.S.C. § 2244(d)(1), a one-year limitation period applies to "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." The one-year period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. §§ 2244(d)(1)(A)–(D) (West 2012) [hereinafter AEDPA]. This subsection was added to section 2244 by Title I of the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214 (1996). In *Holland*, the petitioner's lawyer erroneously believed that the one-year period imposed by AEDPA was tolled during the pendency of petitions for discretionary appellate review, such as petitions for certiorari. 130 S. Ct. at 2558. The petitioner, in contrast, understood the law correctly. *Id.* at 2557. But a lawyer's erroneous understanding of the law is only negligence (whether ordinary or gross negligence) which does not excuse a procedural default. *See id.* at 2563 (instructing that "in the context of procedural default, without qualification, that a petitioner 'must bear the risk of attorney error'" (citing *Coleman*, 501 U.S. at 752–53)). Thus, it was crucial that petitioner emphasize abandonment by counsel, not counsel's error.

Important to the analysis (and outcome) in *Holland* was the petitioner's emphasis on challenging his lawyer's conduct, not as negligence, but as abandonment.[27] As *Maples* characterizes the lawyer's conduct in *Holland*, he "detached himself from any trust relationship with his client."[28] In particular, the lawyer in *Holland* did not communicate with his client for an extended period of time, did not inform him when the state court ruled against him, and did not file the necessary documents in time for his client to seek review in federal court. When the client wrote directly to the Florida Supreme Court to convey his complaints and request a new lawyer, prosecutors objected (and the Florida court agreed) that the client could not contact the court directly because he was represented by counsel.[29]

Justice Alito's concurring opinion in *Holland*, which characterizes as "perverse"[30] the State's opposition to the petitioner's request for new counsel, also articulates an analytic structure to differentiate between ordinary negligence and lawyer misconduct that constitutes "extraordinary circumstances" excusing procedural default.[31] Error, however egregious, is not tantamount to abandonment because it does not sever the relationship between lawyer and client.[32] In contrast, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."[33]

Adopting this distinction, *Maples* holds that a client, under agency principles, is not charged with the consequences of a lawyer's conduct when the lawyer has abandoned the client. By severing the agency relationship, abandonment obviates the basis on which the client as principal is charged with the consequences of the lawyer's conduct. Additionally, a client cannot "be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him."[34] This basis for excusing procedural default requires that the client have been unaware and thus unable to protest

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27. *See Holland*, 130 S. Ct. at 2555 (referring to Holland's claims that his attorney "abandoned" him).

28. Maples v. Thomas, 132 S. Ct. 912, 923 (2012).

29. *Holland*, 130 S. Ct. at 2556.

30. *Id.* at 2568.

31. *Id.* at 2567.

32. *See, e.g.*, *id.* ("[T]he error of an attorney is constructively attributable to the client . . . regardless whether the attorney error in question involves ordinary or gross negligence.").

33. *Id.* at 2568.

34. Maples v. Thomas, 132 S. Ct. 912, 924 (2012).

or otherwise seek assistance, as did the very aware petitioner in *Holland*. Additionally, the client must be unaware of conduct or inaction that is sufficiently grievous to terminate an agency relationship, such that the client is, as a factual matter, not represented by a lawyer whose name remains associated with the case.

B. More of the Maples *Narrative*

To understand how this distinction might apply, it is helpful to consider more of the factual specifics of *Maples* itself, in particular the conduct of the two erstwhile associates at Sullivan & Cromwell, the firm itself and other personnel of the firm, and Maples's local counsel in Alabama. All members of the *Maples* Court agreed that the two associates abandoned their client.[35] They left the firm without giving notice to their client or the court and without seeing to the appointment of substitute counsel.[36] Additionally, both undertook new employment subject to terms that would not permit their ongoing representation of a private client like Maples: one became a law clerk to a federal judge, the other an employee of the European Commission.[37] Within the terminology of agency law, through their conduct they renounced their roles as counsel to Maples.[38] Their renunciations terminated their authority to act on his behalf.[39] Additionally, treating their conduct as a form of de facto withdrawal from representing Maples, the associates disregarded Alabama law, which requires leave from the court to withdraw.[40]

In the majority's assessment, the record is "cloudy" on the roles that other lawyers at Sullivan & Cromwell served in connection with the Maples case.[41] Following the associates' departure, no other lawyer at Sullivan & Cromwell sought to be admitted *pro hac vice* to the Alabama bar and, apparently, no lawyer at the firm associated with Maples's case was generally admitted to law practice in Alabama.[42] No

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35. *Id.* at 927 ("[M]aples was trapped when counsel of record abandoned him without a word of warning."); *id.* at 928 (Alito, J., concurring) ("I agree that petitioner's attorneys effectively abandoned him . . . ."); *id.* at 930 (Scalia, J., dissenting) ("I likewise agree with the Court's conclusion that Maples' two out-of-state attorneys of record . . . had abandoned Maples . . . .").

