No. 23-7227

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.

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

BRIEF OF AMICI CURIAE CAPITAL DEFENSE ATTORNEYS AND FORMER JUDGES IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici are capital defense attorneys and former judges. Amici defense attorneys have collectively represented hundreds of death row defendants at the trial, direct appeal, and collateral review stages. Amici former judges have presided over cases raising issues including competency, waivers, and capital sentencing.

John H. Blume is the Samuel S. Leibowitz Professor of Trial Techniques at Cornell Law School, where he also serves as Director of the Cornell Death Penalty Project. Professor Blume's scholarship and teaching focus on capital punishment, evidence, and post-conviction remedies. He has published several books and many articles and book chapters in those three areas. Additionally, Professor Blume has represented numerous death-sentenced inmates in state and federal trials, as well as appellate and post-conviction proceedings. He has argued eight capital cases before this Court.

David I. Bruck is an attorney with forty-four years of experience representing state and federal capital defendants at trial, on appeal, and in post-conviction proceedings. He has served as Federal Death Penalty Resource Counsel to the federal defender system nationwide since 1992 and as a Clinical Professor of Law and Director of the Virginia

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for amici provided counsel for respondent with notice of our intention to file as soon as the first amicus agreed to file, on May 6, 2024.

Capital Case Clearinghouse at Washington and Lee School of Law between 2004 and 2020. He has argued seven capital cases before this Court, and he currently serves as lead counsel for a defendant in a capital trial before the 9/11 military commission at Guantanamo Bay, Cuba.

Jeremy Fogel is the Executive Director of the Berkeley Judicial Institute. Prior to his appointment at Berkeley, he served as Director of the Federal Judicial Center in Washington, D.C. (2011-2018), as a United States District Judge for the Northern District of California (1998-2011), and as a judge of the Santa Clara County Superior (1986-1998) and Municipal (1981-1986) Courts. He was the founding Directing Attorney of the Mental Health Advocacy Project from 1978 to 1981.

Nancy Gertner is a senior lecturer at Harvard Law School where she teaches a number of subjects, including criminal law, criminal procedure, forensic science, and sentencing. She has also been an instructor at Yale Law School, teaching sentencing and comparative sentencing institutions, since 1998. Prior to her appointment at Harvard, she served as a United States District Judge for the District of Massachusetts (1994-2011).

The Habeas Corpus Resource Center (HCRC) is an entity in the Judicial Branch of the State of California responsible for representing indigent California capital petitioners in state and federal habeas corpus proceedings. *See* Cal. Senate Bill 513 (Ch. 869, 1998 Cal. Stat.). Since 1999, the HCRC has accepted appointments by the state and federal courts in over 100 cases, recruited and trained private counsel in capital habeas corpus proceedings, and

served as a resource to the private capital defense bar. California has the nation's largest death row.

George H. Kendall is Senior Counsel and Director of Squire Patton Boggs (US) LLP's Public Service Initiative, a working group that focuses entirely on significant pro bono cases and projects. Mr. Kendall has handled capital trial and post-conviction matters since 1980, has taught courses on capital punishment and post-conviction litigation at Columbia and St. John's Law Schools, and has advised on and filed numerous amicus briefs in habeas and capital cases before this Court since 1988.

Lawrence Marshall is a Professor of Law at Stanford Law School. Before coming to Stanford, he served as a Professor of Law at Northwestern University School of Law, where he co-founded and served as Legal Director of the Center on Wrongful Convictions. In that capacity he represented several men sentenced to death who, although ultimately exonerated, expressed the desire on several intermittent occasions to forgo further appeals. Professor Marshall has long taught courses in professional responsibility, which include examination of a lawyer's duty to ensure that a client's stated preferences truly reflect the client's actual wishes, reached after the lawyer has meaningfully informed the client of all the ramifications of proceeding in any particular way.

