No. 23-7227

IN THE

Supreme Court of the United States

RICHARD TABLER,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

Following expert evaluation and a hearing in front of the trial court judge, who also presided over the capital murder trial, petitioner Richard Tabler was permitted to voluntarily waive state postconviction proceedings and forego the submission of a postconviction application for state habeas relief, thereby procedurally defaulting any claims for federal habeas review.

Prior to this hearing, state habeas counsel was diligent in their efforts to develop Tabler's state habeas appeal, hiring an investigator, a mitigation specialist, and seeking appointment of a psychologist for a neuropsychological examination. Habeas counsel attempted to dissuade Tabler when he first sought to waive his appeals, while continuing to investigate claims and seek expert evaluation. While Tabler vacillated on the issue of waiver, the trial court granted habeas counsel's request for a neuropsychological examination, and ordered the expert to also determine whether Tabler was competent to waive his appeals. After examination, the expert determined Tabler was in fact competent to make this decision, and state habeas counsel agreed he was competent. Habeas counsel disagreed with Tabler's decision to waive his postconviction appeal, and informed Tabler he would not *help him waive* his appeals at the court-ordered hearing on his competency. Counsel nevertheless counseled Tabler prior to the hearing on his decision to waive and advised him of the limited role he would play in the hearing. Habeas counsel made himself available to Tabler before the hearing to answer any questions he may have. Habeas counsel also attended the hearing, where—as promised—he took no position on what should happen but provided the trial court with the expert's competency report. At the hearing, Tabler was advised, consistent with what state habeas counsel had told him, that an execution date would not be set until direct appeal was completed, and that Tabler may miss his opportunity to file a postconviction appeal if he waited too long. At the end of the hearing, after the trial court found Tabler competent, habeas counsel agreed to be standby counsel, informing Tabler and the court that they "will stay on as his representatives to whatever extent he wants so long as he's in the system."

On these facts, did the Fifth Circuit Court of Appeals err in concluding that Tabler failed to demonstrate either abandonment or ineffective assistance by state habeas counsel sufficient to demonstrate "cause" to overcome the procedural default of his ineffective assistance of trial counsel claims?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Tabler was convicted of capital murder and sentenced to death for gunning down Mohamed-Amine Rahoumani and Haitham Zayed during the same criminal transaction. While his ultimately unsuccessful direct appeal was still pending, Tabler waived state habeas proceedings. After his filing deadline passed, Tabler changed his mind and sought permission to file a state habeas application, which was denied. Tabler then sought to waive federal habeas proceedings, but the district court denied his request concluding that, while competent to make the decision, it was not voluntary. His federal habeas appeals were ultimately unsuccessful.

Tabler now petitions this Court for a writ of certiorari from the Fifth Circuit's opinion affirming the district court's denial of habeas relief, and rejecting Tabler's argument, proffered as cause to excuse the procedural default of his ineffective assistance of trial counsel (IATC) claims, that state habeas counsel abandoned him or otherwise performed deficiently by not challenging his competency to waive state habeas proceedings. Tabler argues that state habeas counsel's "renunciation of representation" during the competency proceeding amounted to either abandonment pursuant to *Maples v. Thomas,* 565 U.S. 266 (2012), or deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), and should have excused the procedural

default of his claims in the federal habeas proceeding, pursuant to *Martinez v. Ryan,* 566 U.S. 1 (2012). He seeks review from this Court, arguing the Fifth Circuit erred by rejecting his abandonment argument and finding no deficient performance, suggesting a split in the circuits with respect to renunciation of counsel, and seeking remand to the lower court for consideration of prejudice under *Martinez*.

But the Fifth Circuit correctly concluded that Tabler failed to show cause to excuse the procedural default of his unexhausted IATC claim because state habeas counsel neither abandoned him, nor were they ineffective in the hearing to determine Tabler's competency to waive his state habeas appeal. And because Tabler could not prove cause, the Court was not required to decide whether he presented a substantial claim for relief under *Martinez*. Tabler's alleged split among the circuits does not exist. Tabler offers no compelling reason to grant certiorari, therefore his petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider a petition for a writ of certiorari seeking review of the judgment of a court of appeals. *See* 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

In its original opinion, the Fifth Circuit summarized the evidence as follows:

On March 21, 2007, Tabler was convicted of capital murder for the shooting deaths of Mohamed-Amine Rahmouni and Haitham Zayed. During the penalty phase of his trial, the State presented to the jury Tabler's confession that he murdered two women for spreading news of his crimes. Tabler admitted to luring the women to a lake with the promise of drugs and then shooting them each multiple times with the same gun used to murder Rahmouni and Zayed. The jury heard further testimony that Tabler had a history of threatening law enforcement officers and fellow inmates.

Tabler's trial counsel presented mitigating evidence in an attempt to show that Tabler was "not normal" and therefore undeserving of the death penalty. This evidence included: (1) testimony from Tabler's mother and sister about his difficult childhood, potential birth trauma, and history of psychiatric treatment; (2) testimony from Dr. Meyer Proler, a clinical neurophysiologist, concerning an abnormality of the left temporal frontal region of Tabler's brain that causes difficulty learning, planning, and weighing the consequences of actions; (3) testimony from Dr. Susan Stone, a psychiatrist, that Tabler suffered from a severe case of attention deficit hyperactivity disorder, borderline personality disorder, and a history of head injuries, all of which inhibited his ability to rationally assess situations and control his impulses; and (4) testimony from Dr. Deborah Jacobvitz, a psychologist, regarding the impact of parental neglect and abandonment on Tabler's development.

In rebuttal, the state called Dr. Richard Coons, a psychiatrist, who diagnosed Tabler as having antisocial personality disorder. Dr. Coons testified that although individuals with antisocial personality disorder may lack remorse or concern for others, they are not compelled to commit criminal acts. Following the State's rebuttal, both parties presented closing arguments. During the State's closing, the prosecutor argued that Tabler's troubled childhood did not mitigate his culpability because it was not related to the crimes for which he was convicted. After three hours of deliberation, the jury found that Tabler presented a continuing threat to society and that there was insufficient mitigating evidence to warrant a sentence of life imprisonment in lieu of a death sentence. *See* Tex. Code Crim. Proc. art. 37.071 § 2(b), (e). The trial court accordingly sentenced Tabler to death.

Tabler v. Stephens, 588 F. App'x 297, 298–301 (5th Cir. 2014) (footnotes omitted); Pet. App'x C at 105a–06a.

II. The State-Court and Federal Appellate Proceedings.

The Texas Court of Criminal Appeals (CCA) upheld Tabler's conviction and death sentence. *Tabler v. State*, No. 75,677 (Tex. Crim. App. 2009), *cert. denied*, 562 U.S. 842 (2010); Pet. App'x K.

While his direct appeal was pending in the CCA, Tabler waived his right to pursue state habeas proceedings. ROA.[1]3094–3109; ROA.3110–11. After a change of heart, ROA.3112, Tabler sought permission to file a state habeas application. ROA.3288–93. The CCA denied permission, finding no good cause under Texas Code of Criminal Procedure Article 11.071, § 4(A) because the failure to timely file was attributable to Tabler's actions. *Ex parte Tabler*, No. 72,350-01 (Tex. Crim. App. Sept. 16, 2009); Pet. App'x J.