36. *Id.* at 919 (majority opinion).

37. *Id.* at 924.

38. RESTATEMENT (SECOND) OF AGENCY § 119 cmt. b (1958).

39. *Id.* § 118.

40. *Maples*, 132 S. Ct. at 919.

41. *Id.* at 925.

42. *Id.* at 919.

one from the firm contacted the court, and, as a result, the two associates remained listed as Maples's attorneys of record, along with local counsel.[43] In an affidavit submitted to the Alabama court once the default (and debacle) materialized, a partner at the firm stated that he had been "involved" in the case since the time of the petition to the trial court seeking post-conviction relief.[44] The partner's affidavit also stated that he and other lawyers prepared for an evidentiary hearing after the trial court denied a motion from the State to dismiss the petition.[45] A separate affidavit from another associate at the firm stated that she, too, had worked on the case.[46] Neither affidavit detailed the nature of the work done and, interestingly, the same partner also stated by affidavit that the practice at Sullivan & Cromwell was that "lawyers 'handle *pro bono* cases on an individual basis'" and do not use the firm name on correspondence or court papers in connection with *pro bono* representations.[47]

Murky though this history may be, it is clear that filing a notice of appeal on behalf of Maples required that a lawyer be admitted—at least *pro hac vice*—to practice law in Alabama, enter an appearance on Maples's behalf, and inform the court that he or she should be substituted for the now-departed associates as counsel of record.[48] It is also clear that no lawyer at Sullivan & Cromwell took any of these steps in the forty-two days during which the trial court's denial of post-conviction relief could have been appealed.[49] Thus, the majority in *Maples* concludes, no lawyer still at Sullivan & Cromwell was, at that time, Maples's authorized agent because none had the qualification, or had satisfied the conditions, required to take legal action on his behalf in compliance with Alabama law.[50] As all of this happened unbeknownst to Maples, he lacked reason to know that he was no longer represented by any lawyer at Sullivan & Cromwell.[51]

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43. *Id.*
44. *Id.* at 925.
45. *Id.*
46. *Id.*
47. *Id*. at 931 (Scalia, J., dissenting). This practice may not be typical among large law firms. It would, for example, lead one to wonder how the firm would identify and address conflicts between potential *pro bono* clients of individual lawyers and clients of the firm.
48. *Id.* at 919 (majority opinion).
49. *Id.* at 925–26.
50. *Id.* at 926.
51. *Id.* at 927 ("[Maples] had no reason to suspect that, in reality, he had been reduced to *pro se* status."). Analyzed in an agency-law framework, no lawyer at Sullivan & Cromwell at

He also had no right to receive notice himself from the trial court because, on the record, he remained represented by counsel.[52] Thus, as Justice Ginsburg observed, Maples was "abandoned . . . without a word of warning" that he lacked effective representation, and left unaware that he proceeded *pro se*.[53]

An implicit element of disagreement between the *Maples* majority and the dissenters is how to define "representation." To the majority, as discussed above, a client is unrepresented for purposes of excusing a procedural default when the client lacks notice that no lawyer involved with the client's case has the legal capacity to take action on the client's behalf that would be requisite to avoid the default.[54] This definition turns on the agency concept of actual authority (here, to represent Maples before Alabama courts) as opposed to the broader range of circumstances under which a lawyer may owe duties to a particular person as a client.[55] In contrast, Justice Scalia's dissent argues that other lawyers at the firm who worked on Maples's case also represented him on an individual basis, and thus owed him duties that included keeping him informed about the case and pertinent deadlines.[56] And presumably any of those lawyers could have informed the court, entered an appearance, and obtained the right to represent Maples *pro hac vice*. Thus, according to Justice Scalia, Maples was *poorly* represented but not *un*represented at the time he could have appealed the trial court's denial of his petition for post-conviction relief. However, this argument overlooks the fact that no one in this larger, but ill-defined, cast of lawyers could legally have

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that time had authority to act on Maples's behalf because it would have been illegal for any lawyer there to take the requisite action. *Id.* at 926 (citing RESTATEMENT (SECOND) OF AGENCY § 111 (1958) (an agent's "failure to acquire a qualification . . . without which it is illegal to do an authorized act" terminates the agency relationship)); *id.* at 924–25 (citing RESTATEMENT (SECOND) OF AGENCY § 111 cmt. b (the ordinary inference is "that a principal does not intend an agent to do an illegal act")).

52. *Id.* at 927.

53. *Id.*

54. Nothing in the *Maples* majority opinion suggests that a client aware that his lawyer does not effectively represent him, as in *Holland*, would be precluded from establishing grounds to excuse a procedural default.