The Office of the Ohio Public Defender (OPD) is the state agency in Ohio responsible for providing legal representation and other services to people accused or convicted of a crime who cannot afford to hire an attorney. OPD provides representation in appeals and post-conviction actions in death penalty,

criminal, and juvenile delinquency cases, as well as at trial when requested by local courts and in counties that contract with OPD for trial services. OPD's Death Penalty Department represents persons convicted and sentenced to death in the following practice areas: direct appeal, state post-conviction, federal habeas, clemency, lethal injection litigation, and ancillary litigation. OPD's mission is "Advocating, Fighting, Helping." OPD's vision is "A Fair Justice System."

Costa M. Pleicones served on the Supreme Court of South Carolina, including service as Chief Justice, from 2000-2016, when he attained mandatory retirement age. He then served as an active-retired justice until 2018, when he re-entered private practice. He dissented in *Johnson v. Catoe*, 548 S.E.2d 587 (S.C. 2002), which denied a new trial to a capital defendant despite a confession to the murder by a prior witness for the state.

Gregory W. Wiercioch is a clinical professor at the University of Wisconsin Law School and a supervising attorney with Legal Assistance to Incarcerated People. He has over thirty years of experience representing people on death row in state and federal post-conviction proceedings. In doing so, he has represented many severely mentally ill clients, and he appeared before this Court to argue on behalf of one of them in *Panetti v. Quarterman*, 551 U.S. 930 (2007). Additionally, Professor Wiercioch co-founded the Texas Defender Service in 1995.

SUMMARY OF ARGUMENT

This case offers the Court an opportunity to address an important issue: whether a capital habeas petitioner's procedural default is excused when his

lawyers renounced their duties, both before and during the proceeding at which he waived his right to state post-conviction review. This Court should hold that it is.

This Court has recognized that the first round of state post-conviction review is critical to the integrity of the capital punishment process. This is particularly so because post-conviction review is generally an incarcerated person's first opportunity to raise constitutional claims about the ineffective assistance of trial counsel. *See Davila v. Davis*, 582 U.S. 521, 532 (2017); *Trevino v. Thaler*, 569 U.S. 413, 417 (2013).

Most individuals sentenced to death pursue state post-conviction review. And many of them succeed, either in that process or in a subsequent federal habeas proceeding.

But if they forgo the right to pursue state post-conviction review, especially with respect to ineffective assistance of trial counsel claims, this will likely foreclose any future avenue for judicial relief. In effect, defendants who forgo state post-conviction review are asking the state to execute them as soon as possible.

Notwithstanding the importance and value of seeking state post-conviction relief, many capital defendants, like petitioner, at some point express an impulse to abandon their claims. But this impulse is almost always transitory and rarely reflects a reasoned decision. Instead, it generally stems from a combination of factors unrelated to the strength of a defendant's claims, including a misunderstanding of the consequences of waiver, mental illness, despair, or defense lawyers' neglect.

Post-conviction counsel play an essential role in assisting, advising, and advocating for clients who have raised the possibility of forgoing review. When counsel provide a capital defendant with appropriate information and address the root causes of his transitory impulse to waive, the defendant rarely follows through.

In the few cases where a capital defendant does appear before a court to attempt a waiver, capable post-conviction counsel not only represent their client's interests, but also assist the court in making an informed determination about their client's competency and the voluntariness of any proposed waiver. Under no circumstance does a responsible lawyer abandon his or her client.

Unlike counsel in the mine-run of capital post-conviction cases, petitioner's lawyers abandoned him when he broached the possibility of ceasing all post-conviction review. Their conduct deviated so dramatically from the usual practice in such a consequential setting that it established cause for the ensuing procedural default.

ARGUMENT

State post-conviction review plays a particularly important role in promoting the fair and accurate administration of capital punishment. The high rate of error in capital cases—with state courts reversing at least 18 percent, and in some jurisdictions up to 90 percent, of capital sentences—underscores post-conviction review's critical role. Frank Baumgartner et al., *Deadly Justice* 149-51 (2017). This is why almost every state with capital punishment not only provides for collateral review in capital cases but also provides

a statutory right to counsel in state post-conviction proceedings.

