No.

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LEE TABLER,

Petitioner,

-v-

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: April 11, 2024

CAPITAL CASE

Question Presented

At a hearing to determine whether Richard Tabler could waive his right to state habeas review, his attorneys explicitly refused to participate, declaring that they "d[id] not announce ready[] because we do not intend to take a position one way or the other." Counsel left Mr. Tabler to proceed on his own. They did not object to the court's erroneous instructions indicating that his habeas proceedings began only after his direct appeal concluded, meaning he could change his mind at any time before the direct appeal decision. And they never told the court about an expert report detailing their client's severe mental impairments. The court proceeded without asking Mr. Tabler whether he wanted alternative counsel or intended to waive his state right to counsel. Instead, it elicited Mr. Tabler's assertion, "I'm competent enough," and determined he was competent to proceed. Mr. Tabler later attempted to revive his habeas proceedings within the time the state court had indicated he could do so, but by then he had missed the actual deadline for filing, a date no one had informed him about. As a result, federal courts on habeas review held that he had procedurally defaulted his Sixth Amendment claim of ineffective assistance of trial counsel.

This Court held in *Maples v. Thomas*, 565 U.S. 266 (2012), that counsel's abandonment of a client in state court proceedings severs the agency relationship between counsel and client and excuses procedural default in federal habeas proceedings. And in *Martinez v. Ryan*, 566 U.S. 1 (2012), it held that cause to excuse procedural default also arises where counsel is either ineffective or absent in state

post-conviction proceedings that provide the initial opportunity to review ineffectiveness of trial counsel claims. The court below refused to apply either decision to excuse default here.

The question presented is: Where counsel's renunciation of representation leads to a procedural default in state post-conviction proceedings that provide the initial opportunity to challenge ineffectiveness of trial counsel, does that renunciation constitute cause to excuse the default in federal habeas proceedings?

Parties to the Proceeding and Corporate Disclosure Statement

Petitioner is Richard Lee Tabler. Respondent is Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division. No party is a corporation.

Related Proceedings

Ex parte Tabler, No. WR-72,350-01 (Tex. Crim. App. Sep. 16, 2009) (denying motion to resume representation); App. 176a.

Tabler v. State, No. AP-75,677, 2009 WL 4931882 (Tex. Crim. App. 2009) (affirming trial court judgment on direct appeal); App. 178a.

Tabler v. Texas, 562 U.S. 842 (2010) (denying petition for certiorari); App. 201a.

Tabler v. Thaler, No. W-10-CA-034 (W.D. Tex. Feb. 9, 2012) (denying writ of habeas corpus); App. 139a.

Tabler v. Stephens, 588 F. App'x 297 (5th Cir. 2014) (denying certificate of appealability); App. 104a.

Tabler v. Stephens, 591 F. App'x 281 (5th Cir. 2015) (granting panel rehearing and remanding to district court); App. 131a.

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Petition For A Writ Of Certiorari

(Capital Case)

Petitioner Richard Tabler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Jurisdiction

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on October 19, 2023, and a timely petition for rehearing was denied on November 14, 2023. On February 5, 2024, Justice Alito granted a thirty-day extension of time, to March 13, 2024, to file a petition for certiorari. On February 27, Justice Alito granted a second extension, to April 12, 2024. *See* Dkt. No. 23A713.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254.

Constitutional And Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . .to have the Assistance of Counsel for his defence.

Opinions Below

The opinion of the court of appeals is available at 2023 WL 6892183 and reprinted in the appendix at App. 1a.[1] The opinion of the district court is reported at 543 F. Supp. 3d 461 and reprinted in the appendix at App. 17a.

[1] Except for citations to the appendix to this petition, which is cited as App.____, the following citation abbreviations from the Fifth Circuit briefing apply:

Statement of the Case

A. Introduction

At a hearing in state court to determine whether Richard Tabler could waive habeas review of his convictions and death sentence, his appointed attorneys expressly renounced their role as counsel and refused to take part, leaving him unrepresented at a crucial juncture in his case. Although counsel had ample grounds to oppose the waiver as incompetent and involuntary, they took "no position" and simply refused to participate in any way. They never disclosed to the court a detailed neuropsychological report describing Mr. Tabler as severely mentally ill, finding impaired neurocognitive functioning, and assessing his overall functioning at 15 on a 100-point scale. Nor did they object or advise Mr. Tabler when the court incorrectly informed him that, "if [his] direct appeal is affirmed," he could "go forward with the state habeas appeal by filing a state petition for writ of habeas corpus," App. 226a, thereby indicating that Mr. Tabler could change his mind about seeking habeas review at any time before his direct appeal concluded. In fact, under Texas law, a defendant must file the habeas petition within 45 days of the government's brief on direct appeal, long before the Court of Criminal Appeals rules.

Despite counsel's open refusal to participate, the state court did not ask Mr. Tabler whether he wanted to proceed without the representation that state law

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Fifth Circuit record on appeal: ROA.___, and excerpts from the record for that appeal: RE___.
Record on first Fifth Circuit appeal: R.___, and excerpts from the record for that appeal: RE1.___.
State court proceedings in the Bell County Reporter's Record prepared for direct appeal: [volume number] RR [page number].
Pleadings and orders in Bell County Clerk's Record: [volume number].CR.[page number].

guaranteed him and proceeded without obtaining an intelligent and voluntary waiver of his right to counsel. Instead, after misinforming Mr. Tabler of the timing of his habeas proceedings, it simply accepted his waiver of state habeas review without counsel. When Mr. Tabler changed his mind—before direct review ended, as the state court had indicated he could—he had missed the 45-day deadline.

In federal habeas proceedings, the court of appeals ruled that by waiving state habeas review, Mr. Tabler had defaulted any federal claims he could have raised, including ineffective assistance of trial counsel (IATC).

That decision was wrong. In *Maples v. Thomas*, 565 U.S. 266 (2012), this Court held that where counsel abandon their role as advocates, they sever the agency relationship with their client, supplying cause to excuse a resulting default on federal habeas review. And in *Martinez v. Ryan,* 566 U.S. 1 (2012), the Court held that the denial of counsel, through either ineffectiveness or absence, also constitutes cause for procedural default of an IATC claim where the denial comes in an "initial-review collateral proceeding," *i.e.*, the first opportunity the state provides to raise IATC. *Id.* at 17. Both cases support finding cause here, because Mr. Tabler's counsel renounced their role as counsel, and left him to proceed without counsel at all.