55. Standard accounts of lawyer-client relationships differentiate between the formation of a lawyer-client relationship, which imposes duties on the lawyer to the client, and a lawyer's authority to take action on a client's behalf. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (2000) (stating circumstances under which a lawyer-client relationship is formed); *id.* § 26 (stating when a lawyer has actual authority to act on a client's behalf); *id.* § 27 (stating when a lawyer's act is considered to be that of the client based on the lawyer's apparent authority).

56. *Maples*, 132 S. Ct. at 931–32 (Scalia, J., dissenting).

taken the action Maples needed, which was to file a notice of appeal on his behalf in an Alabama court. Indeed, the notice itself is a short and simple document,[57] but unaware of his lack of representation, Maples had no reason to know that he needed to file the notice himself, or find other counsel able to act on his behalf before Alabama courts.

As noted in the Introduction, Maples was also represented by local counsel, as required at the time by Alabama law when out-of-state counsel sought *pro hac vice* admission to practice before an Alabama court, regardless of the nature of the proceeding or client.[58] In the majority's assessment, local counsel "did not even begin" to represent Maples because he told the two Sullivan & Cromwell associates that his role would be limited to enabling them to appear *pro hac vice*.[59] To limit his representation in this manner was inconsistent with Alabama law.[60] But it was consistent with local counsel's pattern of sustained inactivity, which extended to his receipt of the notice from the trial court. This prompted no action on his part, such as contacting Sullivan & Cromwell.[61] Tellingly, the State itself appeared at the time to recognize that local counsel's role had been limited and had terminated. Once the time to appeal the trial court's denial of relief expired, the assistant attorney general who represented the State in Maples's post-conviction proceedings sent a letter directly to Maples himself in prison (with no copies to any of his three attorneys of record), notifying him that the deadline to appeal within the Alabama system had expired, but also informing him that

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57. *Id.* at 927 n.11 (majority opinion) (stating that the "notice is a simple document" that "need specify only: the party taking the appeal, the order or judgment appealed from, and the name of the court to which appeal is taken" (citing ALA. R. APP. P. 3(c))).

58. In 2006, Alabama revised the relevant rule, Rule Governing Admission to the Ala. State Bar VII. As amended, Rule VII does not require that out-of-state counsel associate with local counsel when out-of-state counsel seeks to represent, on a *pro bono* basis, an indigent criminal defendant in post-conviction proceedings. *Maples*, 132 S. Ct. at 919 n.3. The majority opinion in *Maples* points out that Alabama is "[n]early alone among the states" in not "guarantee[ing] representation to indigent capital defendants in postconviction proceedings." *Id.* at 918.

59. *Id.* at 926.

60. *Id.* In particular, the applicable rule required that local counsel "accept joint and several responsibility with the foreign attorney to the client, opposing parties, and counsel, and to the court or administrative agency in all matters." *Id.* at 919 (quoting Rule Governing Admission to Ala. State Bar VII (2000)). More generally, restrictions on the scope of a lawyer's representation of a client require the client's agreement. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19(1). Agreed-to restrictions are not effective unless the client is "informed of any significant problems a limitation might entail" and consents. *Id.* cmt. c.

61. *Maples*, 132 S. Ct. at 926.

four weeks remained during which he could file a federal habeas petition.[62] The State's lawyer at least believed that Maples was no longer represented by counsel, given any lawyer's ethical obligation to direct communications to the lawyer known to represent an opposing party.[63]

In contrast, Justice Scalia's dissenting opinion emphasizes that "[w]hat matters . . . is not whether the prosecutor *thought* Maples had been abandoned, but whether Maples *really was* abandoned,"[64] pointing to local counsel's "[a]lmost immediate[]" flurry of activity once the prior default came to light.[65] Whether or not the scope of local counsel's authority revived or expanded after the default, it was defunct or in abeyance prior to the default.[66] Moreover, the fact that the State's lawyer contacted Maples directly is best explained as consistent with a belief, grounded in experience with the case to date, that no lawyer then represented Maples. This episode prompted several questions at oral argument directed to Alabama's Solicitor General. Asked Chief Justice Roberts, followed by laughter in the

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62. *Id.* at 920. Maples then contacted his mother, who called Sullivan & Cromwell, whereupon three other lawyers at the firm made a motion in the Alabama trial court seeking a re-issue of the court's order, which would begin a new forty-two-day period for appeal. *Id.* The trial court denied the motion, noting that the two former associates remained counsel of record, never having withdrawn. *Id.* The Alabama Court of Criminal Appeals denied a petition for a writ of mandamus; the Alabama Supreme Court summarily affirmed. *Id.* at 921.

63. *Id.* at 926.

64. *Id.* at 933 (Scalia, J., dissenting).

