No. 23-7227

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.

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

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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.

INTRODUCTION

Richard Tabler's attorneys openly refused to advocate for him at a hearing to determine whether he could waive his right to state habeas review. Pet. 7-8. Counsel's express refusal to participate left Mr. Tabler unrepresented at this critical hearing and severed the agency relationship between Mr. Tabler and his attorneys. That abdication left him not only without counsel, but affirmatively misguided by the court as to the deadline for revoking his waiver of state habeas proceedings. As a result of counsel's abdication of their role, the state habeas court accepted Mr. Tabler's waiver in ignorance of highly pertinent information counsel failed to disclose that would likely have prevented the waiver and, misinformed by the court's legal instructions about the timeline for filing his habeas case, Mr. Tabler's efforts to withdraw his waiver came too late. Counsel's abandonment of their client therefore excused the resulting default of his substantial ineffective assistance of trial counsel (IATC) claims for purposes of federal habeas review. *See Maples v. Thomas*, 565 U.S. 266 (2012); *Martinez v. Ryan*, 566 U.S. 1 (2012).

Respondent's opposition rests on its refusal to face the facts. It asserts repeatedly that Mr. Tabler's counsel did not leave him unrepresented, but merely "abided by" their client's wishes to waive state habeas review. BIO 6, 12, 29, 30. That is not what happened. Lawyers routinely acquiesce in their client's wishes; that is indeed generally their ethical obligation, at least where those wishes are fully informed. But there is a world of difference between *acquiescing* in a client's wishes and *refusing to participate at all* in a hearing.

The latter is what Mr. Tabler's counsel did here. They announced at the outset of the hearing that they would not participate, and then lived up to that promise by sitting, essentially as potted plants, for the entire hearing—even when the court misinstructed Mr. Tabler about the relevant time frame for making a final habeas waiver decision. Respondent's opposition never confronts the consequences of that naked abdication, and instead argues as if counsel participated and supported their client's wishes.

That failure to reckon with the actual facts pervades Respondent's entire opposition. As a result, Respondent never addresses, much less refutes, Mr. Tabler's contention that his counsel's wholesale abandonment at the waiver hearing constituted cause for the resulting procedural default. Under this Court's precedents, certiorari and a reversal are warranted here.

ARGUMENT

I. THE COURT BELOW ERRED IN CONCLUDING THAT COUNSEL'S REFUSAL TO PARTICIPATE IN A HEARING ON WAIVER DID NOT CONSTITUTE CAUSE FOR PROCEDURAL DEFAULT.

Respondent repeatedly mischaracterizes both counsel's inaction and the inaccuracy of counsel's advice. Respondent emphasizes what counsel did *before* and *after* the hearing, but never confronts their wholesale abandonment at the hearing itself. BIO 8, 9. But the fact that an attorney prepared for a trial and worked on an appeal would not excuse an open refusal to participate in the trial itself. Mr. Tabler never indicated he wanted to waive the assistance of counsel (guaranteed under state law) at his hearing and

represent himself. Yet his attorneys refused to represent him at the hearing. It is that renunciation that constitutes cause.

Respondent also maintains that counsel accurately told Mr. Tabler that he "needed to decide whether to proceed on habeas long before the direct appeal was resolved." BIO 15. That is false. The letters Respondent cites told Mr. Tabler that no *execution* could take place until after the direct appeal. They did not explain that the deadline for deciding whether to waive state habeas review was unconnected to—and much sooner than—the direct appeal decision. The first letter stated that if Mr. Tabler waived "after your direct appeal is over," by that time the state habeas petition would have been filed. But it did not specify the deadline to decide about waiver. ROA.1295. The second letter stated that "dropping your habeas corpus proceeding today will not cause you to be executed one day sooner" because no execution would happen until the end of direct appeal. ROA.1307. That letter, too, failed to specify or explain the deadline for a final determination on waiver of state habeas review. In short, counsel never informed Mr. Tabler of the deadline, and failed to correct the court's misrepresentation that his state habeas case would follow resolution of his direct appeal, implying that he did not have to decide finally about whether to waive until his direct appeal concluded.