Almost all individuals sentenced to death avail themselves of post-conviction review. Nevertheless, at some point along the way, individuals sentenced to death often express an impulse to forgo those proceedings. A key part of post-conviction counsel's responsibilities is to provide guidance and assistance when their client broaches that possibility. In amici's experience, once a client receives guidance and assistance, he seldom gets to the point where he formally seeks to waive his right to post-conviction review. But if there are formal judicial proceedings, counsel cannot simply abdicate their role as their client's representative. A client who shows that his waiver occurred in the face of such an abdication has established cause for his procedural default under 28 U.S.C. § 2254(b).

I. The impulse to forgo post-conviction review is common but transitory for capital defendants.

Most capital defendants at some point experience an impulse to stop challenging their conviction and sentence. *See* John H. Blume, *Killing the Willing: "Volunteers," Suicide, and Competency*, 103 Mich. L. Rev. 939, 940 (2005). A variety of factors contribute to that impulse. And that impulse typically comes and goes. But in the end, almost all capital defendants do pursue post-conviction review.

1. At least four factors may cause capital defendants to temporarily voice a desire to forgo further review. These factors include misunderstanding the consequences of waiver, mental health challenges, external situations over which a

client lacks control, and a client's belief that his lawyer has abandoned him.

First, capital defendants may not understand the consequences of waiver. A legally unsophisticated defendant may not understand that if he decides to forgo the currently available state post-conviction process, that decision is likely irrevocable and will foreclose any further state or federal judicial review of all his potential claims. Or a defendant might misunderstand how long he has to decide whether to pursue post-conviction review. A defendant who decides to drop his appeals under these circumstances cannot be said to have acted "intelligent[ly]"—the requirement for a valid waiver, *see Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

Second, even when a capital defendant is told the consequences of waiver, mental illness or cognitive impairments may impel him to abandon his case.

Many defendants on death row are mentally ill. While only four percent of the general population suffers from severe mental illness, twenty-one percent of people living on death row do. Am. Bar Ass'n Death Penalty Due Process Rev. Project, *Severe Mental Illness and the Death Penalty* 9, 16 (2016). Some of that mental illness may itself be the product of the restrictive confinement they experience on death row. *Cf. In re Medley*, 134 U.S. 160, 168 (1890) (explaining that incarcerated people became "insane" after "even a short [solitary] confinement"). And whatever mental challenges an individual had when he arrived on death row are likely to be exacerbated by the conditions of confinement. *See Davis v. Ayala*, 576 U.S. 257, 286-87 (2015) (Kennedy, J., concurring). Amici have observed these rapid changes in many of our capital clients after

their sentencing, when they are completely alone with their thoughts for the first time.

Sitting on death row in restrictive conditions of confinement, mentally ill defendants may experience panic, hallucinations, loss of impulse control, self-mutilation, feelings of guilt and worthlessness, and suicidal thoughts and behaviors. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 329, 335-36, 349 (2006); *see also* Meredith Martin Rountree, *"I'll Make Them Shoot Me": Accounts of Death Row Prisoners Advocating for Execution*, 46 Law & Soc'y Rev. 589, 600, 603 (2012). This may leave a capital defendant incapable of appreciating the consequences of waiver. Or it may leave him untethered from reality altogether. Or it may even lead him to forgo further proceedings as a means of committing "suicide by waiver."

The fact that mentally ill defendants often vacillate about whether to forgo further review is a powerful indication that mental illness is driving their thought processes. This is borne out by the finding that among the few defendants who ultimately carry through with waiving post-conviction review, the vast majority (78 percent) have a documented history of mental illness or substance abuse. John H. Blume, Volunteers with Mental Illness or Substance Abuse Since 2005, at 2 (2022) (unpublished manuscript available from the author).