65. *Id.*

66. Within the taxonomy of agency law, one might characterize local counsel as a subagent, chosen by Maples's agents (the associates at Sullivan & Cromwell) to fulfill a limited objective, which was to obtain their *pro hac vice* admission in Alabama. His authority terminated when that limited objective was accomplished. A subagent is defined as "a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal." RESTATEMENT (THIRD) OF AGENCY § 3.15(1) (2006). See *id.* cmt. e for a discussion on the termination of a subagent's authority. Separately, local counsel's authority would terminate upon termination of the authority of his appointing agents, the associates who needed *pro hac vice* admission to practice in Alabama. *See id.* Their authority terminated when they abandoned Maples. *See id.* (subagent's authority terminates upon notice, inter alia, that the relationship between agent and principal has been terminated). Local counsel had "notice" of the termination, as agency doctrine defines the term, because he has "notice" of a fact when he "knows the fact, has reason to know it, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." *Id.* § 5.01(3). To fulfill any ongoing duty to Maples, local counsel should have known that he had been abandoned by his other attorneys of record. *See also* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 469 (N. St. John Green rev. ed., 8th ed. 1874) (1839) (explaining that subagency is automatically terminated upon severance of the primary agency relationship because the subagency is a "dependent power" and because termination "is a natural result from the presumed intention of the principal").

courtroom: "Why did he do it? Why did he do it then? Just gloating that— that the fellow had lost?"[67] And: "What was the point of it? He must have thought there was a problem, right," the Chief Justice continued.[68] Replied Alabama's Solicitor General, "Your Honor, he certainly was aware that Mr. Maples's lawyers had failed to file a notice of appeal. But— and his letter reveals that he is very aware—" at which point other Justices intervened with other questions.[69]

Finally, once the missed deadline came to light, lawyers then at Sullivan & Cromwell did take action on Maples's behalf, first in Alabama courts, up through briefing and oral argument in the Eleventh Circuit.[70] However, once the deadline was missed, further work by the firm was shadowed by a conflict of interest because, as the *Maples* majority explains, "the firm's interest in avoiding damage to its own reputation was at odds with Maples' strongest argument," his prior abandonment by the firm's former associates and the firm's failure to respond appropriately and in a timely fashion to the associates' departure.[71] Instead, before the Eleventh Circuit, the firm "attempted to cast responsibility for the mishap on the clerk of the Alabama trial court."[72] To be sure, the clerk's failure to respond more affirmatively when the notices marked "Return to Sender" appeared in the mail could be problematic. One might question whether the clerk, and the State via the clerk's knowledge, had notice that Maples's counsel of record no longer represented him, as well as whether the clerk had a duty to respond in some fashion.[73] But those questions are harder to answer than the questions raised by the conduct of Maples's lawyers.

C. Maples *and Botched Transitions of Responsibility within Large Law Firms*

Justice Alito's separate concurring opinion characterizes what happened to Maples as "not a predictable consequence of the Alabama system but a veritable perfect storm of misfortune, a most unlikely combination of events . . . ."[74] Several media accounts of the

67. Transcript of Oral Argument at 34, *Maples*, 132 S. Ct. 912 (2012) (No. 10-63).
68. *Id.*
69. *Id.* at 34–35.
70. *Maples*, 132 S. Ct. at 925 n.8.
71. *Id.*
72. *Id.*
73. *See infra* text accompanying notes 106–110.
74. *Maples*, 132 S. Ct. at 929 (Alito, J., concurring). In contrast, the majority opinion

Court's resolution of *Maples* quoted the "perfect storm" language,[75] which is prefaced in Justice Alito's opinion by a list of eight salient factors that contributed to the default.[76] Apart from its technical implications for post-conviction relief, *Maples* is also a concrete illustration of the potential for error when individuals within large and complex organizations—here, a well-regarded law firm—share responsibility for work they have undertaken, but specific individuals leave the organization. This potential for cumulative multi-causal error surely rings true for many lawyers, regardless of the nature of their practice.

Two of the causal factors identified by Justice Alito implicate not the specific actions that a lawyer could be authorized to take on behalf of a client, but the functioning of a large organization. Thus, in the midst of the opinion's articulation of eight factors occurring over time that led to Maples's predicament falls "(5) the apparent failure of the firm . . . to monitor the status of petitioner's case" once the former associates left the firm.[77] Indeed, partners in law firms and supervisory lawyers more generally have a duty to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform" to rules of professional conduct,[78] which include a duty to "act with reasonable