Respondent maintains that counsel's failure to provide the Court with the 17-page report of neuropsychologist Kit Harrison was not deficient or prejudicial because it supports Dr. Harrison's two-page report concluding that

Mr. Tabler was competent.[1] Respondent argues that because Dr. Harrison knew the information in the longer report and still found Mr. Tabler competent in the shorter report, counsel could reasonably rely on the competency determination. BIO 13. However, the two-page report did not address in any way how the severe impairments described in the longer report affected Mr. Tabler's ability to make knowing, intelligent, and voluntary choices. Dr. Harrison's descriptions of Mr. Tabler's symptoms in the 17-page report demonstrate that a voluntary and knowing decision was impossible. The longer report describes a "deep and severe constellation of mental illnesses" that were "disabling and debilitating" since at least early adolescence, including "mood instability, behavior in response to rapid-cycling mood, cognition problems involving primarily organization and processing, learning problems, impulsiveness, and explosiveness." ROA. 1503. It also diagnoses bipolar disorder, and assesses Mr. Tabler's global functioning at 15 out of 100. *Id.* Counsel never asked Dr. Harrison to address these symptoms in the competency report, and without addressing that information, could not reasonably rely on the report.

Furthermore, the two-page competency report assessed whether Mr. Tabler was competent to decide whether to waive his direct appeal at a time

[1] The State observes that the Fifth Circuit describes this report as 18 pages, not 17 pages. BIO 12 n.4. The 18th page is a facsimile cover sheet. ROA.1408-1504, 1505.

when he was *not* attempting to waive. Pet. 6, 15. As the State concedes, Dr. Harrison knew Mr. Tabler tended to vacillate, BIO 22-23, and recognized that Mr. Tabler's severe mental illness fluctuated markedly over time. ROA.1493. Accordingly, Dr. Harrison could not assess Mr. Tabler's capacity to make rational decisions about a different waiver (of state habeas review, not appeal) at a time when he was not even waiving. Counsel unreasonably relied on Dr. Harrison's hypothetical conclusion and, even more unreasonably, never communicated Mr. Tabler's history of vacillating to the court.

Respondent argues that Mr. Tabler has "fail[ed] to show that offering Dr. Harrison's longer report would have changed the outcome" of the waiver hearing. BIO 14, 22. But as noted above, the 17-page report includes details entirely missing from the 2-page report, and counsel could have relied on it to argue that Mr. Tabler's bipolar disorder, mood lability, and "cognition problems involving primarily organization and processing" prevented him from making an informed, voluntary, or competent decision about waiver at the hearing—especially in light of the misinformation from the court and counsel about the deadline for a final decision on waiver.

Finally, Respondent argues that Mr. Tabler cannot show a reasonable probability that an accurate explanation of the deadline for waiver would have changed the outcome. BIO 17. Given that Mr. Tabler did change his mind before what he was told was the deadline—before the direct appeal decision—it is reasonably probable that if counsel had not sat silent at the

waiver hearing but had objected and explained that the last chance to withdraw the waiver would arrive within a few weeks, Mr. Tabler would have asked to resume his state habeas litigation before it was too late.

II. RESPONDENT'S EFFORTS TO DISTINGUISH *MAPLES* AND *MARTINEZ* FAIL.

Mr. Tabler's petition invokes the principle, supported by both *Maples* and *Martinez*, that if counsel renounces the agency relationship, leaving the client without counsel, that severed bond constitutes cause to excuse a resulting procedural default and allows federal habeas review. Respondent's efforts to distinguish this Court's precedents do not refute this critical principle.

First, Respondent argues that the result in *Maples* rested on the fact that his attorneys abandoned him without notice. BIO 18-19. By contrast, Respondent maintains, Mr. Tabler was aware that his counsel abandoned him, because they did so in open court after warning him in letters. BIO 19-20. But notice does not alter the critical fact: counsel renounced their representation, and therefore severed the agency relationship and left him unrepresented, at a hearing where no one even asked whether he wanted to waive representation. Under agency law, notice to the client *confirms* the renunciation; it does not cure it. *Restatement* (*Third*) *of Agency* (Am. L. Inst. 2006)*, §* 3.10 & cmt. b; *see also Restatement* (*Second*) *of Agency* 5 (Am. L. Inst. 1958) Intro. Note; *id*. § 118 ("Authority terminates if the principal or the agent manifests to the other dissent to its continuance."). A lawyer who announced

at the outset of a criminal trial that she was refusing to participate would renounce her agency role as surely as one who did not show up for court.

Respondent also notes that Martinez's attorney never told him she had filed a statement of no colorable claims or that he needed to file *pro se* to preserve his rights. BIO 19. But the Court in *Martinez* did not rely on that fact; rather, it held that either absence of counsel or deficient performance by counsel can excuse a procedural default and said nothing about requiring a lack of notice under either showing. 516 U.S. at 18. Again, counsel's open deficiency supplies cause just as surely as deficiency without the client's awareness. Notice does not cure renunciation or inadequate representation.