Tabler then sought to waive his federal habeas proceeding. ROA.75–76; *see* ROA.79. After a hearing, the district court determined that while mentally competent to waive his appeals, Tabler's waiver was not voluntary and ordered that his federal habeas proceeding move forward. ROA.86–88, ROA.126–30, ROA.260–80, ROA.278–79. Tabler filed a motion to stay and abate—so that he could again seek state habeas relief—but federal district court denied that

[1] "ROA" refers to the Record on Appeal from the Fifth Circuit.

motion. ROA.139–48; ROA.7 (Text Order of Oct. 11, 2011). The district court then denied federal habeas relief and also denied Tabler's renewed request for a stay and abatement. *Tabler v. Thaler,* No. W-10-CA-034 (W.D. Tex. Feb. 9, 2012); Pet. App'x F. Tabler filed a motion to alter or amend judgment, pursuant to Federal Rule of Civil Procedure 59(e), ROA.475–83, which was denied. ROA.500–02.

On appeal, the Fifth Circuit initially denied Tabler's request for a COA and affirmed the district court's denial of habeas relief. Pet. App'x C. However, on January 27, 2015, the Fifth Circuit vacated its decision in part and remanded the case back to the district court "solely to consider in the first instance whether Tabler, represented by his new . . . unconflicted counsel, can establish cause for the procedural default of any [IATC] claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." *Tabler v. Stephens*, 591 F. App'x 281 (5th Cir. 2015); Pet. App'x D.

Tabler filed an amended federal habeas petition addressing the alleged ineffectiveness of state habeas counsel and prejudice under *Martinez* and raising several defaulted IATC claims. Pet. App'x P. The district court found Tabler did not demonstrate cause and prejudice under *Martinez*, determining that state habeas counsel were not deficient nor was Tabler prejudiced, and that trial counsel were not ineffective. *Tabler v. Lumpkin*, 543 F.Supp.3d 461, 485–87 (W.D. Tex. June 10, 2021); Pet. App'x B, at 31a–39a. Of the claims

Tabler presented, the district court granted a COA regarding the effectiveness of state habeas counsel's assistance when they did not challenge Tabler's competency to waive state habeas proceedings, and whether, pursuant to *Strickland*, Tabler was prejudiced when trial counsel did not object to the introduction of victim-impact evidence at punishment. Pet. App'x B, at 100a–103a. The district court denied a Rule 59(e) motion to alter or amend the judgment and to expand the COA. ROA.7515–35, ROA.7628–31.

On appeal, the Fifth Circuit affirmed the judgment of the district court and denied relief, concluding that Tabler's state habeas attorneys neither abandoned him nor rendered ineffective assistance. Pet. App'x A at 2a. And because he could not establish "cause" under *Martinez*, the court did not reach "prejudice," or the procedurally defaulted IATC claim on which the district court granted COA. *Id.* The Fifth Circuit also denied Tabler's pending motion to expand COA. *Id.* at 2a n.1. This petition follows.

REASONS FOR DENYING THE WRIT

Tabler presents no compelling reason for granting review. *See* Sup. Ct. R. 10. The Fifth Circuit correctly determined that state habeas counsel was not deficient in their representation of Tabler during the hearing on his competency to waive state habeas proceedings, nor did counsel abandon him in those proceedings. Rather, counsel vigorously advocated for Tabler, but ultimately followed his wishes after determining he was competent to make

that decision. Tabler's efforts to create a circuit split on the issue fall short, as the facts of those cases are readily distinguishable. This Court's existing decisions in *Maples* and *Martinez,* provide a sufficient avenue for the reviewing courts to examine Tabler's claims. And Tabler's claims have been sufficiently reviewed by the lower federal courts, which correctly determined Tabler failed to demonstrate "cause" to excuse procedural default. While the Fifth Circuit did not reach the merits of the IATC claim, the district court did, alternatively rejecting his IATC claims on the merits. Tabler fails to establish how the Fifth Circuit erred or why any such error is so compelling that this Court's intervention is called for. Certiorari review should therefore be denied.

ARGUMENT

I. The Fifth Circuit Correctly Concluded that State Habeas Counsel Neither Abandoned Tabler nor Were They Ineffective at the Competency to Waive Hearing.

Tabler argues that counsel's alleged "renunciation" of duties at the hearing to determine whether he was competent to waive state habeas proceedings left Tabler unrepresented and without counsel at a critical stage and amounted to either abandonment or deficient performance of counsel, pursuant to *Maples v. Thomas,* 565 U.S. 266 (2012), and *Martinez v. Ryan*, 566 U.S. 1 (2012). Under either theory, Tabler argues counsel's behavior should have amounted to cause to excuse the procedural default of any IATC claims, and the Fifth Circuit erred in concluding otherwise. However, the Fifth Circuit

correctly concluded that state habeas counsel's refusal to "take a position" in a hearing on Tabler's competency to waive state habeas proceedings—after concluding Tabler was indeed competent to make this decision—did not amount to either abandonment or ineffective assistance of habeas counsel and did not constitute cause. *See* Pet. at 11–21; Pet. App'x A, at 4a, 8a–14a. Certiorari review of this claim should be denied.

Tabler's argument focuses on habeas counsel's refusal to assist Tabler's quest to waive his state habeas appeals. *See* ROA.1329 (letter to Tabler: "I don't think it is my job to help you [drop your habeas corpus action but] I am also of the opinion that it is not my job to argue against it."); 3096 (refusing at the hearing to "take a position one way or the other of what should happen today.") But habeas counsel's decision to take no position—after diligently investigating his state habeas claims up until this point, securing expert opinion on Tabler's competency, and counseling Tabler on the consequences of his decision—was neither abandonment nor deficient performance. Indeed, Tabler had a right to waive his state habeas appeal. *See* Pet. App'x at 10a; *Ex parte Reynoso,* 228 S.W.3d 163, 165 (Tex. Crim. App. 2007) (per curiam); *cf McCoy v. Louisiana,* 584 U.S. 414, 422 (2018) ("Some decisions, however, are reserved for the client—notably, whether to . . . forgo an appeal.")

Habeas counsel was diligent in their efforts to develop Tabler's state habeas appeal, hiring an investigator, a mitigation specialist, and seeking

appointment of a psychologist for a neuropsychological examination. *See* Pet. App'x A, at 13a–14a. When Tabler first sought to waive state habeas appeal, habeas counsel attempted to talk him out of it, while continuing to investigate claims and seek expert evaluation. *See* ROA.1210, 1293, 1295, 1305, 1307–08, 1314, 1329. Although Tabler vacillated on the issue of waiver, *see* ROA.1211–16, 1280–88, 1294, 1297, 1313, 1325, the trial court granted habeas counsel's request for an expert, who was ordered to also determine whether Tabler was competent to waive his appeals. *See* ROA.1290–95, 1298, 1304, 1315–17. After examination, Dr. Kit Harrison determined Tabler was in fact competent to make this decision, ROA.1311–12, and habeas counsel agreed he was competent, ROA.1329.