Third, amici have represented clients whose impulse to waive stems from issues unrelated to the post-conviction review process itself. For example, a client may feel an impulse to give up because of the end of a relationship, ruptured family ties, violence or harassment by prison guards or other inmates, the

isolation and loneliness of death row, or serious physical health conditions. In our experience, defendants who feel that they have no control over any of the other aspects of their lives may take control in the only way they know—by directing their lawyer to stop challenging their conviction or sentence.

Finally, all too often, "a critical catalyst" to an incarcerated person's impulse to waive "is the fact that a despairing client has lost contact with his attorney." Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure § 4.2 (7th ed. 2023). For a capital defendant on death row, his lawyer often serves as his window to the outside world and one of his few points of contact. Without that contact, an individual may lose faith in the post-conviction process altogether because he feels that nobody is fighting for him.

Any one of these four factors might be enough to prompt a defendant to float the possibility of abandoning his case. But these factors typically act in conjunction, further compounding the likelihood that at some point a defendant will express this impulse. In particular, when a mentally ill death row defendant feels abandoned by his lawyer, he may be especially prone to give up.

2. Even though many of our capital clients at some point experience a transitory impulse to abandon their claims, the vast majority ultimately decide to pursue post-conviction relief. The literature has long recognized this phenomenon. *See, e.g.*, Blume, *Killing the Willing*, *supra*, at 940; Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 Notre Dame L. Rev. 795, 801

(2002); Welsh S. White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 855 (1987).

In amici's experience, actual waiver of post-conviction review at any stage is atypical. Outright waiver of all post-conviction review at the very outset of the process, as happened in petitioner's case, is almost unheard of. Only one amicus recalls a client who ultimately waived further review. And that client suffered from an inoperable brain tumor that caused him tremendous, unrelenting pain. His situation contrasts with the countless death-row clients who ultimately chose to pursue the available avenues for challenging their conviction and sentence. *See* Blume, *Killing the Willing*, *supra*, at 940. As the next section of this brief explains, those clients decided to proceed with their claims. And they did so with ongoing guidance and assistance from their lawyers.

II. Clients who receive guidance and assistance from counsel almost never waive their right to post-conviction review.

In amici's experience, clients who broach the possibility of abandoning further review in their capital cases are most often responding to forces unrelated to the strength of their claims—or even their genuine desire to continue living. An attorney who has his or her client's best interests at heart—the centerpiece of all lawyers' ethical obligations—therefore explores with a client whether forgoing post-conviction review is actually in the client's best interest. *See* Model Rules of Professional Conduct R. 1.3 cmt. 1 (Am. Bar Ass'n 2024) (ABA Model Rules); Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases 7.1 cmt. (Am.

Bar Ass'n 2003) (ABA Guidelines). Post-conviction counsel typically fulfill this duty in at least three ways.

1. Counsel provide legal information to their client to ensure he understands the finality and gravity of waiving post-conviction review. As this Court has long recognized, to make an informed decision, a client must "be made aware of the dangers and disadvantages" of waiving a right. *Faretta v. California*, 422 U.S. 806, 835 (1975) (discussing the right to waive counsel and proceed pro se); *cf. Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (holding that trial counsel are ineffective if they fail to inform their client of the immigration consequences of a plea deal). Professional standards likewise presuppose that counsel will give their client information "necessary to permit [him] to make informed decisions." ABA Model Rule 1.4(b).

It is especially important for counsel to provide guidance where, as here, a client contemplates waiving a right that is preservative of his other rights.

In particular, responsible counsel inform their client of filing deadlines and make clear that if the client does not meet those deadlines, he will be foreclosed from obtaining further review of any of his claims. *See, e.g.*, ABA Guideline 10.5.C.6, 10.8.A.3.c; *Lisenbee v. City of Clarksville Gas & Water*, 2013 WL 3070997, at *1 (M.D. Tenn. June 18, 2013); *Lawyers Disciplinary Bd. v. Palmer*, 798 S.E.2d 610, 618-19 (W. Va. 2017).