Second, Respondent resists the conclusion that counsel abandoned Mr. Tabler by claiming that they merely acquiesced in his wishes. BIO 6, 11-12, 20-21. But, as explained above, there is a categorical difference between acquiescing in a client's wishes and renouncing one's counsel role altogether. Respondent also maintains that, even if counsel did not advocate *for* Mr. Tabler's wish to waive, he cannot show prejudice because he "achieved the desired result . . . on his own." BIO 21. This argument misconstrues both the nature of counsel's fault and its deleterious impact on the result. Counsel's renunciation was prejudicial because the only reasonable course of action was to oppose waiver. What counsel knew from Dr. Harrison's 17-page report directly undermined a finding of competency and voluntariness. And because counsel heard the court mislead Mr. Tabler about when a waiver of state

postconviction proceedings would become final and irrevocable—and did nothing to correct it—their refusal to participate as his counsel at the hearing plainly undermined the waiver.

Third, Respondent objects that federal courts ought not intrude upon the state court's procedure for determining "a death-sentenced prisoner's ability to waive postconviction proceedings[.]" BIO 31. Mr. Tabler, like Maples and Martinez, does not seek review of state court procedures, but of his counsel's performance—or in this case, refusal to perform—and its effect on *federal* habeas corpus. Whether that refusal constitutes cause sufficient to excuse procedural default is a federal question about access to federal habeas review, not an intrusion on state procedures. As in *Maples* and *Martinez*, where counsel either abandon their client or provide ineffective assistance, cause to excuse procedural default exists. That is exactly what happened here.

III. RESPONDENT FAILS TO REFUTE THE CONFLICT AMONG THE COURTS OF APPEALS WITH RESPECT TO RENUNCIATION BY COUNSEL.

Respondent also errs in asserting that there is no split in the circuits on the legal ramifications of an in-court renunciation by counsel. The circuit opinions fall into two camps: some recognize that attorneys who behave as Mr. Tabler's counsel did sever the agency relationship and/or deprive their clients of the assistance of counsel; others do not. Respondent attempts to

treat the cases as merely "factually distinguishable," BIO 25. But the facts are similar; it is the courts' legal analyses that differ.[2]

On one side of the split are decisions, like the one below, that fail to treat counsel's renunciation as problematic. These include the Eighth Circuit's decision in *Raymond v. Weber*, 552 F.3d 680 (8th Cir. 2009). Pet. 26. Respondent maintains that counsel in *Raymond* engaged in vigorous prehearing advocacy. BIO 26. But the critical point is that Raymond's counsel refused to take any position on the expert's competency testimony at the hearing, 552 F.3d at 685, yet the court of appeals did not find his representation ineffective. Thus, *Raymond* is squarely on the same side of the circuit split as the Fifth Circuit here.

Respondent is equally unsuccessful in seeking to distinguish the cases on the other side of the divide: those finding renunciation or ineffective assistance where counsel refused to participate in a hearing. Respondent points to inaction by some of those counsel in the run-up to the hearings at which counsel failed to participate. BIO 26-30. But as noted above, counsel's conduct *before* a hearing cannot excuse a refusal to participate as counsel in court. Every case Mr. Tabler cited on this side of the split featured an

[2] The State faults Mr. Tabler for "fail[ing] even to mention" *Mullis v. Lumpkin*, 70 F.4th 906 (5th Cir. 2023), but that hardly refutes the presence of a split among the cases Mr. Tabler did cite. In any event, *Mullis* did not involve a complete refusal to advocate at a court proceeding, as here and as in the cases establishing the circuit split.

attorney's refusal to act on the client's behalf in court. *See Lewis v. Zatecky*, 993 F.3d 994, 1006 (7th Cir. 2021) (counsel did not participate in the sentencing hearing, stating he did not "have anything to add"; this "went beyond a failure to conduct adversarial testing; it was an announcement of abandonment"); *United States v. Collins*, 430 F.3d 1260, 1265-66 (10th Cir. 2005) (counsel refused to participate in competency hearing or provide relevant information to the court, and "did not attempt to represent Mr. Collins"); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (appointed attorney "made no attempt to represent his client's interests" at resentencing hearing); *Childress v. Johnson*, 103 F.3d 1221, 1229, 1231 (5th Cir. 1997) (counsel was "in court to stand by, listen to the judge, and respond to any contingencies that might arise. . . . counsel was 'on the spot' but did not actively assist the defendant," and "took no responsibility for advocating the defendant's interests"); *Appel v. Horn*, 250 F.3d 203, 215-16 (3d Cir. 2001) (counsel "did not attempt to litigate the competency determination in any way," and "did not subject the crucial competency determination . . . to any adversarial testing"); *Martin v. Rose*, 744 F.2d 1245, 1249-51 (6th Cir. 1984) ("[A] trial strategy of refusing to participate is not an exercise of reasonable professional judgment.") (internal citation and quotation omitted).