However, habeas counsel did not agree with Tabler's decision to waive, and informed Tabler he would not *help him waive* his appeals. Counsel nevertheless counseled Tabler, prior to the hearing, on his decision to waive, and advised him of the role counsel would play in the hearing. *See* ROA.1210, 1295, 1329, 3099–04. In a letter sent a week before the hearing, habeas counsel explained that he would not argue for or against waiver; the extent of his involvement would be to tell the court that Tabler was competent to make this decision. However, counsel stated he would "make every attempt to get to the courthouse as early as possible so we can discuss whatever you'd like to discuss." Counsel also attached a postage pre-paid envelope so that Tabler

could ask any questions before the hearing, and counsel would "be prepared for the questions." *See* ROA.1329. Habeas counsel also attended the hearing, where—as promised—he took no position on what should happen, ROA.3096, but provided the trial court with Dr. Harrison's two-page competency report, ROA.3104–06. At the end of the hearing, after the trial court found Tabler competent, habeas counsel agreed to be standby counsel, informing Tabler and the court that they "will stay on as his representatives to whatever extent he wants so long as he's in the system." ROA.3107–08.

A. State habeas counsel did not abandon Tabler, nor were they ineffective.

On these facts, the Fifth Circuit correctly concluded that state habeas counsel were neither ineffective nor did they abandon Tabler. Pet. App'x A, at 9a. On the issue of abandonment,[2] the Fifth Circuit correctly determined that "[t]he conduct of Tabler's habeas counsel [was] worlds away from the

[2] Tabler insists that any distinction between ineffectiveness under *Martinez* and abandonment under *Maples* is immaterial, *see* Pet. at 14 n.6, consistently merging the two together. However, this Court explicitly held there is an "essential difference" between negligent lawyering and abandonment. *Maples*, 565 U.S. at 282. The former is charged to a petitioner "under 'well-settled principles of agency law'" and therefore "does not qualify as 'cause.'" *Id*. at 280–81 (quoting *Coleman v. Thompson,* 501 U.S. 722, 753–54 (1991)). But, where an attorney is no longer acting as his client's representative, his acts or omissions "cannot fairly be attributed to [the client.]" *Id.* at 281 (quoting *Coleman,* 501 U.S. at 753.) While the Court later carved out an equitable exception to "cause" for negligent lawyering in *Martinez,* the Fifth Circuit correctly addressed Tabler's argument as two distinct concepts. *See* Pet. App'x A at 9a, 11a–13a.

abandonment in *Maples*." Pet. App'x A at 13a. In contrast to *Maples,* who had no notice that his attorneys had ceased representing him at the time he defaulted his claims, 565 U.S. at 281, Tabler's habeas counsel had been actively working on his habeas petition at the time Tabler sought to waive; counsel prepared Tabler for and attended the competency hearing, but respected Tabler's desire to waive further proceedings; and Tabler had ample notice he would be proceeding with only standby counsel after the hearing and would thus likely be unrepresented when his state habeas filing date expired. *See* Pet. App'x A at 13a. Further, Tabler was warned before the competency hearing that counsel would not argue for or against his request to waive. Tabler also acknowledged he was waiving any appeal after direct appeal and understood the time constraints he was facing. *Id.* at 13a–14a. As the Fifth Circuit found: "In short, there was no abandonment." *Id.*

Under *Martinez,* the Fifth Circuit also concluded that Tabler failed to demonstrate state habeas counsel's performance was objectively unreasonable as required by *Strickland.*[3] Pet. App'x at 11a. Rather, habeas counsel "followed

[3] In reviewing whether state habeas counsel was ineffective as cause to excuse procedural default, the standards of *Strickland* apply. *Martinez*, 566 U.S. at 14. *Strickland's* first prong requires a petitioner to establish that counsel's performance fell beyond the bounds of prevailing, objective professional standards. *Strickland*, 466 U.S. at 688. Under the second-prong, a defendant must show that his counsel's deficient performance prejudiced him—that is, a reasonable probability that state habeas relief would have been granted had the evidence been presented in the state habeas proceedings. *Id.* at 687.

[Tabler's] explicit wish to drop further habeas proceedings, reasonably finding him 'competent to make this decision' for himself." *Id.* The Court reasoned, "[t]hroughout these proceedings, the trial court, the CCA, the federal district court, and the multiple mental health professionals that evaluated Tabler found him mentally competent to make substantive decisions surrounding his case." *Id.* Relying on binding Circuit precedent, the Fifth Circuit found "[i]t was entirely reasonable … for Tabler's habeas counsel to 'merely acquiesce[] to [Tabler's] wishes in light of a court-appointed expert's finding that [Tabler] was competent—wishes that are permissible given that defendants need not pursue habeas relief at all.'" *Id.* at 12a (citing *Mullis v. Lumpkin,* 70 F.4th 906, 913–14 (5th Cir. 2023)). Of most significance to the Fifth Circuit was the report of Dr. Harrison, who was hired to review Tabler's competency and found him "forensically competent to make decisions to suspend his automatic appeal." *Id.* at 12a. The court concluded that habeas counsel had no duty to continue searching for an expert who would contradict Dr. Harrison's opinion. *Id.* at 13a.

Tabler nevertheless asserts habeas counsel had a duty to challenge this competency determination at the hearing, Pet. at 16–17, and could have altered the result of the hearing: 1) by proffering to the court Dr. Harrison's additional eighteen-page[4] report outlining Tabler's mental health issues,

[4] Tabler refers to the report as seventeen pages, while the Fifth Circuit cites to eighteen pages. The Director will defer to the Fifth Circuit.

thereby undermining Dr. Harrison's two-page report finding Tabler competent to waive the proceedings; and 2) objecting to the trial court's "misleading instruction" on the filing deadline for Tabler's state habeas application, providing him with the correct deadline for changing his mind and resuming state habeas proceedings. Pet. at 15–16. But the Fifth Circuit correctly found neither argument persuasive.

First, the Fifth Circuit concluded state habeas counsel was reasonable in relying on Dr. Harrison's two-page competency report, without challenge, *because of* Dr. Harrison's lengthier eighteen-page report stemming from the same neuropsychological examination. The second report demonstrated Dr. Harrison "was well aware 'of the contours of [Tabler's] diagnoses and mental-health history'" and had "the full picture of Tabler's mental health[.]" Pet. App'x A at 12a (citing *Mullis,* 70 F.4th at 912). With this knowledge, he nevertheless found Tabler competent.