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begins with systemic information about the representation of indigent defendants in capital cases in Alabama courts. *See id.* at 917–18 (majority opinion); discussion *supra* note 3. One scholar characterizes "perfect storm" as a metaphor that, when used in judicial opinions, "offers a complete explanation of the consequences of the storm in a way that absolves the human actor of all blame." Carol McCrehan Parker, *The Perfect Storm, the Perfect Culprit: How a Metaphor of Fate Figures in Judicial Opinions*, 43 MCGEORGE L. REV. 323, 333 (2012). In the context of his concurring opinion in *Maples*, Justice Alito's use of "perfect storm" seems not to absolve human actors from blame but to differentiate his explanation from an inference to be drawn from the majority opinion's discussion of aggregate characteristics related to representation of indigent defendants in capital cases in Alabama. Specifically, Justice Alito observes that, "I do not think that Alabama's system had much if anything to do with petitioner's misfortune." *Maples*, 132 S. Ct. at 928 (Alito, J., concurring). Moreover, "a similar combination of untoward events could have occurred if petitioner had been represented by Alabama attorneys who were appointed by the court and paid for with state funds." *Id.* This is not an argument that the "combination of untoward events" in any way exculpated the lawyers who actually or hypothetically represented Maples.

75. *See, e.g.*, Adam Liptak, *Justices Rule for Inmate After Mailroom Mix-Up*, N.Y. TIMES Jan. 18, 2012, http://www.nytimes.com/2012/01/19/us/cory-r-maples-must-be-given-second-chance-after-mailroom-mix-up-justices-rule.html; Debra Cassens Weiss, *Supreme Court Rules for Death-Row Inmate Whose BigLaw Lawyers Missed the Appeal Deadline*, ABAJOURNAL.COM, Jan. 18, 2012, http://www-source.abajournal.com/news/article/supreme_court_allows_appeal_for_death-row_inmate_whose_biglaw_lawyers_misse.

76. 132 S. Ct. at 928–29 (Alito, J., concurring).

77. *Id.* at 928.

78. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2011).

diligence and promptness in representing a client."[79] And all lawyers must, upon terminating their representation of a client, "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client [and] allowing time for the employment of other counsel."[80] In *Maples*, steps to protect the client's interests would include, at a minimum, notifying him of the gap in representation and explaining available options going forward.

Separately, Justice Alito's opinion identifies the performance of Sullivan & Cromwell's mail room as a distinct contributor to the procedural default: "(6) when notice of the decision denying petitioner's request for state postconviction relief was received in [the] firm's offices, the failure of the firm's mail room to route that important communication to either another member of the firm or to the departed attorneys' new addresses."[81] Of course, a mail room is not itself a legal person or a morally accountable agent, nor is it a naturally-occurring object like a rock formation. Mail rooms have operational and supervisory (human) personnel, use technology chosen by human personnel, and often operate subject to defined protocols or routines. *Maples* does not address how the error happened, but more than one person may have shared responsibility. Likewise, the routine or protocol under which the mail room operated, or the technology it used, may not have been designed with a keen enough eye to the possibility of human error.

Nonetheless, many breaches of duties by lawyers and organizational mishaps within large law firms fall short of the standard articulated in *Maples* to warrant excusing a procedural default. How best to define the standard engaged the Court during oral argument in *Maples*. Justice Kagan asked counsel for Maples:

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79. *Id.* R. 1.3. It is not clear how compliance with this rule would co-exist with a firm's policy that *pro bono* clients are those of individual lawyers alone, and are not clients of the firm. *See supra* text accompanying note 47 (describing affidavit from partner of Sullivan & Cromwell).

80. MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

81. *Maples*, 132 S. Ct. at 928 (Alito, J., concurring). Sounding a much darker note, a widely-read blog introduced the term "Mailroom of Death." *See* David Lat, *Sullivan & Cromwell's Mailroom of Death: A Law Firm's Error Could Cost a Man His Life,* ABOVE THE LAW (Aug. 3, 2010), http://www.abovethelaw.com/2010/08/sullivan-cromwells-mailroom-of-death/; David Lat, *Supreme Court Rules on Sullivan & Cromwell's Mailroom of Death*, ABOVE THE LAW (Jan. 18, 2012), http://www.abovethelaw.com/2012/01/supreme-court-rules-on-sullivan-cromwells-mailroom-of-death/. The term persists. *See* Staci Zaretsky, *Former Sullivan & Cromwell 'Mailroom of Death' Associate Promoted to Partner at Baker & McKenzie*, ABOVE THE LAW (July 5, 2012), http://www.abovethelaw.com/2012/07/former-sullivan-cromwell-mailroom-of-death-associate-promoted-to-partner-at-baker-mckenzie/.

"[H]ow do we distinguish between abandonment and simply a botched, a very botched, transfer of responsibility within a law firm?"[82] Counsel responded: "Well, where you have counsels of record leaving without obtaining the approval that they're required or telling the Court, I think that is abandonment pure and simple."[83] Counsel continued: "Beyond that, you would look to agency principles, whether there's a breach of loyalty . . . . [Y]ou would want to get into the facts, although I think it is a very high bar."[84] As stated in *Holland,* when a lawyer's breach of duty amounts to abandonment because it leaves the client without representation, the lawyer's conduct is external to the client and no longer that of an agent who represents the client.[85] As counsel for Maples acknowledged, this standard demands much of petitioners seeking to excuse procedural defaults. It also requires a fact-specific inquiry into events from which the default arose.