The court below refused to follow *Maples* or *Martinez.* It deemed *Maples* distinguishable because Maples's counsel abandoned him without notice, while Mr. Tabler's counsel abandoned him with notice. App. 13a. But with or without notice, counsel's refusal to participate in the hearing on waiver ended the agency relationship; indeed, notice only confirms the severance of agency. And the court

declined to follow *Martinez*, finding Mr. Tabler's attorneys not ineffective because they arranged for a mental health evaluation, even though they then abandoned him at the critical point at which he waived. App. 12a-13a.

This case provides an important opportunity to clarify that when counsel wholly renounce their role in an initial-review proceeding, as here, federal habeas courts should treat that renunciation as cause for a resulting default. The courts of appeals have reached divergent results on similar facts. the question is important because it goes to the critical role of counsel in ensuring fair administration of the death penalty, especially where capital defendants, many of whom are mentally ill, frequently change their minds about whether to proceed with their post-conviction review. And the question is cleanly presented, having been squarely raised and ruled upon below. Presentation of federal questions below.

This is an appeal from the denial of an amended habeas petition that raised Sixth Amendment claims of ineffective assistance of trial counsel, App. 452a, and sought to excuse Mr. Tabler's default of the claims in the state court, in part, because Mr. Tabler's state habeas counsel wholly abandoned him in the wavier hearing, thereby severing any agency relationship and denying him counsel under *Maples* and *Martinez*. App. 349a, 360a, 375a, 378a. The district court denied habeas relief without holding a hearing, rejecting the *Maples* and *Martinez* arguments and finding the Sixth Amendment IATC claim procedurally defaulted, but it granted a certificate of appealability (COA) on a narrow set of issues. App. 17a.[2]

[2] App. 35a, 38a-39a & nn.10, 11.

Mr. Tabler appealed, and again argued that his default should be excused under *Maples* and *Martinez*[3] and that trial counsel provided ineffective assistance.[4] In a per curiam opinion issued on October 19, 2023, the court of appeals declined to find cause under *Maples* because Mr. Tabler had notice that his counsel had abandoned him. App. 9a-14a. And it declined to follow *Martinez* because "his habeas attorneys followed his explicit wish to drop further habeas proceedings, reasonably finding him competent to make this decision for himself." App. 11a (quotation marks and citation omitted).

This case presents the question whether counsel's wholesale abandonment of their client in initial-review proceedings provides cause to excuse procedural default of his IATC claims under *Maples* and/or *Martinez*. The hearing transcript reflects counsel's explicit renunciation and non-participation, and therefore there is no dispute about the facts.

B. State Court Proceedings

Mr. Tabler was convicted and sentenced to death for capital murder on April 2, 2007. ROA.6377-79, ROA.7092-95. The trial court appointed Karyl Krug to represent him for direct appeal and David A. Schulman (and later second chair John Jasuta) to represent him for concurrent state habeas review. ROA.3642. Texas law provides a statutory right to counsel for state post-conviction proceedings in capital cases. *See* Tex. Code Crim. Proc. Art. 11.071(2)(a).

[3] App. 578-80a, 595a-604a, 638a, 648a-50a, 657a.
[4] App. 618a, 663a, 665a, 671a, 669a, 683a, 689a.

State habeas counsel obtained funding for a mitigation specialist, but the specialist never interviewed any witnesses. ROA.1270-72. Mr. Tabler repeatedly told Mr. Shulman, his lead counsel, that he wanted to waive his state habeas review "after my direct appeal," but just as repeatedly retracted that request. Mr. Shulman and Ms. Krug both gave Mr. Tabler inaccurate information about the deadline for waiver, leading him to believe he could change his mind at any point before his direct appeal concluded. ROA.1280-1309. In fact, he had only until 45 days after the filing of the State's appeal brief, a deadline *no one* informed Mr. Tabler about. *See* Tex. Code Crim. Proc. Art. 11.071 § 4(a).

By June 2008, after Mr. Tabler had reversed position several times on whether to waive his post-conviction review, Mr. Schulman requested and the court authorized the retention of Dr. Kit Harrison for neuropsychological testing and a competency evaluation. ROA.1298-1304. The doctor never offered an opinion on competency to waive habeas review but did indicate in a two-page report, sent to Mr. Schulman on July 28, 2008, that Mr. Tabler was "forensically competent" to decide to "suspend his automatic appeal." At the time of the doctor's evaluation, however, Mr. Tabler wanted to *continue* pursuing his "appeals," so the issue was hypothetical. ROA.1311-12. Later that summer he again changed his mind, but the doctor did not examine him at that time. ROA.1793.

In September, Mr. Schulman received Dr. Harrison's full, 17-page neuropsychological report, which assessed Mr. Tabler's global functioning at 15 on a 100-point scale, reflecting severe impairment. ROA.1503. Dr. Harrison wrote that

Mr. Tabler "demonstrates a rapid-cycling mood destabilization with strong evidence of Bipolar Disorder, Type I," along with "full-blown manic and euphoric ideation, which is evident during interview, coupled with obvious rapid-cycling depression, suicidality, intermittent explosiveness, and surging anger with a moment's notice." ROA.1493. He described Mr. Tabler as "mildly psychotic," and suffering from "a deep and severe constellation of mental illnesses [that] have been disabling and debilitating for him since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." Counsel never gave the court this report or even disclosed its existence.