And, regardless of whether habeas counsel's decision not to share the lengthier report with the trial court was reasonable, Tabler failed to show habeas counsel's decision met *Strickland*'s prejudice prong. Pet. App'x A at 14a. The Fifth Circuit agreed with the district court that, even if counsel had provided the trial court with the eighteen-page report, there was no substantial likelihood that the court would have found Tabler incompetent to waive his habeas proceeding. *Id.* at 14a–15a; *Harrington v. Richter,* 562 U.S. 86, 112

(2011). The court reasoned that Dr. Harrison provided counsel *both* the eighteen-page report outlining Tabler's mental health issues and a separate report nevertheless finding Tabler mentally capable of waiving his appeals. Pet. App'x A at 15a. Further, the same judge presided over both trial and the competency hearing and had heard evidence of mental incapacity from "multiple doctors testifying about Tabler's extensive history of mental challenges," similar to that provided in Dr. Harrison's eighteen-page report. *Id.* Relying on this evidence and the colloquy with Tabler at the hearing, the trial court accepted Dr. Harrison's opinion and found Tabler competent to waive further proceedings. *Id.* Accordingly, the Fifth Circuit found no substantial likelihood of a different result if counsel had proffered the eighteen-page report at the competency hearing. *Id.* at 16a. Tabler fails to demonstrate that simply offering Dr. Harrison's lengthier report—along with his report finding him nonetheless competent—would have changed the outcome.[5]

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[5] Tabler implies that, because of the eighteen-page report, the district court later concluded his request to waive federal habeas proceedings was involuntary. *See* Pet. at 20. To the contrary, after Tabler attempted to waive federal habeas proceedings, the district court judge appointed Dr. Richard Saunders who evaluated Tabler and, once again, concluded that he was mentally competent to waive. *See* Pet. App'x B at 28a–29a. At the hearing, the federal district court, after hearing Tabler's testimony, determined that he was "not presently suffering from a mental disease, disorder, or defect which prevents him from understanding his legal position and the options available to him or which prevents him from making a rational choice among his options." (ECF No. 30). However, the district court nevertheless determined that Tabler's decision to forego post-conviction remedies may not have been *voluntary* because Tabler made a threatening phone call to a state senator which led to an investigation into cell phone smuggling in prison—an investigation which

The Fifth Circuit also disagreed that habeas counsel "failed to object to the state court's incorrect implication that his habeas deadline would occur after the CCA decided his direct appeal." Pet. App'x A at 10 n.3. Rather, 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 the CCA would decide his direct appeal well after the time for filing his habeas application had passed. Pet. App'x A at 10 n.3. The record supports that Tabler knew the potential deadlines long before the hearing. Indeed, in a letter dated May 24, 2008, habeas counsel explained that Tabler's direct appeal was due July 7, 2008, with the State's responsive brief due in September or October. Counsel explained further that the CCA would not render an opinion until approximately twelve to fifteen months after briefing concludes—sometime in late 2009—and, "[b]y that time, we will have long before finished our investigations and submitted whatever claims we were able to raise." ROA.1295. In another letter, in response to Tabler's request "to drop all my appeals and receive an execution date," ROA.1306, habeas counsel encouraged him to delay making a decision on his habeas appeal, explaining that dropping habeas proceedings now will not result in an execution date because "literally

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purportedly resulted in pressure on Tabler from prison inmates and guards to volunteer for execution. On this ground, the district court rejected his attempts to waive his appeals and ordered the habeas proceedings to continue. (ECF No. 34).

nothing" will happen in the case until the CCA issues an opinion on direct appeal. By counsel's guess, "that will be a year from now, well after we will have submitted a habeas corpus application on your behalf." ROA.1307. Counsel warned: "If you waive your rights to habeas now, it may be too late if you change your mind later." *Id.*

The trial court's nebulous discussion with Tabler about the process following direct appeal was not inconsistent with this information. ROA.3098–99 (explaining state habeas and federal habeas follow direct appeal, but habeas is not automatic—a defendant can decide; if he does not proceed, the State will seek an execution date when direct appeal mandate issues); 3101–04 (court explaining that his attorneys are operating under time constraints and, if he changes mind after time for filing writ has run, CCA might decline to entertain it). Tabler stated in letters that he knew the due date of his direct appeal, ROA.1282, 1284;[6] and confirmed to the trial court that his attorneys had discussed the appellate process, time frame, and time constraints they were operating under, ROA.3102, and he wanted an execution date set as soon as direct appeal was concluded, ROA.3100–01 (Identifying letter sent to court in which Tabler confirms, he does not wish to continue appeals after direct appeal

[s] Habeas counsel later informed Tabler that this due date was extended to July 7, 2008, by his direct appeal counsel. *See* ROA.1297.

is concluded, indicating "should direct appeal be denied, I'm asking for an execution date as soon as possible.").

Tabler argues habeas counsel's warnings were not sufficient to correct this alleged misinformation, Pet. at 20–21, but Tabler had clearly and repeatedly stated, at the hearing and prior, that he wanted no further appeals beyond the mandatory direct appeal, and he was seeking an execution date as soon as possible. *See also* ROA.1206–07 (letters to direct appeal and habeas attorneys to withdraw all appeals ASAP); 1211 (letter indicating he "only wanted to go ahead and end fast"); 1283–84 (asking that all appeals be dropped or withdrawn after direct appeal, he is ready to accept fate); 1294 (indicating he wants to drop appeals after direct appeal is denied and volunteer for execution); 1297 (wanting no further appeals after direct appeal and asking for execution date before he killed himself); 1306 (wishing to drop appeals and receive an execution date). His quest for an immediate execution date preceded most of the conversations between Tabler, counsel, and the court, all explaining an execution date cannot happen until direct appeal is concluded—long after his habeas appeal would be filed. Tabler was unpersuaded. There exists no reasonable probability that further explanation on the precise deadline of his habeas appeal would change the outcome.

B. The Fifth Circuit correctly applied Supreme Court authority to Tabler's case.

Tabler contends that the Fifth Circuit failed in their efforts to distinguish *Maples* and *Martinez* from his case by misapplying the Court's precedent and principles of agency law in declining to find cause. Pet. at 17–21. Tabler's arguments are unconvincing.

First, Tabler disavows as "immaterial" the Fifth Circuit's distinction from *Maples* based upon Tabler's knowledge that counsel would not participate in the hearing. Pet. at 17; *see* Pet. App'x at 13a–14a. But this Court repeatedly and explicitly cited a *lack of knowledge* regarding the severance of the attorney/client agency relationship as ground for establishing abandonment and thus cause. *See Maples,* 566 U.S. at 281 (While attorney negligence does not establish cause, "[a] markedly different situation is presented . . . when an attorney abandons his client *without notice*, and thereby occasions the default.") (emphasis added); *id.* at 283 (Agreeing "that, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client 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.") (emphasis added); *id.* at 283 ("*Unknown to Maples*, not one of [his three attorneys of record] was in fact serving as his attorney during the 42 days permitted for an appeal from the trial court's order.") (emphasis

added); *id.* at 289 (In conclusion, Maples "had *no reason to suspect* that, in reality, he had been reduced to *pro se* status," and "has shown ample cause . . . to excuse the procedural default into which he was trapped when counsel of record *abandoned him without a word of warning*.") (emphasis added). Under these circumstances, this Court held that acts or omissions of an attorney no longer acting as his client's representative "cannot fairly be attributed to [the client.]" *Maples,* 566 U.S. at 281 (citing *Coleman,* 501 U.S. at 753). *Martinez* similarly involves a lack of knowledge that habeas counsel was no longer representing him during a critical time. *See* 566 U.S. at 6 (Martinez was unaware counsel filed statement of no colorable claims and that he was given 45 days to file *pro se* petition because counsel failed to advise him of need to file *pro se* to preserve his rights); *id.* at 7 (accusing habeas counsel of deficient representation for failing to raise any claims and failing to notify Martinez of her actions)