III. LIMITING AGENCY'S CONSEQUENCES

Most broadly, *Maples* is an invitation to rethink the validity of the initial premise that lawyers should be viewed as their clients' agents because this premise carries the consequence, as explained above, that absent extraordinary circumstances the client bears the risk of the lawyer's errors. In a recent provocative essay, Adam Liptak questions and challenges the appropriateness of the agency framework.[86] He points out that agency 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.[87] Putting aside "a sophisticated client with money" who may be

82. Transcript of Oral Argument at 60, *Maples*, 132 S. Ct. 912 (2012) (No. 10-63).

83. *Id.*

84. *Id.*

85. *Holland v. Florida*, 130 S. Ct. 2549, 2567 (2010).

86. *See generally* Liptak, *Agency and Equity*, *supra* note 12. Mr. Liptak is the Supreme Court correspondent for the New York Times.

87. *Id.* at 875. Indeed, agency is defined as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). The relationship between a lawyer and her client is conventionally defined as an agency relationship. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, ch. 2, intro. note (2000) (stating that "[a] lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity"). A client's greater vulnerability is the basis on which the law creates "safeguards for clients beyond those generally provided to principals." *Id.*

assumed to exercise free choice among lawyers, monitor the chosen lawyer's work, and terminate representation if the lawyer proves inept or disloyal,[88] many clients are "poor, uneducated, mentally troubled, scared, or imprisoned."[89] For them, the relationship with a lawyer may seem less than "authentic," especially when the lawyer has been assigned to the client by the state or is a volunteer, not retained counsel.[90]

Although agency is often termed a "fiction,"[91] like much legal doctrine, repetition normalizes agency's "fictional" elements.[92] If a fiction, agency seems to operate in an unproblematic fashion in most instances. It may even be functionally necessary to understand how legal responsibility can be ascribed in many settings, including the representation of clients by their lawyers. However, as *Maples* itself illustrates, agency doctrine includes components that limit or defeat consequences for the principal that would otherwise follow from the conduct of an agent appointed by the principal. Additionally, agency is not a body of law with imperial pretensions or imperatives. That is, sources of law apart from and external to common-law agency may limit its consequences.

A. Limitations Internal to Agency Doctrine

Common-law agency is not the only body of common-law doctrine with components limiting legal consequences that would otherwise follow in their absence. An analogy to contemporary tort law may be illuminating. Students learn that the fundamental

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88. Liptak, *Agency and Equity*, *supra* note 12, at 875.

89. *Id.*

90. *Id.*

91. *Id.* at 879. Justice Holmes, for example, wrote of the "fictitious unity of person" as an intellectually inexplicable underpinning of agency law. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 183 (Mark DeWolfe Howe ed. 1963) (1881). Holmes also characterized agency law as the simple-minded combination of a fiction of identity between agent and principal, plus common sense. Oliver Wendell Holmes, Jr., *Agency II*, 5 HARV. L. REV. 1, 14 (1892).

92. As Lon Fuller described the process:

> Probably the maxim "qui facit per alium, facit per se" was originally a fiction because it was understood as an invitation to the reader to pretend that the act in question had actually been done by the principal in person. But the statement has been so often repeated that it now conveys its meaning (that the principal is legally bound by the acts of the agent) *directly*: the pretense that formally intervened between the statement and this meaning has been dropped out as a superfluous and wasteful intellectual operation. The death of a fiction may indeed be characterized as a result of the operation of the law of economy in the field of mental processes.

LON L. FULLER, LEGAL FICTIONS 19 (1967).

structure of liability for general negligence requires that an injured person show: (1) a duty owed to him by the injurer; (2) a breach of that duty; (3) a factual causal connection between that breach; and (4) the loss suffered by the injured party.[93] However, tort law contains doctrines that limit or defeat liabilities that would otherwise follow when the standard four-part analysis is satisfied, even when the injurer has no affirmative defense against liability. As is well known, even when a defendant's breach of duty in fact caused injury to the plaintiff, the plaintiff will lose if the defendant's breach is not also the "proximate" cause of the injury—or, in more contemporary terms, if the plaintiff's injury did not stem from the risk that made the defendant's conduct wrongful.[94] Likewise, although the doctrine is less crisp, many plaintiffs cannot recover if their injuries consist only of economic loss unrelated to any personal injury or injury to property.[95] Tort law thus contains doctrines that spare defendants from liability even when a plaintiff establishes the basic requisites for a claim of liability in general negligence.