In short, some courts have declined to find an attorney's refusal to participate as counsel in a critical hearing constitutionally problematic; others have. This Court should grant review and clarify that when counsel

refuse to play their assigned role, their renunciation constitutes cause to excuse procedural default.

IV. RESPONDENT DOES NOT DISPUTE THAT WHETHER OPEN RENUNCIATION OF COUNSEL'S ROLE CONSTITUTES CAUSE TO EXCUSE A DEFAULT IS AN IMPORTANT QUESTION, ESPECIALLY IN A CAPITAL CASE.

Mr. Tabler argues that the abdication question he presents is important because the right to counsel in court proceedings, especially in capital cases, deserves vigorous protection. Like other persons facing end-of-life decisions, capital defendants often change their minds about whether to continue their litigation. Pet. 27-29. Amici curiae, capital defense attorneys and former judges, concur, arguing that in capital cases the impulse to forgo review is common but usually transitory, that clients who receive guidance and assistance rarely seek to waive, and that, where competence to waive becomes a question, counsel need to participate fully in any judicial proceedings. Brief of Amici Curiae at 7, 11, 16. Respondent disputes none of this, and certiorari review is thus appropriate to address these vital issues.

V. THE COURT SHOULD AFFORD MR. TABLER THE OPPORTUNITY TO DEMONSTRATE PREJUDICE.

Because the court of appeals found no cause to excuse default, App. 7a, it did not address the issue of prejudice. Accordingly, if this Court concludes that counsel's renunciation did amount to cause, it should remand to afford Mr. Tabler an opportunity to show that his IATC claims were substantial, requiring an evidentiary hearing and ultimately relief. Pet. 29-30.

Respondent argues that this is a poor vehicle to address the cause question because Mr. Tabler could not establish IATC even if procedural default were excused. According to the State, 28 U.S.C. § 2254(e)(2) would bar an evidentiary hearing because he "failed to develop" his IATC claims in state court. BIO 35-36 (citing *Shinn v. Ramirez*, 596 U.S. 366 (2022), and *Shoop v. Twyford*, 596 U.S. 811 (2022)). The Fifth Circuit did not address this argument because the district court had "considered" evidence beyond the record in finding no cause for the default. App. 7a n.2. But Respondent's objection is unfounded, because resolving the question presented in this petition in Mr. Tabler's favor would also resolve the § (e)(2) question. *Ramirez* rested on the same agency principles as *Maples*. 596 U.S. at 382-83. Accordingly, if this Court finds cause based on counsel's renunciation, § (e)(2) would pose no barrier to an evidentiary hearing for the same reason: "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). The failure to develop the facts in the state proceeding, like the waiver, would not be attributable to Mr. Tabler. Thus, if this Court finds cause to excuse the default, it should either reject Respondent's § (e)(2) argument or remand to allow the Fifth Circuit to address it in the first instance.

If this Court finds cause, that will also undermine Respondent's argument in opposition to a potential motion for stay and abeyance under *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005), to permit Mr. Tabler to pursue the claim in state court. Respondent argues that he could never establish good cause for a *Rhines* stay because his "own behavior" resulted in the missed deadline. BIO 38-39. The same showing that should excuse default—that the waiver resulted from his attorneys' abdication of duty—would also establish good cause for a stay.[3]

Respondent also argues that this case is not an appropriate vehicle because the district court has already considered Mr. Tabler's claims, and considered evidence in support of the claims, yet ruled against him. BIO 34-37. In fact, the district court denied an evidentiary hearing and rejected the IATC claims without considering Mr. Tabler's proffer of 24 declarations to support them, contained in two supplemental appendices the court never mentioned (ROA. 2478-542), while repeatedly asserting, incorrectly, that Mr.

[3] The State argues that even if the Court finds cause and remands the case, the remand should be limited to the single claim on which the Fifth Circuit granted a COA. BIO 39. If this Court determines that merits review is appropriate, however, it should direct the Fifth Circuit to decide in the first instance how much of its original disposition it needs to reassess. In particular, the Fifth Circuit should decide whether the district court's erroneous failure to consider any of the declarations that comprised the centerpiece of Mr. Tabler's evidentiary proffer requires it to reassess all his IATC claims.

Tabler based his allegations on "hearsay" and "sheer speculation." Pet. App. 67a-68a, 79a, 87a. Despite the court's general statement in conclusion that it had considered the whole record, App. 102a, the court did not apprehend that Mr. Tabler's exhibits included extensive factual support for the IATC claims. Because the Fifth Circuit ruled only on procedural default, it did not consider or correct the district court's clear error and did not decide whether the proffer warranted a hearing. Those issues would be appropriate for the Fifth Circuit on remand were this Court to find that the renunciation constituted cause.

CONCLUSION

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

Respectfully submitted,

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