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Brief of the Week: A rarity among briefs — an amica

TONY MAURO

The case that embodies every lawyer's nightmare is set for argument before the U.S. Supreme Court on October 4, the second day of the fall term.

Briefing has flowed in on both sides of *Maples v. Thomas*, in which Alabama death row inmate Cory Maples is closer to execution in part because his pro bono lawyers left their firm and blew a deadline for challenging the denial of his post-conviction appeal.

Among the amicus curiae briefs from groups ranging from the NAACP Legal Defense and Educational Fund, the Cato Institute and the state of Texas, one is unique.

For one thing, it is called an amica curiae brief, because it was filed on behalf of one woman. For another, it focuses exclusively on the law of agency, which sounds far removed from capital punishment law, but is actually central to the case.

Authored by O'Melveny & Myers partner Walter Dellinger, the brief represents the view of one of Dellinger's Duke University School of Law colleagues Deborah DeMott, whom Dellinger describes as "the leading scholar on the law of agency." DeMott was the reporter for the American Law Institute's *Restatement (Third) of Agency.*

DUKE LAW SCHOOL'S DEBORAH DEMOTT

It is only the seventh amica curiae brief filed in Supreme Court history, Dellinger reports. Only two were filed before 2000, he said, "But the pace is picking up -- five 'amica' briefs have been filed so far this century. Hopefully, this styling will soon cease to seem unusual." (See chart below of previous amica curiae briefs.)

DeMott's brief argues that at the time of the missed deadline, none of Cory Maples' lawyers could have been regarded as his agents to the extent that Maples could be held responsible for their mistakes.

Maples, convicted of killing two drinking buddies in 1995, was represented on appeal by two Sullivan & Cromwell associates from New York. In addition, an Alabama lawyer signed on as local counsel to enable the New Yorkers to appear *pro hac vice* in Alabama courts.

When the trial court rejected their initial appeal of the conviction, the court clerk's office sent notice to the three lawyers. By then, however, the Sullivan & Cromwell lawyers had left the firm for positions that left them unable to represent Maples. So the notice was sent back unopened by the firm's mailroom, stamped "Return to Sender" and "Left Firm." The Alabama lawyer did not respond. The Alabama clerk made no effort to reach the lawyers, and any appeal was time-barred.

According to the DeMott brief, under rules of agency, Maples had been abandoned by the Sullivan & Cromwell lawyers. They showed disloyalty to their client by not informing the Alabama court of their departure or of appointment of any substitute counsel. "The actions by Maples's attorneys do not meet any plausible standard for attributing responsibility" to Maples, the brief states. And since they were representing Maples "on an individual basis" under Sullivan & Cromwell rules, neither the firm itself nor any other lawyer there had authority to bind Maples

As for the Alabama lawyer, DeMott argues that he is "best classified as a subagent" to the Sullivan & Cromwell lawyers, so his responsibilities, if any, ended when they abandoned the client.

DeMott also highlights the state's failure to make "reasonable inquiry" into the status of Maples' representation after the notices were returned unopened. That failure, especially "in a context with such grave consequences," the brief argues, leaves the state unable to claim that Maples was responsible for the missed deadline.

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Previous Amica Curiae in the Supreme Court	
Anne Barschall	*Bilski v. Doll, 2009*
Bonnie Snavely	*Marshall v, Marshall, 2006*
Emily Lyons	*Scheidler v. National Organization for Women, 2005*
Leandra Lederman	*Ballard v. Commissioner of Internal Revenue, 2004*
Jane Jacobs	*Kelo v. New London, 2004*
Rita Gluzman	*U.S. v. Morrison, 1999*
Joni Rabinowitz	*Singer v. U.S., 1964*

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