No. 23-6451

In the Supreme Court of the United States

TRAVIS DWIGHT GREEN, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Travis Green does not dispute that he raped, beat, and strangled Kristin Loesch in her own home. Nor can he dispute that the state trial court held not one but two hearings under *Faretta v. California*, 422 U.S. 806 (1975), to ensure that he was competent both to stand trial for his heinous crime and to present his own defense. Rather, he maintains that he was incompetent to stand trial and that his state-habeas counsel abandoned him within the meaning of *Maples v. Thomas*, 565 U.S. 266 (2012). Again, Green does not dispute that habeas counsel filed a timely petition raising numerous claims. Rather, he maintains that counsel should have amended the petition to challenge whether Green was incompetent at the time of trial. The questions presented are:

1. Is whether (and thus when) attorney abandonment occurs within the meaning of *Maples* a legal conclusion subject to de novo review?

2. Is mental incompetency a factor external to the defense such that it may serve as cause to overcome procedural default when the state-habeas petitioner is represented, and any factual basis for the underlying claim is apparent from the face of the trial record?

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Travis Green does not dispute his guilt for the brutal sexual assault and murder of nineteen-year-old Kristin Loesch whose autopsy revealed more than a liter of blood in her abdomen, a silent witness to the pain and terror that were the final moments of the effervescent teen's all-too-short life. Green does not dispute that the question of his competency was thoroughly explored twice before his trial or that he was provided counsel to present a state-court habeas petition. Nevertheless, twenty-five years after he left Kristin's body to be found in her bedroom by her distraught boyfriend, Green insists that he is entitled to a writ of habeas corpus because his state-habeas counsel abandoned him within the meaning of *Maples* when counsel chose not to litigate Green's competency—for the third time.

The Fifth Circuit declined to reopen the issue of Green's competency to stand trial a quarter century after the fact because the claim has long since defaulted. The basis for Green's current claim of incompetence was apparent from the face of the trial record at the time that state-habeas counsel declined to include the claim in his timely filed state-habeas application. Any actions that Green insists represented abandonment did not occur until years after the state-court deadline to amend the application had lapsed. Accordingly, Green asserts not abandonment but negligence: In his view, his attorney *should* have re-litigated his competency in his state-habeas petition. But under this Court's well-established rule, negligence of state-court counsel is *not* grounds for federal-habeas relief. *Maples*, 565 U.S. at 280-81. The Fifth Circuit further held that under its precedent, mental incompetency during state-habeas proceedings is not cause to excuse a default because it is not "external" to the defense. *See* Pet.App.9a n.2 (citing *Gonzales v. Davis*, 924 F.3d 236, 244 (5th Cir. 2019)).

Neither ground the petition identifies merits this Court's attention. *First*, there is no need for the Court to assess whether abandonment (and, by extension, when abandonment occurs) represents a legal question or a factual one. Notwithstanding Green's assertions to the contrary, the courts of appeals uniformly review the existence of cause to excuse a state-court default de novo and any underlying factual findings for clear error. Further, this case presents a poor vehicle to resolve any confusion that might exist regarding the appropriate standard of review because under any standard of review, Green's state-habeas counsel did not *abandon* him when he filed a state-habeas petition on Green's behalf. He merely omitted a claim that Green now insists would have been meritorious. Green's theory of abandonment would expand *Maples* beyond recognition and swallow the well-established rule, expressly

reaffirmed in *Maples*, that attorney negligence is not cause to overcome procedural default. 565 U.S. at 280-81.

Second, any potential friction among the courts of appeals regarding whether and when incompetence during state-habeas proceedings can represent cause to overcome a state-court default does not merit review at the present time. True, the Eighth Circuit has held that mental incompetency may serve as cause in limited circumstances. But the circuits agree that such circumstances do not exist when an incompetent habeas petitioner is represented by counsel and that incompetence does not prevent counsel from raising a defaulted claim. That is precisely what happened here: Green had state-habeas counsel who had access to trial court records in which Green's trial-time competency was actually litigated. Under those circumstances, the failure to argue in state-habeas proceedings that Green was tried while incompetent was attributable to his state-habeas counsel's actions, not any mental illness from which Green may have suffered during state-court proceedings. Thus, any friction between the Eighth Circuit's decades-old precedent and the unpublished decision below is not relevant to the resolution of this case.

Because Green identifies no split of authority relevant to this case and ignores multiple vehicle problems with the questions on which he seeks review, his petition should be denied.