As noted by the Fifth Circuit, "[t]he conduct of Tabler's habeas counsel is worlds away from the abandonment in *Maples*." Pet. App'x A at 13a. Specifically, counsel was actively representing Tabler; they attended the hearing but respected Tabler's desire to waive; they informed Tabler before the hearing that they would not take a position on his request for waiver; Tabler acknowledged the potential consequences of his waiver decision at the hearing; and Tabler "had ample notice that he would be proceeding without counsel"

when the state habeas filing date eventually expired. *Id.* at 13a–14a. Further, the record reflects state habeas counsel offered their continued assistance after Tabler entered his waiver, and counsel submitted Tabler's belated request to resume his postconviction application several months after he had entered his waiver. ROA.3107–08, ROA.3288–92. The Fifth Circuit's distinction—based upon, not only Tabler's knowledge, but also his competence to make the waiver decision, and counsel's dedicated representation before, during and after the hearing—is supported by the law and facts.

Relying on *Martinez,* the Fifth Circuit found no ineffective assistance because habeas counsel were following Tabler's wish to waive habeas proceedings, "reasonably finding him 'competent to make this decision' for himself," and because Dr. Harrison had found Tabler forensically competent to make this decision. Pet. App'x A at 11a–12a. Tabler calls the Fifth Circuit rational "flawed," arguing counsel was *not* following Tabler's wishes because they did not advocate *for or against* waiver, resulting in an absence of counsel, as forbidden by *Martinez*. Pet. at 19–21. Second, Tabler argues that reasonable counsel would have brought Dr. Harrison's second, eighteen-page report to the court's attention, and pointed out Tabler's history of mental illness and history of changing his mind. Pet. at 19-20. Third, the Fifth Circuit addressed, but only in a footnote, habeas counsel's failure to correct the trial court's allegedly

misleading instruction on the timing of filing a habeas petition. Pet. at 20. Tabler's arguments do not demonstrate misapplication of *Martinez*.

First, Tabler cannot show deficient performance, and certainly no resulting harm from counsel's refusal to advocate *for* waiver. Indeed, Tabler achieved the desired result—waiver of his habeas proceedings—on his own. But counsel was also not deficient for refusing to *oppose* waiver. As noted, Tabler had a right to waive his habeas proceeding, but no right to counsel to do so. *See Shinn v. Martinez Ramirez,* 596 U.S. 366, 386 (2022) ("[W]e have repeatedly reaffirmed that there is no constitutional right to counsel in state postconviction proceedings.") And habeas counsel was not required to question his own expert's opinion on competency. *See* Pet. App'x A at 13a. Especially when, based upon their own history with the client, counsel agreed with the expert's conclusion. It is unlikely that any additional challenge with Dr. Harrison's eighteen-page report would have changed the outcome of the waiver hearing. Any suggestion that Dr. Harrison's competency report was "entirely conjectural" when contrasted with his own longer report is unsupported—obviously Dr. Harrison rendered an opinion on competency knowing the mental health information contained in the longer report. *See* Pet. at 15; Pet. App'x A at 12a.

On the issue of whether habeas counsel should have provided the longer report to the court, both the district court and the Fifth Circuit found no

substantial likelihood of a different result had counsel provided the trial court with Dr. Harrison's eighteen-page report. Pet. App'x A at 14. As the court reasoned, Dr. Harrison still found Tabler competent with full knowledge of the facts in his second report. Also, the judge at the competency hearing was the same judge who presided over Tabler's trial, where trial counsel presented similar evidence of Tabler's mental incapacity. Armed with this information, the trial court still accepted Dr. Harrison's expert opinion that Tabler was competent. Therefore, the Fifth Circuit correctly concluded there was no reasonable likelihood that the full report from Dr. Harrison would have changed the outcome of the competency hearing. *See* Pet. App'x A at 14a–16a; *Strickland,* 466 U.S. at 694.

Tabler also attempts to discredit the Fifth Circuit's reliance on Dr. Harrison's competency determination by inaccurately suggesting that Tabler was not seeking to waive appeals at the time Dr. Harrison evaluated him. Pet. at 19; ROA.1311–12 (Harrison's report). But the record reflects Tabler repeatedly vacillated on this point before, during and after the evaluation. *See* ROA.1206 (desire to waive appeals); 1211–12 (wavering on decision); 1213–20 (wanting to proceed with appeal, letters to and from attorney); 1280 (March 20, 2008, discussing appeal); 1282 (March 31, 2008, letter asking to withdraw habeas appeal); 1283–84 (April 1, 2008 letter to court asking to drop appeals after direct appeal); 1286 (April 5, 2028 letter asking habeas counsel to

continue appeal); 1294 (May 15, 2008 letter indicating he will sit for Dr. Harrison's examination but he may decide to drop appeals); 1296–97 (June 2, 2008 letter wishing to drop appeals); 1306 (July 1, 2008 letter acknowledging June 27th examination with Dr. Harrison went well, but standing by decision to drop appeals); ROA.1309–10 (July 28, 2008 letter, will to "try and ride these appeals out"); 1321–25 (September emails indicating Tabler contacted court, requesting to terminate habeas proceeding).

And Dr. Harrison was aware of this vacillation. While Tabler "expressed a desire to continue the appeal process during the evaluation session" with Dr. Harrison, ROA.1312, Dr. Harrison acknowledged Tabler's vacillation. Contrary to Tabler's assertion, *see* Pet. at 19, Dr. Harrison stated, in the two-page report, "It is not at all unusual to have death row inmates vacillate on such matters affecting their ultimate best interests, particularly in proportion to their perceived circumstances and fluctuating mental status while incarcerated." ROA.1311–12. Given Dr. Harrison's awareness of Tabler's ongoing vacillation, Tabler fails to demonstrate that the expert's opinion was somehow unreliable because, at the moment of the interview, Tabler agreed to continue his appeals.[7] And once again, Dr. Harrison was clearly aware of

[7] Tabler also cites to Dr. Harrison's reference to Tabler's competency to waive "automatic appeal" rather than "post-conviction proceedings." Pet. at 15; *see also* ROA.1312. Tabler fails to explain how Dr. Harrison's confusion of these two proceeding undermined his determination that Tabler was competent to decide.

Tabler's history of vacillation, as well as his extensive mental health history, as evidence by the eighteen-page report, but still found Tabler competent to make the decision to waive his habeas appeals.