On September 30, 2008, the state habeas court conducted a brief hearing, covering only thirteen transcript pages, on Mr. Tabler's waiver of state habeas review. App. 224a-36a. Mr. Schulman announced that, while present for the proceeding, "we do not announce ready[] because we do not intend to take a position one way or the other of what should happen today." App. 224a. Counsel took no part in the ensuing colloquy between Mr. Tabler and the court. Counsel made no objection when the court advised Mr. Tabler, incorrectly, that "if [his] direct appeal is affirmed," he could "go forward with" a state habeas petition, App. 226a, implying that he could change his mind until that time. In fact, in Texas, state habeas review proceeds simultaneously with the direct appeal, and post-conviction claims must be filed within 45 days of the State's brief on appeal. *See* Tex. Code Crim. Proc. Art. 11.071 § 4(a); App. 225a-27a. Neither the court nor counsel told Mr. Tabler of that deadline. After counsel's renunciation of role, the court did not ask Mr. Tabler whether he wanted to have

substitute counsel, or proceed in the waiver hearing without counsel, much less whether he was knowingly and voluntarily waiving his state right to counsel.

Responding to the court's direct inquiry about his competence, Mr. Tabler insisted, "I'm competent enough." App. 232a. The court relied on a two-page report from a medical expert, drafted at a time when Mr. Tabler had decided not to waive. Counsel did not provide the court with the 17-page report they had obtained from the same expert detailing Mr. Tabler's severe mental impairments. In fact, counsel's only participation was to seek and receive the court's assurance that it relieved them of any further obligation to investigate. App. 235a-36a.

The State filed its brief on direct appeal the next day, October 1, 2008, triggering the 45-day deadline for Mr. Tabler to file his state habeas petition. State's Brief, *Tabler v. State*, 2008 WL 5191415 (Tex. Crim. App. Oct. 1, 2008). Mr. Schulman and Mr. Jasuta had no contact with Mr. Tabler between that day and the date his time to file a state habeas petition expired. ROA.3693. On June 9, 2009, six months *before* the direct appeal decision, which the court and counsel had incorrectly told him was when state habeas proceedings would begin, he wrote the trial court asking to "pick up" his habeas proceedings. ROA.1369. But at that point, he had missed the 45-day deadline.

On July 14, Mr. Schulman and Mr. Jasuta filed a motion to resume representation and establish a new filing date, as set out in Tex. Code. Crim. Proc. Art. 11.071 § 4A(b). ROA.1941. Their only argument for good cause was that Mr. Tabler was "seeking attention," demonstrated an "inability to make sound informed

decisions," and frequently changed his mind. App. 172a. They did not point out that the habeas court and counsel themselves had misled Mr. Tabler about the filing deadline for state habeas review, although this could have established "good cause" for an untimely petition. Nor did counsel support their assertion of Mr. Tabler's "inability to make sound informed decisions" with Dr. Harrison's still-undisclosed 17-page report detailing his severe mental impairments. The CCA denied the motion because it attributed the failure to file to Mr. Tabler's "own continued insistence on foregoing" state habeas review. *Ex parte Tabler*, No. WR-72,350-01 (Tex. Crim. App. Sep. 16, 2009), App. 169a, 177a.

On December 16, 2009, the CCA affirmed the convictions and death sentence on direct appeal. *Tabler v. State*, No. AP-75,677, 2009 WL 4931882 (Tex. Crim. App. 2009); App. 178a. This Court denied certiorari. *Tabler v. Texas*, 562 U.S. 842 (2010); App. 201a.

C. Federal Habeas Proceedings

After the CCA denied relief on Mr. Tabler's direct appeal, state habeas counsel secured appointment as federal habeas counsel. *Tabler v. Stephens*, No. W-10-CA-034, ECF No. 6 (W.D. Tex. Feb. 25, 2010). Over the course of 2010 and 2011, Mr. Tabler again wavered about whether to continue litigating, both before this Court on direct appeal and in federal habeas proceedings.[5] Counsel eventually requested a

[5] In this Court, counsel finally relied on Dr. Harrison's 17-page report to argue that Mr. Tabler's request was "not the product of a voluntary and rational decision," as he "suffers from serious mental disabilities, and at this time is not able to make a voluntary, knowing, and intelligent waiver of his rights to appeal." R.47; RE1 12, at 2. This Court denied certiorari without ruling on Mr. Tabler's request. *Tabler v. Texas*, 562 U.S. 842 (2010).

competency hearing. ROA.81. The district court heard testimony from Dr. Richard Saunders, a court-appointed psychologist, and found Mr. Tabler competent, but ruled that his desire to waive was involuntary, because it was motivated by his fear that his life was in danger in prison. The court therefore refused his request. ROA.126-30, ROA 1506-17.

On February 9, 2012, the district court denied Mr. Tabler's habeas petition; it later appointed new counsel for appeal after counsel conceded they might have a conflict of interest in arguing their own ineffectiveness. App. 139a, ROA.500-02, ROA.522-24. After initially denying a COA, App. 104a, the Fifth Circuit granted panel rehearing and remanded to the district court to determine whether Mr. Tabler could establish cause for the default of any IATC claims and whether they merited relief. App. 131a.

On remand, Mr. Tabler filed an amended petition arguing that trial counsel provided ineffective assistance in the investigation, preparation, and presentation of a mitigation case. He supported this claim with a 1,000-page appendix that included medical, mental health, and incarceration records, a 35-page life history by a licensed social worker, and seven expert reports. App. 238a, 246a-55a, ROA.710, ROA.992-1002. A supplemental appendix contained the declarations of 24 lay witnesses and experts, and the declaration of trial counsel's neuropsychologist, Dr. Milam. All these witnesses indicated that they would have been willing to testify at trial to the information they provided. ROA.2478-2542.

The evidence included the opinions of qualified experts that Mr. Tabler suffers from two congenital forms of brain damage that have profoundly impaired his functioning since before birth: Klinefelter's Syndrome (KS or 23,xxy, a genetic disorder caused by an extra X chromosome) and Fetal Alcohol Spectrum Disorder (FASD, a birth defect caused by maternal alcohol consumption during pregnancy). Both syndromes impair central nervous system development and functioning. They share common features that include emotional dysregulation, anxiety, depression, impulsivity, executive dysfunction, and learning impairments. ROA.1604, ROA.1639-40.

None of the new evidence proffered in federal habeas review was available to the jurors or the state courts. It was available to both trial and state habeas counsel, but they did not conduct the investigation adequate to reveal it. Although this evidence would have supported a substantial IATC claim, state habeas counsel simply renounced their role as counsel. They let Mr. Tabler waive his state habeas rights without counsel, and on the basis of faulty information about the time he had to change his mind.