Notably, some clients may not be able to understand or intelligently assess the gravity of waiver due to mental illness or some other cognitive deficit. In those cases, counsel inform the court that

the client may be incompetent. Indeed, because "such a high percentage of death row inmates have serious mental health problems," issues related to competence "color *everything* in terms of how [counsel] respond to an expressed desire to waive appeals." *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 Law & Soc. Inquiry 849, 867 (2000).

2. Even if counsel conclude that their client is capable of understanding the consequences of waiver, they still need to determine what has driven their client's impulse to waive.

Counsel who have been doing their job generally understand why their client has floated the possibility of forgoing further review because they have an ongoing "relationship of trust" with him. *See, e.g.*, Guidelines & Standards for Tex. Capital Counsel 12.2.B.2.a (State Bar of Tex. 2006) (Texas Guidelines). Indeed, professional standards presume that post-conviction counsel "maintain close contact with the client" and "continually monitor the client's mental, physical and emotional condition." ABA Guideline 10.15.1.E.1-2; *id.* 10.15.1. cmt.

If, however, counsel do not understand why their client has raised the possibility of waiver, they probe further. For instance, counsel may consult with their client's family or others who regularly interact with him. Or counsel may seek expert evaluations of their client. If an initial evaluation is inconclusive or inconsistent with the other information counsel have, then counsel often seek a second opinion. *See* John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell*

Us About Mitigation, 36 Hofstra L. Rev. 1035, 1040-41 (2008).

The same factors that lead the client to raise the possibility of waiver may also lead the client to resist this kind of investigation. But counsel who are focused on their client's best interests nonetheless pursue these investigations. *Cf. Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam) (explaining that a client's "fatalistic or uncooperative" actions do not excuse counsel from their duty to pursue a mitigation investigation); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (same for an "actively obstructive" client).

3. In most cases, counsel conclude that their client's abandonment of post-conviction review is the product of forces having little or nothing to do with his prospects for relief or his overall desire to continue living. In such situations, counsel support their client in addressing whatever issues have led to the impulse to forgo review. That support can take a variety of forms.

For example, counsel might help the client secure medical treatment. One amicus had a client whose desire to forgo further review was triggered by excruciating back pain. Counsel helped connect the client with a physician in the prison. After receiving pain relief, the client decided to resume post-conviction review.

In other cases, counsel might rectify issues their client faces in prison. Amici have provided assistance by speaking with prison administrators to resolve conflicts between their clients and guards or other individuals.

And sometimes, counsel might simply remind their client that his life has worth. In this vein, amici have helped arrange visits and communications with their client's family. And if a client's sense of despair or worthlessness stems from the fact that his prior lawyers failed to maintain a relationship with him, post-conviction lawyers reassure him that he now has counsel committed to representing him vigorously. Hertz & Liebman, *supra*, § 4.2.

In amici's experience, when counsel inform their client of the consequences of a possible waiver and assist him by addressing the factors that impelled him to raise that possibility, the client decides to continue pursuing post-conviction review. As such, a client's decision to knowingly and intelligently waive post-conviction review after receiving an attorney's full assistance is a once-in-a-career occurrence.

4. But in no case do diligent counsel "simply acquiesce" to an initial expression of the wish to forgo further review. ABA Guideline 10.5 cmt. To do so would be a "dereliction of [post-conviction] counsel's duty." Texas Guideline 12.2.B.2.c; *see also id.* 12.2.B.5.a. This is particularly true when the client expresses a desire to waive *all* potential claims at his first opportunity to seek post-conviction review: Capital defendants who make a wholesale waiver at this early stage essentially ask the state to execute them straight away.

III. If a client's competence becomes a question for the court, counsel need to participate fully in any judicial proceedings.

Because most capital defendants decide, after consulting with counsel, to continue pursuing post-

conviction review, the issue of waiver rarely comes before a court. But in the rare case that a defendant insists on waiving, the court must determine whether he is competent to make a knowing and intelligent waiver. Counsel owe duties to both the court and their client to ensure that this determination is made properly.