Finally, Tabler faults the Fifth Circuit's resolution in a footnote, of his argument regarding the trial court's allegedly misleading instruction on the timing of filing a habeas petition. Pet. at 20. As discussed above, Tabler was fully aware that his habeas petition would be filed before the direct appeal was finally decided, that his attorneys were operating under time constraints, and that he may forego the opportunity to file if he waited too long. Tabler was more concerned with obtaining an execution date than he was with filing a habeas application, but was repeatedly told an execution date would not happen until his direct appeal was final. Counsel was diligent in their efforts to advise Tabler to continue with the habeas appeal, but there was no reasonable probability that, had either the trial court or habeas counsel advised Tabler of the specific deadline for the filing of his appeal, that the outcome of the proceeding would have been any different. *Strickland,* 466 U.S. at 687. The Fifth Circuit properly applied Supreme Court precedent in denying relief, and certiorari review of his claims should be denied.

Indeed, Tabler also wanted to waive direct appeal but was repeatedly told he could not waive until his postconviction proceeding. *See* ROA.1207, 1210.

II. Tabler Identifies No Circuit Split.

Tabler argues that the Fifth Circuit's decision in his case conflicts with decisions by the Third, Sixth, Seventh, and Tenth Circuits, as well other Fifth Circuit panels who have all purportedly provided relief where counsel renounced their role and failed to provide representation. Pet. at 22–27; *see Lewis v. Zatecky,* 993 F.3d 994, 1006 (7th Cir. 2021); *United States v. Collins,* 430 F.3d 1260, 1265 (10th Cir. 2005); *Appel v. Horn,* 250 F.3d 203 (3rd Cir. 2001); *Martin v. Rose,* 744 F.2d 1245, 1249 (6th Cir. 1984); *see also Childress v. Johnson,* 103 F.3d 1221, 1229 (5th Cir. 1997); *Tucker v. Day,* 969 F.2d 155, 159 (5th Cir. 1992). In contrast, he argues, only the Eighth Circuit and this panel have denied relief. *See Raymond v. Weber,* 552 F.3d 680 (8th Cir. 2009). But Tabler's effort to create a circuit split—including internal inconsistency in the Fifth Circuit—fails. The lower court's decision is consistent with existing Circuit precedent and Supreme Court authority, and Tabler's cited cases are factually distinguishable.

First, Tabler fails to even mention the case primarily relied upon by the Fifth Circuit in denying him relief, in which that court rejected a "nearly identical" argument, concluding that habeas counsel was reasonable in not challenging waiver at the competency hearing. Pet. App'x A at 11a–12a (citing *Mullis,* 70 F.4th at 911–14). Like Tabler's, Mullis's counsel was reasonable in not challenging their own expert's conclusion on competency, where an expert

determined he was competent, there had been no previous finding of incompetency, and the same judge presided over his trial and competency hearing. *Id.* at 12a. Also like Tabler, *see id.* at 13a, habeas counsel "did not sit idle," but investigated Mullis's mental health history, requested evaluation by an expert, and discussed with the expert his findings. *Mullis,* 70 F.4th at 912–13. Like Tabler, the Fifth Circuit found no deficient performance on these facts.

The Eighth Circuit case involves circumstances similar to both Tabler's and *Mullis*. In *Raymond,* weeks after determining petitioner was competent to represent himself at trial, the court sua sponte ordered another psychological evaluation—where petitioner was again deemed competent to represent himself—and held another competency hearing. 552 F.3d at 682. New counsel was appointed for the hearing, but petitioner was permitted to continue representing himself. *Id.* Nevertheless, counsel performed legal research, investigated petitioner's competency, prepared for the competency hearing, did not withhold mitigating evidence from the court, but ultimately chose not to contest the expert's competency testimony on petitioner's instructions and counsel's own decision. *Id.* at 682–83, 685. On these facts, the Eighth Circuit found no deficient performance under *Strickland*. *Id.* at 685.

Tabler does not address the entirely consistent *Mullis*, but instead attempts to create an internal circuit split, citing two allegedly contrasting cases from the Fifth Circuit. But both are distinguishable in that appointed

counsel never actually assumed any responsibility for the case. In *Tucker,* the Fifth Circuit found a constructive denial of counsel[8] at a resentencing proceeding where the petitioner "was unaware of the presence of counsel, counsel did not confer with [petitioner] whatsoever, and as far as the transcript is concerned, counsel made no attempt to represent his client's interests." 969 F.2d at 159. When Tucker inquired, "Do I have counsel here?" appointed counsel purportedly responded, "Oh, I am just standing in for this one." *Id.* In *Childress,* petitioner moved to quash as unconstitutional an enhancement paragraph involving two prior convictions in which he pled guilty only after uncounseled plea negotiations with the prosecutors. 103 F.3d at 1223. At those plea hearings, counsel was appointed solely to execute a waiver of petitioner's right to a jury trial, but did not investigate facts, discuss applicable law with petitioner, or advise him of the rights he was surrendering. *Id.* The Fifth Circuit concluded that petitioner was constructively denied counsel because appointed counsel was the equivalent of only standby counsel—he took no responsibility for advocating the defendant's interests at a critical phase of the proceeding and did not actively assist the defendant. *Id.* at 1229–31.

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[8] A "constructive denial of counsel" occurs where counsel entirely fails to subject the case to meaningful adversarial testing at a critical stage; thus, petitioner need not make an independent showing of prejudice. *See United States v. Cronic,* 466 U.S 648, 659 (1984); *see also Roe v. Flores-Ortega,* 528 U.S. 470, 483 (2000).

Similarly distinguishable are the cases from other circuits. In *Lewis,* the Seventh Circuit found "total abandonment" at a critical sentencing stage where counsel communicated no strategy to the petitioner, conducted no mitigation investigation, presented no evidence, and did not prepare his client for the proceeding, stating on the record at the sentencing proceeding only that he would "defer to" his client, but "did not have anything to add." 993 F.3d at 1006. In *Collins,* petitioner's counsel filed a motion to withdraw just before the competency to stand trial hearing, citing inability to communicate with his client, and refused to comment or participate in the hearing, and abstained from providing relevant information to the court, citing the motion to withdraw. 430 F.3d at 1265–66. On these facts, the court found a constructive denial of counsel. *Id.* at 1266. In *Appel,* the court determined that the petitioner was constructively denied counsel because petitioner rejected court appointed counsel from the outset, resulting in counsel performing no investigation and making no attempt to litigate the competency hearing in any way because they did not believe they were actually counsel of record. 250 F.3d at 215–17. The Third Circuit concluded counsel "abandoned their duty to both the court and their client" by failing to investigate the petitioner's competency. *Id.* at 215–16. Finally, in *Martin,* the Sixth Circuit found both constructive denial of counsel under *Cronic* and deficient performance and prejudice under *Strickland* where trial counsel made a strategic decision to refuse to

participate because he erroneously believed that his participation would either waive pretrial motions or render their denial harmless error on appeal.744 F.2d at 1249–51.