Reasons For Granting Certiorari

I. The court below egregiously erred in concluding that counsel's express refusal to participate in a hearing on waiver did not constitute cause for procedural default.

Mr. Tabler's counsel abandoned him in open court, leading to his waiver. "Common 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." *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring). That principle should have been dispositive here. This Court has twice ruled that an attorney's failure to serve as counsel for a client can amount to cause to excuse a resulting procedural default in federal habeas proceedings. In *Maples v. Thomas,* 565 U.S. 266 (2012), and *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court ruled that cause exists when counsel abdicates their role, were ineffective, or were absent in state post-conviction proceedings. In refusing to find cause here based on an open renunciation by counsel, the court below flatly contradicted both *Maples* and *Martinez,* and deepened a split among circuits about the consequences of counsel's renunciation. The decision is wrong and merits this Court's review.

A. An attorney's open refusal to act as counsel in a state post-conviction proceeding severs the agency relationship and denies representation, and therefore constitutes cause to excuse a resulting procedural default of an IATC claim.

This Court held in *Coleman v. Thompson* that the "adequate and independent state ground" doctrine imposes a bar on federal habeas review of claims "when a state court declined to address [those claims] because the prisoner failed to meet a state procedural requirement." 501 U.S. 722, 729-30 (1991). A state prisoner may overcome default by showing "cause" for the default and "prejudice" from the violation of federal law. *Id.* at 750. Applying agency principles, *Coleman* held that ordinary attorney negligence in state post-conviction representation does not supply cause because an attorney acts as the client's agent and the client bears the risk of attorney error. *Id.* at 753. Relieving the client of that risk because of an attorney's inadvertent error would be "contrary to well-settled principles of agency law." *Id*. at 754 (citing

Restatement (Second) of Agency § 242 (1958) (master is subject to liability for harm caused by negligent conduct of servant within the scope of employment)).

The Court has recognized, however, that counsel's abdication of their role in state post-conviction proceedings *can* constitute cause to excuse procedural default. In *Maples*, state post-conviction counsel left their law firm for other jobs without seeking permission to withdraw from representation, arranging for new counsel, or informing Maples that they would no longer represent him. As a result of their departure, Maples missed the deadline for filing a post-conviction appeal. 565 U.S. at 270-71. This Court held that counsel's abandonment provided cause to excuse the default in federal habeas review. Acknowledging that the client, as the principal in an agency relationship, ordinarily "bears the risk" of counsel's "negligent conduct," *id*. at 281, the Court reasoned that "[a] markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Id.* The *Maples* Court held that counsel's abandonment constituted cause to excuse the procedural bar and remanded for an assessment of whether Maples could demonstrate prejudice. *Id*. at 290.

In *Martinez*, state post-conviction counsel refused to file an advocate's petition, claiming only that she could find no colorable claims. 566 U.S. at 6. Martinez was essentially left unrepresented. He never responded to the court's invitation to submit a pro se brief because, he alleged, his counsel never told him about the ongoing collateral proceedings. The post-conviction court dismissed the action. *Id*. When

Martinez, represented by new counsel, attempted to file a new post-conviction petition alleging IATC, the state courts dismissed the petition as procedurally barred. The federal courts similarly ruled Martinez's claims procedurally barred.

This Court recognized a narrow equitable exception to its procedural default rule, holding that where IATC claims must be raised in the first instance in an "initial-review collateral proceeding," cause to excuse procedural default exists "if, in the initial-review collateral proceeding, *there was no counsel* or counsel in that proceeding was ineffective." 566 U.S. at 17 (emphasis added).[6] This Court has extended *Martinez* to states like Texas, where the procedural framework "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise" an IATC claim on direct appeal. *Trevino v. Thaler*, 569 U.S. 413 (2013).

Maples and *Martinez* make clear that where, as here, counsel refuse to participate in an "initial review collateral proceeding," leaving the client effectively unrepresented and leading to a procedural default, cause exists to excuse procedural default in federal habeas.

B. Counsel's renunciation left Mr. Tabler unrepresented and established cause to excuse his default.

Mr. Tabler's counsel were physically present at his waiver hearing, but that was it. They began by refusing to announce ready, because they would take no

[6] Whether one characterizes Mr. Tabler's counsel here as ineffective or absent is immaterial, as either provides cause under *Martinez*. Lower courts have found cause to excuse default under *Martinez* for prisoners who had no representation in state post-conviction proceedings. *See, e.g.,* D*ixon v. Baker,* 847 F.3d 714, 721-22 (9th Cir. 2017) (fact that petitioner was pro se during state post-conviction proceedings sufficient to establish cause); *Sneathen v. Sec'y Dep't of Corr*., 787 F. App'x 567, 572-73 (11th Cir. 2019) (petitioner's pro se status after state post-conviction court denied motion to appoint counsel establishes cause).

position whatsoever in the proceeding. True to their word, they did nothing—even when the court misled Mr. Tabler about when his state habeas proceedings would begin, and even though they had obtained a 17-page expert report attesting to Mr. Tabler's severe mental impairments, information highly relevant to whether he was competent to make an intelligent and voluntary waiver of his right to pursue post-conviction relief under state law. *See* Tex. Code Crim. Proc. Art. 11.071(2)(a).

As a result of his attorneys' renunciation, Mr. Tabler was left without counsel at the very point of deciding whether to pursue or waive his state collateral review. Under both *Maples* and *Martinez* his counsel's refusal to participate was cause to excuse the default.

Had counsel not renounced, they could have altered the result in two ways. First, they had the 17-page expert report detailing Mr. Tabler's "constellation" of severe mental illnesses and globally impaired functioning, which seriously undermined his competence to make an intelligent and voluntary waiver, yet they did not even provide the report to the court charged with determining competence to waive at a hearing designed to assess that question. Counsel could also have pointed to the fact that the two-page competency report did not assess Mr. Tabler's competence to waive post-conviction proceedings and evaluated his waiver of automatic appeal at a time when he was not seeking to waive his rights. Counsel could have argued, therefore, that the report was entirely conjectural.