Similarly, as *Maples* itself demonstrates, agency doctrine also defines boundaries that limit consequences for principals. The majority's analysis turns on the absence of actual authority to act on Maples's behalf by filing a notice of appeal within the limitations period. Lawyers may have "represented" Maples in some sense during that period and served as his agents, but none (in particular at Sullivan & Cromwell) had authority at that time to serve as his lawyer in an Alabama court.[96] Additionally, agency's consequences do not follow in rote sequence because the parties or popular usage label a particular relationship as one of agency.[97] Such labels are not controlling because "agency" is a legal conclusion made following assessment of the facts of a particular relationship.[98] Likewise, no standard template inherent in the legal category of agency defines the

93. *See, e.g.*, David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1673 (2007) (stating and criticizing the "standard four-element account of negligence").

94. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (2011).

95. *See generally, e.g.*, Gennady A. Gorel, *The Economic Loss Doctrine: Arguing for the Intermediate Rule and Taming the Tort-Eating Monster*, 37 RUTGERS L.J. 517 (2006); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523 (2009); John J. Laubmeier, *Demystifying Wisconsin's Economic Loss Doctrine*, 2005 WIS. L. REV. 225.

96. *See supra* text accompanying notes 42–46.

97. RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006).

98. *Id.* cmt. 1.02.

scope of an agent's authority.[99] Thus, the fact that a cast of lawyers were associated in more-or-less defined ways with the Maples case does not mean that each (or any) was authorized to furnish the timely assistance Maples required.

Agency doctrine also limits agency's consequence by specifying when an agency relationship ends. In *Maples*, for example, the relationship ended by abandonment when the two associates left Sullivan & Cromwell for jobs elsewhere that prohibited the representation of private clients like Maples.[100] Additionally, disloyalty by an agent may terminate the agency relationship. By definition, agency is a fiduciary relationship, long understood to "disallow the pursuit of self-interest as a motivating force in actions the agent determines to take on the principal's behalf."[101] It has long been clear that an agent breaches this duty by taking a stance "antagonistic" to the principal[102] because the principal has the right to assume, unless informed otherwise, that the agent is able to give the principal "that undivided allegiance and loyalty which the proper performance of the agency requires and that he will remain in that situation."[103] An agent's serious breach of loyalty thus terminates the agency relationship,[104] with the consequence (among others) that notice of facts known to the agent is not imputed to the principal.[105]

In short, just as the Court was able to address Maples's predicament within the framework of agency doctrine, that doctrine contains additional components that might be explored to mitigate the consequences for clients ill-served by their lawyers. Those possibilities are more complex and less direct than the simple abandonment and lack of authority theories applied by the majority in *Maples*, and the modest scope of this comment precludes a full exploration.

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99. *See id.* § 2.01 ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations, that the principal wishes the agent so to act.").

100. *See supra* text accompanying note 37.

101. RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. b.

102. FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1189 (2d ed. 1914).

103. *Id.* § 1206.

104. RESTATEMENT (SECOND) OF AGENCY § 112 (1958).

105. RESTATEMENT (THIRD) OF AGENCY § 5.04.

B. Limitations External to Agency Doctrine

The factual sequence in *Maples* suggests another possible limit on the consequences of agency. In the sequence of events stated in Justice Alito's concurring opinion, the blunder in the Sullivan & Cromwell mail room was followed by "(7) the failure of the clerk's office to take any action when the envelope[s] containing [the] notice came back unopened."[106] Although the majority opinion does not analyze the legal consequences of the clerk's failure, Justice Scalia's opinion emphatically doubts whether "*any* notice of a court's order in a pending case" is due a litigant.[107] His opinion distinguishes the litigation context from *Jones v. Flowers*,[108] a 2006 case in which the Court held that a state must take additional reasonable steps to locate a property owner when a mailed notice of a tax sale is returned unclaimed.[109] The opinion also emphasizes that the Federal Rules of Civil Procedure and Appellate Procedure do not treat notice as an absolute requirement.[110]

However, as Adam Litpak argues, it is worth considering whether notice should be given directly to the client in cases like *Maples*—that is, cases in which the stakes for the client are high and it confounds reality to lump that litigant with a "sophisticated client with money."[111] To be sure, as Justice Alito's concurring opinion notes, multi-causal misfortunes may also befall clients with retained counsel, but the odds of mishap seem higher for litigants like Maples. These are also cases in which after-the-fact litigation can be complicated (as in *Maples* itself), and notice to the client of an impending catastrophe may be more efficient. Of course, system-wide estimates of relative costs and benefits would help. An alternative to imposing a duty to give direct notice to a client would be to jettison the basic tenet that agency doctrine, with specific modifications, is the appropriate basic framework within which to understand attorney-client relationships. However, this shift would destabilize much if implemented as a general matter. Even limited to cases in which clients resemble Mr.