1. States generally presume that capital defendants will avail themselves of the state's procedures for seeking post-conviction relief. Recognizing both the complexity and gravity of the potential claims those defendants will raise, nearly every state that imposes capital punishment also provides capital defendants a statutory right to counsel in that post-conviction review process.[2] Those counsel are expected to "raise and preserve all arguably meritorious issues," understanding that failure to do so may foreclose future review for their client. ABA Guideline 10.15.1.C cmt. B. Indeed, counsel's failure to do so may lead the court to appoint new counsel. *E.g.*, *Ex parte Medina*, 361 S.W.3d 633, 642-43 (Tex. Crim. App. 2011); *see also* Tex. Code Crim. Proc. Ann. art. 11.071 § 4A(b)(3) (West 2015). Counsel who file a deficient petition deprive their client of his "one full and fair opportunity to present his constitutional or jurisdictional claims" on post-conviction review. *Ex parte Medina*, 361 S.W.3d at 642 (citation omitted).

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[2] *E.g.*, Tex. Code Crim. Proc. Ann. art. 11.071 § 2 (West 2015); *see* Sup. Ct. Ohio Task Force on Conviction Integrity & Postconviction Rev., *Report and Recommendations of the Task Force on Conviction Integrity and Postconviction Review* 4 (2022) (finding that all death-penalty states but one provide a statutory right to counsel).

Because wholesale waiver of state post-conviction review is so atypical, several jurisdictions require a hearing on the capital defendant's competence before he forgoes all further review, *see, e.g.*, *State v. Motts*, 707 S.E.2d 804, 809 (S.C. 2011); *cf. Mata v. Johnson*, 210 F.3d 324, 331 (5th Cir. 2000) (federal courts). Even absent this requirement, state courts often hold hearings to consider evidence regarding the defendant's competence to waive. *See, e.g.*, *Cox v. State*, 327 So. 3d 100, 111, 115 (Miss. 2021); *Roberts v. State*, 426 S.W.3d 372, 377 (Ark. 2013); *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993).

2. At a hearing to determine a capital defendant's competence to waive post-conviction review, the court relies on counsel to alert it to important information.

Counsel are uniquely positioned to inform the court about their client's mental condition. After all, counsel have "the closest contact with the defendant." *Drope v. Missouri*, 420 U.S. 162, 177 n.13 (1975) (citation omitted). Counsel can disclose past diagnoses and mental health history. They can tell the court about their client's vacillation on waiver. And they can describe behavior that sheds light on their client's capacity to make reasoned decisions. Indeed, as this Court has recognized, counsel "often have the best-informed view of [their client's] ability to participate in his defense," which can "in and of itself, constitute probative evidence of incompetence." *Medina v. California*, 505 U.S. 437, 450 (1992).

In assessing competence or considering questions of waiver, amici with judicial experience have found that other sources of information—such as a mental health expert's assessments or the judge's own observations—may provide incomplete signs of a

defendant's condition. Expert assessments of an individual's competence reflect only a snapshot in time. And a judge's observations are confined within the four walls of the courtroom. Thus, these sources of information may not capture critical changes in the defendant's mental condition, particularly when a defendant has been vacillating on the issue of waiver. Counsel help fill these gaps and "bring [competence] issues into focus." *Drope*, 420 U.S. at 176-77.

Counsel who harbor any doubts about their client's competence normally inform the court of those doubts. One amicus who informed a court of his concerns that a client was not competent to waive post-conviction review did so in a case where the client had thirty years of documented mental health problems, repeatedly went on hunger strike, and (like petitioner) engaged in self-harm. *Mata*, 210 F.3d at 331; Pet. App. 301a, 670a. Counsel's role as "officers of the court" requires candor about these types of concerns. *See* Crim. Justice Standards for Defense Function 4-1.2(b), 4-1.3(c) (Am. Bar Ass'n 2017) (ABA Defense Standards); ABA Model Rule 3.3 cmt. 2. The court must make an informed finding about the defendant's competence to waive, and responsible counsel support this finding by providing critical information.