Second, counsel could have objected to the court, and advised Mr. Tabler, that, contrary to the court's misleading instructions, his state habeas proceedings would

not begin "after" his direct appeal concluded but would run concurrently. Counsel could have explained to Mr. Tabler that the deadline for changing his mind (again) was 45 days from the date the State filed its appeal brief, and not, as the court indicated, at any time before the direct appeal concluded. But they never informed him of that fact, either beforehand, at the hearing, or thereafter. In fact, they had no contact with him whatsoever between the time the State filed its appeal brief (one day after the waiver hearing), and the 45-day deadline for pursuing habeas. As a result, when Mr. Tabler did in fact change his mind and attempt to pursue habeas review, well before the direct appeal concluded, he had missed the 45-day deadline.

In the famous words of Oliver North's counsel, Brendan Sullivan, attorneys are not "potted plants."[7] Mr. Tabler's counsel had an obligation to represent their client until relieved, Tex. Code Crim. Proc. Art. 26.04, and not to sit silently and "take no position," leaving their client unrepresented. Indeed, because of what counsel knew about Mr. Tabler's mental challenges, they had an obligation not just to represent him, but to oppose waiver. *See* Tex. Disciplinary R. Prof'l Conduct 1.16(b); *Restatement of Law Governing Lawyers* § 31(c) & cmt.; *see also, e.g.,* I*n re McCann,* 422 S.W.3d 701, 708 (Tex. Crim. App. 2013) ("[A] client's ability to define his or her own best interests may end when an attorney's duty [under rules of criminal procedure]. . . begins—when an attorney reasonably believes that the client's ability to make decisions in his or her best interest is compromised."). Texas law allows a

[7] https://www.gettyimages.com/detail/video/attorney-brendan-sullivan-counsel-for-lieutenant-colonel-news-footage/1272259940.

state habeas petitioner to waive the right to review only if the waiver is knowing, intelligent, and voluntary. *See, e.g.,* E*x parte Reedy,* 282 S.W.3d 492, 503 (Tex. Crim. App. 2009). Effective advocacy could have both demonstrated Mr. Tabler's inability to make a competent and voluntary waiver and provided him with an accurate understanding of the consequences. That, at a minimum, would have ensured that if and when he changed his mind again, he would know when he had to proceed. What counsel could not do is what they actually did—nothing at all.

Under both *Maples* and *Martinez*, counsel's conduct here constitutes cause to excuse procedural default. Counsel's renunciation of their role severed their agency relationship and constituted cause under *Maples*. And the same refusal to participate in an initial-review collateral proceeding constitutes cause to excuse default of the IATC claim under *Martinez*.

C. The court of appeals' efforts to distinguish *Maples* and *Martinez* fail.

The court of appeals misapplied both this Court's precedents and basic principles of agency law in declining to find cause under *Maples* and *Martinez*.

1. *Maples v. Thomas*

The court of appeals characterized this case as "worlds away" from *Maples* simply because Maples's attorneys abandoned their representation without telling him, while Mr. Tabler's counsel announced in open court that they would play no role. App. 13a-14a. But that distinction is immaterial here. Under agency law, counsel's notice to Mr. Tabler only *confirmed* the renunciation, rather than obviating it. An agent's decision to renounce representation ends the agency relationship between

counsel and client. The fact that counsel renounces with notice does not change that conclusion. Because the principal-agent relationship rests on mutual consent, *Restatement 3d of Agency, §* 3.01 & cmt. b, it ends when either party withdraws consent. The fact that one party gives notice to the other party, far from preserving the relationship, confirms the severance. *Restatement 3d* §3.10(1); *see also Restatement 2d* 5 Intro. Note; *id*. § 118 ("Authority terminates if the principal or the agent manifests to the other dissent to its continuance."). "The rationale for the power to revoke or renounce is that agency is a consensual relationship…. *A manifestation of nonconsent, or dissent, to the other party is determinative.*" *Restatement 3d* § 3.10 cmt. b (emphasis added). *See, e.g., Sec. Servs., Inc. v. K Mart Corp.,* 996 F.2d 1516, 1523 (3d Cir. 1993), *aff'd*, 511 U.S. 431 (1994).

For the same reason, a lawyer's authority to represent a client ends when the lawyer withdraws, whether or not the lawyer withdraws properly. *See Restatement of Law Governing Lawyers* § 31(c) & cmt. f (citing Restatement 2d *of Agency*, § 118).

The court of appeals also reasoned that counsel did not abandon Mr. Tabler because they performed some work before the waiver hearing and were following Mr. Tabler's wishes. App. 13a. But preliminary work outside court does not somehow offset wholesale abandonment of role in court, nor is there any evidence that Mr. Tabler asked counsel not to participate. That was their decision, not his. And despite counsel's open abdication, the court made no effort to offer alternative counsel or ascertain whether Mr. Tabler sought to waive *both* his state law right to counsel for post-conviction and his right to post-conviction review itself. Accordingly, *Maples*

governs, and counsel's abandonment of Mr. Tabler constitutes cause for his subsequent uncounseled default.

2. *Martinez v. Ryan*

The court's efforts to distinguish *Martinez* fare no better. The court held that counsel were not ineffective under *Martinez* because they followed Mr. Tabler's "explicit wish to drop further habeas proceedings" and because Dr. Harrison had declared him "forensically competent," even though that assessment was made at a time when Mr. Tabler was not seeking to waive and did not address the voluntariness of his vacillating waiver requests. App. 11a-13a. Both rationales are flawed. Where, as here, counsel renounce their role altogether, they are both ineffective and "absent," either of which supplies cause under *Martinez* for default of an IATC claim in an initial-review collateral proceeding.

In fact, counsel did not follow Mr. Tabler's instructions; indeed, lead counsel told him beforehand that it was "not my job" to do so. They did not advocate at all, for or against waiver. This is not just ineffective counsel; it is no counsel at all. And *Martinez* makes clear that both the absence of counsel and ineffective counsel supply cause to excuse a default of an IATC claim in an initial-review collateral proceeding. 566 U.S. at 17. Yet in attempting to distinguish *Martinez*, the court of appeals simply overlooked the fact that counsel abdicated their role altogether, rendering them both absent and ineffective.