Aside from *Appel,* the petitioners in these cases expected their attorney to defend their interests but were either constructively or actually denied effective representation. In contrast and like Tabler, in *Mullis, Raymond,* and *Appel* the petitioners sought to either waive proceedings or represent themselves. And, like Tabler, in *Mullis* and *Raymond,* counsel did not abandon the petitioners or perform deficiently in their ongoing representation. This stands in contrast to *Appel* where, at a hearing to determine competency to represent himself at trial, his counsel did not investigate his background, speak to family and friends, or obtain health and employment records; and both attorneys believed they were never Appel's counsel. 250 F.3d at 215–16. Therefore, neither conducted any investigation, nor provided neither the court nor the examining doctor any information. *Id.*

As discussed at length in Section I, Tabler's counsel zealously advocated for their client up until the waiver hearing; through expert assistance, they determined that their client was competent to make the decision to waive; they abided by Tabler's wishes at the waiver hearing, although they attempted to talk him out of his decision, and remained on as stand-by counsel, should

Tabler change his mind. This is far cry from the complete abdication of responsibility addressed by the Third, Sixth, Seventh, and Tenth Circuits.

In short, Tabler's case is not about "renunciation" and consequent failure to subject a case to meaningful adversarial testing, but about following Tabler's wishes to not proceed further. Counsel abided by Tabler's wishes only after thorough investigation and consultation with their client. As his cited cases are readily distinguishable from the facts here, Tabler fails to identify any circuit split on this issue and certiorari review should be denied.

III. Existing Supreme Court Authority is Sufficient to Allow Resolution of Whether Trial Counsel's Alleged "Renunciation" Amounted to "Cause" to Excuse Procedural Default.

In Issue 3, Tabler seeks certiorari review on whether "open renunciation of counsel's role constitutes cause to excuse a default[.]" Pet. at 27–29. Tabler notes that, in *Maples* and *Martinez*, "this Court announced rules for habeas petitioners who were abandoned, unrepresented, or deficiently represented in state collateral review" and "[b]oth 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." Pet. at 29. Tabler now asks the Court to expand this controlling authority to specifically encompass situations where "an attorney abandons a client to proceed alone," and find "cause for a procedural default is established at least in 'initial-review collateral proceedings' for IATC claims, as here." Pet. at 29.

However, the review and resolution Tabler seeks from this Court is unnecessary as the cited authority more than adequately covers the concerns Tabler proposes. Tabler claims counsel abdicated their duty of advocacy and left him unrepresented and misled. Pet. at 29. This argument can be addressed under *Maples,* where this Court has already found "cause" to excuse a procedural default for abandonment, without notice and without securing substitute counsel, at a critical time in state postconviction proceedings. 565 U.S. at 271. And in *Martinez,* this Court recognized a "narrow exception" to *Coleman* cause and prejudice, specifically for procedurally barred IATC claims where a petitioner can establish that state habeas counsel performed deficiently, and "the underlying [IATC] claim is a substantial one." *Martinez,* 566 U.S. at 9, 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The pronouncements in these cases are sufficient to cover the contingency now proposed by Tabler. Tabler simply did not prove the necessary elements to establish "cause."

The real crux of Tabler's argument appears to challenge the procedure utilized in the state trial court's review of a death-sentenced petitioner's ability to waive postconviction proceedings, or to waive the right to counsel in those proceedings. *See* Pet. at 27–28. To the extent Tabler believes that state courts should be held to a universal standard of determining whether the petitioner's waiver is knowing, intelligent, and voluntary, and that the petitioner is

competent to make that determination, *see* Pet. at 28 (citing *Rumbaugh v. Procunier,* 753 F.2d 395, 396 (5th Cir. 1985)), this Court has set no such requirements for state habeas proceedings, nor should it. Indeed, *Rumbaugh* addresses the competency standards for a petitioner seeking to withdraw his *federal* habeas petition. *See Mullis v. Lumpkin*, 47 F.4th 380, 391 (5th Cir. 2022). But federalism prevents the interference of federal courts with state courts and state law—exactly what Tabler would be asking this Court to do in applying *Rumbaugh* to determine the competency of a state habeas applicant where no such state law requirement exists.

In fact, this Court has held that a petitioner like Tabler has no due process right to collateral proceedings at all. *See Murray v. Giarratano,* 492 U.S. 1, 7–8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). And because he has no due process right to the proceeding itself, he also has no due process right to the appointment of counsel during those proceedings. *Finley*, 481 U.S. at 555. More importantly, where a State allows for post-conviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted). As the Court has explained, "Federal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights

provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). Where state law permits a petitioner to waive proceedings, as well as the appointment of counsel in those proceedings, *see Mullis,* 70 F.4d at 912, the Court should not intervene to establish standards for a petitioner's waiver under the circumstances. Especially where an expert, counsel, and the court all agree the petitioner is competent to make such a determination.

Counsel's performance in this case can be sufficiently evaluated under the established authority in *Maples* and *Martinez*. The Court need not expand this coverage to cover the specific facts of this case, nor should the Court impose any universal standard on the states for determining whether a petitioner is competent to waive postconviction proceedings.

IV. No Remand Is Necessary as the Claims Have Received Due Consideration and Any Evidentiary Development is Prohibited.

Finally, Tabler argues that the Court should grant review, rule that habeas counsel's "renunciation" amounted to "cause" to excuse his default, and remand for the opportunity to demonstrate "prejudice," as it did in *Maples* and *Martinez.* Pet. at 29–32. Tabler contends that, on remand, he can show that his IATC claims—from both his COA application and merits brief—were substantial and should have required an evidentiary hearing and, ultimately, relief. Pet. at 30. This Court need not remand for any reconsideration.

First, even though the Fifth Circuit declined to reach the merits of the IATC claim, Tabler has already received considerable review of his claims. Despite exhausting no claims on state postconviction review, Tabler was still permitted to raise and have his IATC claims considered on federal habeas review. As set forth in the Statement of the Case, Section III, Tabler filed a federal habeas petition, which was denied. *See* Pet. App'x E. His case was remanded by the Fifth Circuit following *Martinez* so that he could file an amended federal habeas petition, through new counsel, raising new unexhausted IATC claims, and permitting him the opportunity to demonstrate cause and prejudice to overcome the default of these claims. *See* Pet. App'x D; Pet. App'x B, at 17a, 29a (Memorandum Opinion and Order on Tabler's Amended Petition). The district court determined that he could establish neither cause nor prejudice to excuse the procedural default of his new IATC claims and, in the alternative, each IATC claim lacked merit. Pet. App'x B at 17a, 34a–39a. However, the district court granted COA, allowing Tabler to present the issue of cause and prejudice to the Fifth Circuit, and granted COA on one IATC claim. *Id.* at 101a–02a. Tabler moved for COA on several other IATC claims. The Fifth Circuit ultimately found no cause to excuse procedural default and declined to reach the underlying IATC claim or grant additional COA. Pet. App'x A at 2a & n.1.

Tabler's case stands in stark contrast to *Martinez,* where this Court determined remand was appropriate because no court had yet passed on the issue of habeas counsel's performance or the IATC claim itself, 566 U.S. at 18, or *Maples,* where neither the state court, the district court, nor the circuit court reached the question of prejudice, 565 U.S. at 290. Here, two federal courts have already considered and rejected a finding of cause to excuse procedural default, and the district court considered and rejected the underlying IATC claims. Remand for additional consideration is unwarranted.