3. At a competency hearing, counsel advise their client and safeguard his best interests. *See* ABA Defense Standard 4-1.2(b); *see also id.* 4-4.6. Counsel do so in two key ways.

First, counsel ensure that their client receives accurate information. If the court misinforms a defendant—for instance, about his ability to later change his mind or about the finality of waiver—counsel must correct that misinformation or else the

waiver is not truly intelligent. *Cf. Belcher v. State*, 93 S.W.3d 593, 596-97 (Tex. Crim. App. 2002) (explaining that a lawyer breached her duty to her client by remaining silent when the court repeatedly misstated the deadline to file a motion for a new trial); ABA Defense Standard 4-9.5(b) (noting that "appellate counsel should explain" to their client "any timing deadlines that apply" to collateral proceedings).

Second, counsel advance their client's interests by ensuring his competence is accurately determined by the court. *See* ABA Model Rule 1.3; ABA Defense Standard 4-5.2. This may require them to dispute their client's competence to waive. In amici's experience, counsel who have investigated their client's situation generally harbor some doubt about whether a client is competent to knowingly and intelligently waive post-conviction review. Counsel owe a duty to their client to express that doubt to the court and guard against a finding that their client is competent if he is not. *See Comer v. Stewart*, 215 F.3d 910, 914 & n.2 (9th Cir. 2000). This is especially so because an inaccurate determination by the court that the client is competent will permanently deprive him of his right to review.

If counsel determine that their client is undoubtedly competent and nevertheless wishes to waive further proceedings—an occurrence most amici have never encountered—counsel have two options. First, counsel could assist a client in effectuating a waiver. *See, e.g.*, Harrington, *supra*, at 865. Second, counsel could withdraw and allow the court to appoint new counsel.

In no case, however, may counsel let the question of competency be determined without their

investigation or participation. A lawyer's failure to advocate constitutes a constructive denial of counsel. *See Appel v. Horn*, 250 F.3d 203, 215-17 (3d Cir. 2001) (hearing to determine competence to waive right to counsel); *United States v. Collins*, 430 F.3d 1260, 1265-66 (10th Cir. 2005) (hearing to determine competence to stand trial). A lawyer's failure to withdraw is even worse: It leaves both the court and the client with the false impression that the client is receiving the representation the law requires. And beyond that, it effects *sub rosa* an additional waiver—this time of the client's right to counsel—with no determination whatsoever that this second waiver is valid.

IV. Petitioner's case presents the Court with the right opportunity to clarify what, in this setting, constitutes cause for procedural default.

This case is the right vehicle to address how counsel's inaction in the face of a client's impulse to waive post-conviction review can create cause that excuses procedural default under 28 U.S.C. § 2254(b). Like the individuals described in Part I of this brief, petitioner Tabler experienced a transitory impulse to waive post-conviction review that he soon renounced. But unlike the attorneys discussed in Parts II and III of this brief, petitioner's post-conviction counsel failed him utterly, thereby causing his default.

1. Petitioner experienced all of the extrinsic factors that lead capital defendants to express an impulse to waive post-conviction review.

First, petitioner misunderstood how long he had to decide whether to pursue post-conviction review—a

misunderstanding created initially by his lawyers and then compounded by the judge who accepted his waiver. Pet. App. 297a, 226a.

Second, petitioner has a long, documented history of mental illness. He suffers from two congenital birth defects that impair his brain function, as well as bipolar disorder and borderline personality disorder. Pet. App. 256a-57a. These illnesses contributed to petitioner's erratic and self-harming behavior in the months preceding his waiver. *Id.* 301a.

Third, petitioner was experiencing severe isolation and loneliness when he raised the possibility of forgoing further review because he was unable to get in contact with his sister and mother. Pet. App. 297a n.10.

Finally, petitioner's attorneys exacerbated his loneliness by failing to maintain meaningful contact with him. *See, e.g.*, Pet. App. 284a-88a.