Nor does the fact that Dr. Harrison had earlier deemed Mr. Tabler "forensically competent," at a time when he had not chosen to waive his appeals, remotely excuse counsel's failure to play any role in his waiver hearing. Any reasonable counsel would

at a minimum have brought to the court's attention Dr. Harrison's subsequent 17-page report detailing his severe mental impairments, and would have pointed out Mr. Tabler's history of changing his mind repeatedly about whether to waive. The Fifth Circuit panel dismissed the second report as merely longer than Dr. Harrison's initial two-page letter. App. 12a. But the issue is not the report's length, but its substance. Any reasonable counsel would have recognized that the findings of severe mental impairment in the 17-page report were relevant to Mr. Tabler's ability to waive voluntarily and competently. The district court, in fact, later concluded that Mr. Tabler's request to waive federal habeas proceedings was involuntary.

The court of appeals relegated to a footnote counsel's failure to correct the court's misleading instruction about the timing of state habeas review, and therefore of Mr. Tabler's deadline for changing his mind. App. 10 n.3. The court excused counsel's failure on the ground that "habeas counsel repeatedly told Tabler that he needed to decide whether to proceed on state habeas long before his direct appeal was resolved," and that in one letter counsel told him that "waiting until the CCA decided his direct appeal would occur well after they would have to file a habeas application." *Id*. Mr. Schulman did mention that the state habeas petition could be filed before the direct appeal decision, *see* ROA.1295, ROA.1307-08, but critically said nothing about the deadline to rescind any waiver. And counsel, like the court, made statements that implied Mr. Tabler would not have to decide until after his direct appeals concluded. In one letter, he told Mr. Tabler, "Under Texas law, an appeal . . . is 'automatic' . . . The reality is that you will be with us until your direct appeal is over. After that . . .

you can choose not to take further steps to obtain relief." ROA.1210 (emphasis added). In another letter, he said, "Nothing, literally nothing, will happen in your case until the Court of Criminal Appeals issues its opinion on your direct appeal . . . I think it is definitely in your best interest to put this decision off until the first day it can have any real effect." ROA.1307-08. Nowhere did counsel ever tell Mr. Tabler that his time to file his state habeas petition would begin to run on the day the state filed its brief and expire 45 days later.

More important, because counsel renounced any role *during* the hearing, they neither objected to nor corrected the court's incorrect inquiry whether Mr. Tabler wanted to waive his appeals "after your direct appeal is concluded." App. 228a, lines 4-6; *see also* App. 226a, lines 4-8; 227a, lines 13-15. The state court's repeated misstatements about when Mr. Tabler's post-conviction case would proceed were the last words Mr. Tabler heard on the subject prior to his doomed efforts to resurrect his post-conviction proceedings. In short, Mr. Tabler reasonably understood, from both his counsel and the court, that he could change his mind until some point "after" decision on his direct appeal, and this was a direct consequence of counsel's failure to correct the habeas court's misleading instructions.

Whether viewed through the lens of *Maples* or *Martinez*, counsel's abdication of role amounted to cause sufficient to excuse procedural default, and the court of appeals' conclusion to the contrary is wrong. This Court should grant review and make clear that when counsel abdicates their role in an initial-review collateral proceeding, that provides cause to excuse a procedural default for an IATC claim.

II. The decision below conflicts with decisions of multiple other courts of appeals with respect to renunciation of counsel.

The courts of appeals have reached conflicting conclusions about how to treat an attorney's open abdication of their role. The Third, Sixth, Seventh, and Tenth Circuits, as well as other panels in the Fifth Circuit, have recognized that open renunciation or abandonment severs the agency relationship or otherwise denies counsel,[8] and have relieved litigants of the consequences of their attorneys' abdication of duty. Only the court below and the Eighth Circuit have declined to treat such conduct as grounds for relief. And while the cases described below addressed ineffectiveness claims in contexts where the Sixth Amendment right to counsel applied, the questions of how to treat renunciation and the agency principles at stake are the same.

[8] *See United States v. Cronic*, 466 U.S. 648, 659 (1984) (prejudice presumed where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing").

A. Cases providing relief where counsel renounces role.

In the Third, Sixth, Seventh, and Tenth Circuits, as well as before some panels in the Fifth Circuit, open renunciation denies counsel and severs the agency relationship between attorney and client. In *United States v. Collins*, 430 F.3d 1260, 1265 (10th Cir. 2005), for example, counsel moved to withdraw but "attempted to fulfill his ethical obligation in the meantime" by appearing *silently* in court. Counsel "stated that he would 'not comment' when the district court inquired whether there were any outstanding issues relating to Mr. Collins's competency" and "did not introduce []newly discovered military records and site reports into evidence." *Id.* at 1265-66. The trial judge found competency "without having opportunity to review the new records." *Id.* at 1266. On direct appeal, the Tenth Circuit found constructive denial of counsel due to the "complete absence of adversarial testing" of the prosecution's case, akin to sleeping through proceedings. *Id.* at 1265-66. The court presumed prejudice and remanded for a new trial. *Id.* at 1266-67.

In *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001), counsel undertook no investigation or preparation for a competency hearing. At the hearing, they provided no information and specifically told the court that they had nothing to contribute. They did not challenge the court-appointed psychiatrist's conclusion that Appel was competent, and the court accepted his waiver of counsel. *Id.* at 206-07. The Third Circuit held that counsel failed to "act as [] advocates" or ensure "meaningful adversarial testing" at the competency hearing, constructively denying Appel his Sixth Amendment right to counsel. *Id.* at 217-18. Because Appel was without "the guiding hand of counsel at every later stage of the proceedings which eventually lead

[sic] to his death sentence," the Third Circuit held that Appel should receive a new trial. *Id.* at 218 (internal quotation marks omitted); *see also Hull v. Kyler*, 190 F.3d 88, 109-12 (3d Cir. 1999) (holding that counsel's agreement that client was competent and failure to cross-examine sole expert who disagreed with incompetency diagnoses was "essentially tantamount" to denial of counsel).