106. *Maples v. Thomas*, 132 S. Ct. 912, 928 (2012) (Alito, J., concurring).
107. *Id.* at 933 (Scalia, J., dissenting) (emphasis in original).
108. 547 U.S. 220 (2006).
109. *Id.* at 220.
110. *Maples*, 132 S. Ct. at 933 (Scalia, J., dissenting) (discussing FED. R. CIV. P. 77(d)(2) and FED. R. APP. P. 4(a) and 4(a)(6)).
111. Liptak, *Agency and Equity*, *supra* note 12, at 875.

Maples, discarding agency's basic framework would require difficult exercises in demarcation among lawyer-client relationships and, within such relationships, their consequences. Thus, imposing a duty to give direct notice to a client under some circumstances seems more feasible. The source for the duty would be the equitable nature of the doctrine surrounding habeas corpus, such as the principle of equitable tolling articulated by the *Holland* Court.[112]

A separate question is how best to specify the trigger for a duty to give notice to a client who is represented by counsel, whether generally or limited to appointed or *pro bono* counsel. Potential triggers include the nature of the consequences about to befall the client,[113] the type of case, and whether a lawyer bore relatively greater responsibility for an impending default than did the client. As Mr. Liptak notes, Justice Black's dissent in *Link v. Wabash Railroad Co.*[114] in 1962 argued that as a general rule:

> [I]t would be far better in the interest of the administration of justice, and far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt the rule that no client is ever to be penalized . . . because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head.[115]

In contrast, the four-to-three majority opinion in *Link,* a civil case dismissed when a lawyer did not prosecute it diligently, held that having freely chosen his (retained) counsel, the client was charged with the consequences of his chosen agent's conduct.[116] "Any other notion would be wholly inconsistent with our system of representative litigation," wrote Justice Harlan.[117] Again, some system-wide assessment of costs and consequences, taking into account developments in the fifty years since 1962, would be useful.

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112. *See* discussion *supra* Part II.A.

113. For an example, see Dunphy v. McKee, 134 F.3d 1297, 1301 (7th Cir. 1998) (holding that, although no "ironclad" requirement dictates notice to a client of impending dismissal of his case as a result of a lawyer's omissions or errors, regardless of whether counsel is retained or appointed by court, the district court has the power to notify the client and "should weigh the extent to which the responsibility for the neglect of the case lay with the lawyer rather than the client" as well as consider "penalizing the lawyer rather than the client").

114. 370 U.S. 626 (1962).

115. *Id.* at 648 (Black, J., dissenting).

116. *Id.* at 633–44 (majority opinion).

117. *Id.*

Finally, and circling back to agency doctrine for an analogy, the facts of *Maples* suggest a distinct trigger for a duty to give notice directly to a represented client: the State's awareness of facts from which it may reasonably be inferred that the client's lawyers no longer effectively represent him. As discussed above, at some point the Assistant Attorney General who represented the State in Maples's post-conviction proceedings appears to have reached that conclusion.[118] Separately, the court clerk's receipt of the "Return to Sender" envelopes at a minimum gave notice that something might be seriously awry in the representation of Maples, particularly if the court knew that local counsel in such cases served only to obtain *pro hac vice* admission for out-of-state *pro bono* counsel.

Apparent authority is a long-established basis in agency doctrine on which a principal may be charged with the legal consequences of an agent's actions even though the agent lacks actual authority to take such action on the principal's behalf.[119] Whether an agent acts with apparent authority turns on whether the third party with whom the agent interacts reasonably believes the agent to act with actual authority and whether that belief is traceable to a manifestation by the principal.[120] When a third party's belief is unreasonable, the principal is not bound on the basis of apparent authority.[121] In *Maples*, the re-appearance of the notices sent to Maples's out-of-state counsel marked "Return to Sender" could call into question whether, without further inquiry, it was reasonable for the clerk to continue to believe that those lawyers continued to represent Maples. Circumstances that challenge the reasonableness of continuing to believe that a particular lawyer effectively provides representation to a client might also trigger a duty to notify the client directly. Although this duty does not stem from agency doctrine itself, the extensive body of cases determining whether an agent acted with apparent authority may help clarify when agents of the state, like the trial court clerk and the Assistant Attorney General in *Maples*, could not reasonably believe that a client's counsel of record continued to represent that client.

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118. *See supra* text accompanying notes 63–69.
119. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).
120. *Id.*
121. *Id.*; *id.* § 3.03.

IV. CONCLUSION

The majority's opinion in *Maples* is narrowly drawn to resolve the immediate petitioner's misfortune with a close focus on the facts that led to his predicament. The opinion, building on the framework articulated in Justice Alito's concurring opinion in *Holland v. Florida*, locates bases within agency doctrine itself to excuse a client from the consequences of flawed legal representation. Additionally, the case should serve as a cautionary landmark, illustrating that a sequence of errors can lead to grave consequences. The case's broadest significance may well be pedagogical, emphasizing to lawyers (and law students) the responsibility due clients from individual lawyers and the firms through which they practice law.