2. Petitioner's lawyers failed to help him determine whether forgoing post-conviction review was in his best interest.

First, petitioner's lawyers misinformed him about the legal consequences of abandoning his right to post-conviction review by telling him that "[n]othing, literally nothing, [would] happen" until after his direct appeal was litigated. Pet. App. 297a; *see also, e.g.*, *id.* 302a-03a, 307a. In reality, petitioner had only forty-five days after the State filed its brief with the Court of Criminal Appeals to initiate his post-conviction review. Tex. Code Crim. Proc. Ann. art. 11.071 § 4(a) (West 2015).

Second, petitioner's lawyers never established the relationship with him that would have enabled them

to properly assess his competence and needs. After visiting petitioner once in June 2007, they rarely communicated with petitioner and never again saw him in person until his competency hearing fifteen months later. Pet. App. 284a-88a. They also failed to get a second opinion on the conflicting neuropsychological assessments of petitioner they received. *Id.* 297a, 300a. Moreover, they failed to seek further information regarding petitioner's mental state by speaking with people who knew him well. *See, e.g.*, *id.* 288a-98a.

Third, petitioner's lawyers never addressed the reasons underlying his impulse to forgo post-conviction review. This inaction came despite the psychiatric report and numerous letters from petitioner detailing his suicidal ideation and loneliness, deteriorating mental health, and vacillation about waiving. *E.g.*, Pet. App. 286a-88a, 292a-93a, 297a. Instead, petitioner's lawyers simply acquiesced to his impulse to waive further review, failing to advise him while he made a life-ending decision. *See id.* 286a.

3. Finally, petitioner's lawyers abdicated their role as his counsel at his competency hearing. They declared themselves "present" but not "ready," Pet. App. 224a, then stood by silently while the court misinformed petitioner of the deadline after which he could no longer pursue post-conviction review. *Id.* 540a. And they withheld information that cast doubt on petitioner's competency. This information included not only letters documenting his vacillation and suicidal ideation, but also a seventeen-page neuropsychological evaluation detailing his "constellation of mental illnesses." *Id.* 292a-93a, 286a-

88a, 300a, 553a-54a. Worse still, petitioner's lawyers submitted, ostensibly as an exhibit of the court, a misleading two-page evaluation that found petitioner was "forensically competent" to waive his *direct appeal*. *Id.* 297a, 232a-33a, 302a.[3]

Worst of all, petitioner's lawyers refused to take any position on petitioner's competency to waive. Pet. App. 224a, 302a, 540a. Rather than provide information to the court on his behalf or withdraw and ask the court to appoint new counsel, they left petitioner to represent himself on the issue of his competence. And they allowed the court to find him competent based on his own completely subjective sense that he was "competent enough." *Id.* 232a.

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Both capital defendants and courts depend on post-conviction counsel to ensure that a defendant understands the importance of state post-conviction review—especially because forgoing such review usually means that "no state [or federal] court will ever review" the defendant's claims, however meritorious. *E.g.*, *Davila v. Davis*, 582 U.S. 521, 532 (2017). Post-conviction counsel must safeguard their capital client's best interests at this crucial stage in his proceedings and accurately represent those interests to the court. If they cannot, they must withdraw. Accordingly, post-conviction counsel who fail to advise and represent their capital clients in this setting

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[3] In any event, capital defendants in Texas cannot waive their direct appeals. *See, e.g.*, David R. Dow & Jeffrey R. Newberry, *Reversal Rates in Capital Cases in Texas, 2000-2020*, UCLA L. Rev. Discourse, Apr. 2020, at 2, 10; *Falk v. State*, 2018 WL 3570596, at *1, n.2 (Tex. Crim. App. July 25, 2018).

undermine the integrity of the capital punishment system.

This Court should grant the petition for writ of certiorari to clarify that a capital defendant can establish cause for procedural default under 28 U.S.C. § 2254(b) by showing that his counsel abdicated their responsibility to assist him in making the decision to forgo post-conviction review in state court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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