In *Lewis v. Zatecky*, 993 F.3d 994, 1006 (7th Cir. 2021), the entirety of counsel's "assistance" at sentencing on a felony murder conviction was a statement rejecting his role as advocate. Counsel announced: "Judge, I'm going to defer to [the client] if he has any comments. I don't have anything to add." *Id.* The Seventh Circuit held that this behavior "went beyond a failure to conduct adversarial testing; it was an announcement of abandonment." *Id.* Because counsel "gave up on" Lewis and "total[ly] abandon[ed]" their client, the court granted habeas relief. *Id.* at 1006.

In *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984), trial counsel appeared for trial but refused to participate, ostensibly to pursue a "strategy" of preserving pretrial motions. Counsel told Martin he would not participate in the trial but did not explain why. *Id.* at 1248. Although counsel knew the client had a reasonably strong defense, counsel stood "mute" throughout trial, "offering the jury virtually no option but to convict." *Id.* at 1250. The Sixth Circuit held that "refusing to participate is not an 'exercise of reasonable professional judgment.'" *Id.* The defendant was deprived of representation "as thoroughly as if [counsel] had been absent." *Id.* at 1250-51. This was "constitutional error even without any showing of prejudice" requiring habeas relief. *Id.* at 1251-52; *see also United States v. Ross*, 703 F.3d 856, 871-73 (6th Cir.

2012) (remanding for determination whether "standby" counsel conducted "meaningful adversarial testing" at competency hearing where he was present but made no argument).

Even the Fifth Circuit, which here refused to find cause for Mr. Tabler's procedural default, has provided relief in similar situations, in line with the above circuits. In *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992), for example, the court granted relief where counsel appointed for resentencing abandoned his role. He "did not consult with [the client], had no knowledge of the facts, and acted as a mere spectator." Counsel allegedly announced at the hearing, "I am just standing in for this one," and then said nothing else throughout the hearing. *Id.* at 159. The Fifth Circuit held that the absence of any effort to represent Tucker's interests constructively denied him counsel, requiring a presumption of prejudice and habeas relief. *Id*.

Similarly, in *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997), counsel performed no advocacy duties before an indigent client's guilty plea hearing. At the hearing itself, counsel appeared but took "no responsibility for advocating the defendant's interests at a critical phase." *Id.* at 1231. The court held that counsel, "though certainly more sentient than a potted plant," had failed to provide the assistance of counsel. *Id.* Because Childress was constructively denied the assistance of counsel, the resulting convictions could not support an enhanced sentence and required habeas relief. *Id.* at 1232.

Thus, the Third, Sixth, Seventh, and Tenth Circuits, as well as other panels within the Fifth Circuit, have all recognized that when counsel abandons their role and no longer provides representation, relief is warranted.

B. Cases denying relief where counsel renounces role.

In contrast to the circuits above, the court below and the Eighth Circuit have denied relief where an attorney renounced his or her role. In *Raymond v. Weber*, 552 F.3d 680, 680 (8th Cir. 2009), the court appointed counsel to assist in a competency hearing, as required by state law. Appointed counsel conducted legal research, prepared for cross-examination, and reviewed prior psychological reports. *Id.* at 683. At the hearing, however, counsel informed the court that he would not "ask any questions or present any evidence which would tend to bring [Raymond's] competency into question." *Id.* at 682. He sat passively as a "warm body," *id.* at 684, while Raymond personally examined the expert, over government objections and contrary to state law. *Id.* at 682. On federal habeas review, the Eighth Circuit acknowledged that the competency hearing was a critical stage at which Raymond had a constitutional right to counsel. *Id.* at 684. But it declined to presume prejudice under *Cronic* because counsel had performed some preparation before the hearing, thereby subjecting the prosecution's case to "at least some meaningful adversarial testing." The court therefore denied habeas relief. *Id.* at 685.

In short, the courts of appeals are divided on whether counsel's wholesale abandonment of their role in court proceedings denies counsel or severs the agency relationship. This case affords an opportunity for the Court to make clear that when

counsel abdicates their role, they provide no representation at all. Where the Sixth Amendment applies, that amounts to ineffective assistance under *Cronic*; where the Sixth Amendment does not apply, it nonetheless provides cause to excuse a procedural default—at least in an "initial-review collateral proceeding" for IATC claims.

III. Whether open renunciation of counsel's role constitutes cause to excuse a default is an important question, especially in a capital case.

The question presented is important because our system relies on counsel for the defense to ensure just results. *See, e.g.,* U*nited States v. Wade,* 388 U.S. 218, 226-27 (1967) ("It is central to [the right to counsel] that … the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."). The right to counsel's advocacy in court proceedings deserves this Court's vigorous protection.

The right to counsel is especially important in capital cases, and in proceedings addressing waiver of rights to review in such cases—both because of the life-or-death stakes and because defendants facing death, understandably, often change their minds about how to proceed. They may be held to their decisions only where those decisions are competent, knowing, and voluntary, and only when they are represented by effective counsel, or have made an intelligent and voluntary waiver of counsel. That manifestly did not happen here.

In repeatedly changing his mind about whether to pursue appeals, Mr. Tabler is not alone. Despairing prisoners who face the death penalty, many with underlying

severe mental health impairments, often seek to waive further review at some point, only to change their minds later. John Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939, 939-40 (2005). "By at least one estimate, a majority of persons on death row request execution at some point during their criminal proceedings[.]"; Kristen M. Dama, *Redefining a Final Act: The Fourteenth Amendment and States' Obligation to Prevent Death Row Inmates from Volunteering To Be Put To Death*, 9 U. Pa. J. Const. L. 1083, 1083 (2007) (citing G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 861 (1983)). The reality is that most capital defendants "at one point or another, express[] a preference for execution over life in prison. Most of them, though, change their minds." Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 Notre Dame L. Rev. 795, 801 (2002) (footnote omitted). Nor are death row defendants unique in this regard. For example, persons facing end-of-life decisions often have difficulty deciding whether to seek medical treatment or not, and often change their mind as the end approaches. *See* Daniela J. Lamas, M.D., *When Faced With Death, People Often Change Their Minds*, N.Y. Times, Jan. 3, 2022, at A22 (describing fallibility of advanced care directives in predicting patient choices about care at end of life).