Regardless, even if the Court determines the Fifth Circuit's finding of no "cause" was in error, Tabler is barred from presenting new evidence in support of his claim or developing evidence in an evidentiary hearing. Tabler complains that the Fifth Circuit failed to address a number of evidentiary rulings: the district court's refusal to consider evidence outside the state court record—submitted in a supplemental appendix after the Director had already answered the amended petition; the district court's refusal to grant a stay and abeyance to allow Tabler to return to state court for factual development; and whether 28 U.S.C. § 2254(e)(2) would bar federal fact development. Pet. at 30–31. But the Court should decline remand to resolve these issues because evidentiary development is foreclosed.

In *Martinez Ramirez*, this Court explicitly held that *Martinez* did not permit federal courts to dispense with § 2254(e)(2)'s narrow requirements

where the petitioner's state postconviction counsel negligently failed to develop the state court record. 596 U.S. at 371, 384; *see also Shoop v. Twyford,* 596 U.S. 811 (2022) (Reaffirming *Martinez Ramirez,* holding, "if § 2254(e)(2) applies and the prisoner cannot meet the statute's standards for admitting new merits evidence, it serves no purpose to develop such evidence just to assess cause and prejudice.") "If a prisoner 'failed to develop the factual basis of a claim in State court proceedings,' a federal court may admit new evidence, but only in two quite limited situations." *Twyford,* 596 U.S. at 821 (citing § 2254(e)(2)). Tabler's argument rests on state habeas counsel's alleged failure to develop evidence in the state court, thus his claim falls squarely in § 2254(e)(2)'s opening statement and he must meet one of the "limited situations" to allow admission of new evidence. But Tabler fails entirely to satisfy these "limited situations." Tabler does not contend that his claim relies on a new rule of constitutional law or a factual predicate that was previously undiscoverable through due diligence. *See* § 2254(e)(2)(A). And he does not allege that he is actually innocent of the crime. *See* § 2254(e)(2)(B). Indeed, he seeks to develop evidence relevant only to the punishment phase of trial. *See* Pet. at 31. Thus, even if he could show "cause" to excuse the procedural default of his claims, he cannot meet the narrow exception to the prohibition of federal evidentiary development, and the federal courts would not be permitted to either consider

the evidence outside the state court record or hold an evidentiary hearing. *Martinez Ramirez,* 596 U.S. at 371, 380–81.

Nevertheless, as noted by the Fifth Circuit, in reviewing Tabler's argument for *Martinez* cause, the district court did indeed consider evidence beyond the state record. Pet. App'x A at 7a n.2. While acknowledging the applicability of *Martinez Ramirez,* the Fifth Circuit nevertheless concluded that existing Circuit precedent "permits consideration of 'evidence outside the state record ... in *Martinez* claims for the limited purpose of establishing an excuse for procedural default.'" Pet. App'x A at 7a n.2 (citing *Mullis,* 70 F.4th at 910–11); *see also Segundo v. Davis,* 831 F.3d 345, 351 (5th Cir. 2016). Therefore, Tabler has already been granted more evidentiary consideration than anticipated by this Court's precedent. *See Mullis,* 70 F.4th at 910–11 (Noting as "seemingly dictum" *Martinez Ramirez*'s "suspicion of admitting evidence outside the state court record to determine whether procedural default is excused" but concluding court was bound by rule of orderliness.).

Furthermore, despite complaining that "the district court did not even acknowledge the existence of" his extra-record evidence in denying his claims on the merits, Pet. at 30, the district court, in its alternative de novo review, specifically noted the more than 1,350 pages of exhibits and audio and video exhibits submitted with the amended petition. Pet. App'x B, at 29a–30a, 102a. And, in denying a Rule 59(e) motion to alter or amend the judgment, the

district court rejected Tabler's complaint that the court "failed to discuss specific arguments or evidence when adjudicating an issue," finding it demonstrated "little more than disagreement with the way the Court ultimately decided the issues" which did not warrant reconsideration of the order. ROA.7630. Thus, despite § 2254(e)(2) prohibition against it, the district court did consider extra-record evidence.

Regarding the district court's denial of Tabler's *Rhines*[9] motion for stay and abeyance, the district court did not err because Tabler failed to show good cause why the CCA would allow him to circumvent the Texas Code of Criminal Procedure article 11.071 §4A prohibition to the filing of untimely applications. *See* ROA.2659–62 (finding no good cause to disregard Tabler's actions that resulted in default and no likelihood the CCA would now consider his claims). Every case Tabler cites, *see* Pet. at 30 n.9, involves error by appellate counsel not attributable to the applicant—unlike here where Tabler's deliberate waiver resulted in a missed deadline. Tabler cites only one case in which good cause was found after applicant waived his habeas proceeding. *See Ex parte Reynoso [II],* 257 S.W.3d 715 (Tex. Crim. App. 2008). But *Reynoso II* did not abrogate its previous holding that an applicant's own behavior would not establish good

[9] *Rhines v. Weber,* 544 U.S. 269, 277–78 (2005) (finding stay and abeyance appropriate only in "limited circumstances" when (1) there is good cause, (2) the claims are not "plainly meritless," and (3) petitioner has not engaged in "abusive litigation tactics or intentional delay").

cause. *Id.* at 723; *Reynoso [I],* 228 S.W.3d at 166. Further, when Tabler sought to file an out-of-time application, the CCA rejected his attempt. *See* Pet. App'x J. There is no reason to believe the state court has changed its mind, and the district court's denial of Tabler's motion was correct.

Finally, even if this Court did find "cause" and chose to remand for a further determination of his claims, that remand should only encompass the claim for which COA was granted—whether counsel performed deficiently in failing to object to victim-impact testimony. Tabler attempts to expand the "prejudice" remand to a number of other IATC claims for which COA was not granted, *see* Pet. at 31, but fails to explain how the finding of "cause" to excuse the procedural default of one claim would extend to the Fifth Circuit's denial of COA on Tabler's other IATC claims.

Indeed, AEDPA requires that, "[b]efore an appeal may be entertained, a prisoner must first seek and obtain a COA" as a jurisdictional prerequisite. *Miller-El,* 537 U.S. at 335–36; *see also* 28 U.S.C. § 2253(c)(1)(A). A COA will only issue if the petitioner makes a substantial showing of the denial of a constitutional right, which requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that)" the court below should have resolved the claims in a different manner or that this Court should encourage him to further litigate the claims. *Id.* This showing of debatability of the constitutional claim must be made in addition to demonstrating that the

district court's procedural rulings were also debatable. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The Fifth Circuit did not explain its denial of COA, *see* Pet. App'x A at 2a n.1, and the Court should not presume Tabler meets the entire jurisdictional prerequisite to merits review.

Tabler has already received more review of his unexhausted claims than he was entitled to. And, even considering extra-record evidence, both the district court and the Fifth Circuit found no cause to excuse the procedural default of his unexhausted claims. Further review is unwarranted, and the Court should decline his request for remand.

CONCLUSION

The Fifth Circuit correctly affirmed the district court's denial of habeas relief. For all the reasons discussed above, the Court should deny Tabler's petition for a writ of certiorari.

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