It is essential, therefore, that courts confronted with requests to waive ensure that the waivers are knowing, intelligent and voluntary, and that the defendants are competent to make the decision. *See Rumbaugh v. Procunier*, 753 F.2d 395, 396 (5th

Cir. 1985) (courts considering applications for waiver of collateral review must decide whether petitioners have mental disease or defect preventing them from understanding legal position or making rational choices); *see also Rees v. Peyton*, 384 U.S. 312, 314 (1966) (same). Of necessity, courts rely on the advocacy of counsel to develop and present the relevant evidence and arguments. A client who at one moment seeks to forego review can present thorny ethical issues, but that does not justify what Mr. Tabler's counsel did: abdicating the duty of advocacy in the courtroom and leaving the client essentially unrepresented and profoundly misled.

In *Maples* and *Martinez*, this Court announced rules for habeas petitioners who were abandoned, unrepresented, or deficiently represented in state collateral review. Both cases support the proposition that where counsel abandons the client, and the client is forced to proceed without counsel, that constitutes cause to overcome a resulting procedural default. The Court should grant review and hold that whenever an attorney abandons a client to proceed alone, cause for a resulting procedural default is established at least in "initial-review collateral proceedings" for IATC claims, as here.

IV. The Court should afford Mr. Tabler the opportunity to demonstrate prejudice

Because the court of appeals found no cause to excuse Mr. Tabler's procedural default, App. 7a, it did not address his showing of prejudice. Thus, if this Court concludes that cause was shown, it should remand for that prejudice determination, as the Court did in *Maples* and *Martinez*.

Mr. Tabler will be able to show that his IATC claims were substantial and should have required an evidentiary hearing and, ultimately, relief. *See Maples*, 566 U.S. at 290; *Martinez*, 566 U.S. at 18. Most important, the district court clearly erred in finding Mr. Tabler's allegations of readily available mitigating evidence unsupported by "a single affidavit" and "tantamount to sheer speculation." App. 67a-68a. In fact, Mr. Tabler submitted a two-volume supplemental appendix to his amended habeas petition, containing 24 declarations by 18 lay witnesses and 6 experts, all of whom stated that they would have testified consistently at trial. ROA.2478-535, ROA.2536-42. The district court did not even acknowledge the existence of this evidence, and instead repeatedly asserted that Mr. Tabler had proffered no supporting affidavits. App. 67a-68a, 79a, 87a.

If the court of appeals had corrected this clearly erroneous ruling, it would have required reassessment of the IATC claims and of the district court's refusal to grant a stay and abeyance for state court fact development.[9] *See Rhines v. Weber*, 544 U.S.

[9] State courts could readily allow further litigation of these claims on the basis of state habeas counsel's errors. Because the Texas CCA has a firm rule that each state habeas petitioner should receive "one full and fair opportunity" to present claims in state habeas review, *see Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002), it has repeatedly granted motions to reinstate habeas proceedings because of attorney error or inadvertence. Article 11.071, § 4A, provides that the CCA may command counsel who files an untimely application or fails to timely file to "show cause," after which the court may appoint new counsel and establish a new filing date. When an applicant's counsel makes mistakes not attributable to the applicant, the CCA has granted a single "bite at the apple" by finding "good cause" under § 4A. For example, in *Ex parte Reynoso* (*II*), 257 S.W.3d 715, 717, 723 (Tex. Crim. App. 2008), the CCA found good cause, despite the petitioner's "waffling" about whether to waive, because counsel's mistaken interpretation of law contributed to the failure to file. *See also, e.g.,* E*x parte Medina,* 361 S.W.3d 633, 637, 643 (Tex. Crim. App. 2011) (good cause where counsel "intentional[ly] refus[ed] to plead specific facts that might support habeas-corpus relief" to advance legal theory); *Ex parte Murphy*, No. WR-70,832-01, 2009 WL 766213 (Tex. Crim. App. Mar. 25, 2009) (good cause found where extension motion filed after deadline due to counsel's misreading of statute); *Ex parte Bigby*, WR-34,970-02, 2008 WL 5245356 (Tex. Crim. App. Dec. 17, 2008) (good cause found for "a simple miscalculation of the dates").

269, 278 (2005) (denying stay and abeyance likely abuses discretion where, inter alia, unexhausted claims "potentially meritorious").

In addition, because the court below ruled exclusively on procedural default, it never decided whether 28 U.S.C. § 2254(e)(2) would bar federal fact development. App. 7a n.2 (citing *Shinn v. Ramirez*, 596 U.S. 366 (2022)); App. 580a-82a (arguing *Ramirez* presents no bar). For the same reasons that counsel's abandonment of role at the waiver hearing excuses the default of state habeas review, § 2254(e)(2) would impose no bar to a federal evidentiary hearing, because the severance of agency means Mr. Tabler is without fault for the "failure to develop" the evidence in state court.

Because the court of appeals refused to treat counsel's abandonment as cause for Mr. Tabler's procedural default, no court has ever heard the evidence showing that his trial counsel provided ineffective assistance. Mr. Tabler has not had the opportunity to prove multiple aspects of counsel's deficient performance, including: inadequate investigation and trial presentation of background and expert mental health evidence; failure to object to inadmissible victim impact and character evidence; and disloyal and ineffective summation remarks. App. 620a, 665a, 671a, 683a, 689a. Nor has Mr. Tabler had a chance to show that, had counsel conducted a constitutionally adequate investigation, they would have discovered, among other things, that Mr. Tabler has suffered since before birth from two congenital forms of brain damage, Kleinfelter's Syndrome and Fetal Alcohol Spectrum Disorder. He has not had a chance to demonstrate the reasonable probability that the undiscovered

mitigating evidence, when reweighed with the all the evidence in aggravation and mitigation introduced at trial, would have led to a different outcome. *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003).

This Court should grant review, rule that counsel's renunciation of the agency relationship at the waiver hearing constituted cause, and remand for further proceedings consistent with its ruling.

Conclusion

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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