STATEMENT

I. The Brutal Murder of Kristin Loesch

In 1999, Kristin Loesch was nineteen years old, ROA.6519,[1] and attending community college in Houston, Texas, ROA.6499-500, 6519. She was described by those who loved her

[1] "ROA." refers to the electronic record on appeal in *Green v. Lumpkin*, No. 20-70021 (5th Cir.).

as having a "big heart," and being "open," "trustworthy," "honest," and "just a good girl." ROA.6493. She had just moved in with her high-school sweetheart, Bobby Stewart, ROA.6519, from whom she was "inseparable," ROA.6498.

One day that September, Kristin and Bobby hosted a get-together at their Houston apartment. ROA.6487-93, 6519-20. After their friends left, they struck up a conversation with a passerby named Travis, ROA.6524-29, with whom they spent the evening together before dropping Travis off at his apartment complex. ROA.6529-33. Upon returning to their own apartment, Kristin went to bed. ROA.6536. Bobby, whom everyone knew as a heavy sleeper, fell asleep on the couch in a separate room. ROA.6539-45.

The next morning, Bobby found Kristin dead on the bedroom floor. ROA.6547-48. She had been sexually assaulted, strangled, and suffered severe blunt-force trauma. ROA.6792-6803. The medical examiner's autopsy revealed that Kristin's liver contained a large tear, and her abdomen was full of blood. ROA.6796-97. Such an injury requires an "extreme amount of force" ordinarily comparable to a car crash. ROA.6799. There was hemorrhage in her neck, and one of her neck bones was broken. ROA.6801-02. In other words, she had been strangled to death, ROA.6803, but the trauma to her abdomen would have killed her anyway. ROA.6803-04.

The "Travis" that Bobby and Kristin had met and that Bobby later described to police matched petitioner, Travis Green. ROA.6647-51. Green also matched a neighbor's description of a man seen entering the apartment around the time Kristin died. ROA.6460-63. Green's DNA was also found in semen and blood stains on Kristin's shirt, semen in her vagina, and skin under her fingernails. ROA.6763-74.

II. Green's Trial

Green was charged with capital murder in Texas state court. ROA.4820. Judge Michael McSpadden appointed counsel for Green, ROA.4822, but Green filed a motion invoking his constitutional right to represent himself. ROA.4861. After Green executed a written waiver of his right to counsel, ROA.4868, Judge McSpadden held a *Faretta* hearing to ensure that Green was competent to proceed pro se. ROA.5302-03. Green indicated that he was "competent enough and intelligent enough" to represent himself, that he had a right to represent himself, and that he understood he would be held to the same rules as lawyers. ROA.5306, 5311-17. Judge McSpadden also inquired into Green's mental-health history and appointed a doctor to assess Green's competency, but Green refused to speak to him. ROA.5312-13, 5042. Judge McSpadden ultimately permitted Green to proceed pro se, but he ordered that existing counsel should remain as standby counsel and "be available on a consulting basis only." ROA.5305, 5315. Judge McSpadden later appointed Tyrone Moncriffe as standby counsel. ROA.6979, 4870.

Judge McSpadden was replaced by Judge Robert Jones, who conducted a second *Faretta* hearing to ensure Green's competency. ROA.5323-26. Green indicated he understood that his waiver might affect his appellate rights, and that he would need to follow evidentiary rules, subpoena witnesses, and file motions properly. ROA.5332-51. Green listened to admonishments and asked relevant questions. *See* ROA.5332-53. Green explained that he was "being charged with capital murder," and facing "the death penalty, and that's what [he was] going to defend" against. ROA.5353. Green repeatedly stated he was competent and reaffirmed his waiver of counsel. ROA.5338-57. When Judge Jones specifically inquired into Green's mental-health history, Green explained that he had, on

occasion, spoken to a psychologist regarding social and economic issues, but had never been diagnosed with any mental illness or admitted to a mental institution. ROA.5330-31, 5348-50. Like Judge McSpadden before him, Judge Jones deemed Green competent to waive his rights and proceed pro se. ROA.5359; *see also* ROA.5965-66, 6415-16.

Through thirteen days of pretrial proceedings, neither Judge Jones nor the prosecutors noted signs of incompetence. *See* ROA.5300-6399. Nevertheless, when Moncriffe informed the court that he observed signs of paranoia, Judge Jones ordered a psychological assessment. ROA.5965-66. A doctor evaluated Green, observed him during voir dire, and issued a report concluding that Green was competent. ROA.5093-98. Green had no record of mental illness, and a report from county medical staff assessed Green's mental status as normal. ROA.5093. Green's mother reported no mental illness and attributed Green's nervousness and distrust of lawyers to his incarceration and previous experience. ROA.5094. The bailiff similarly reported that Green told him he distrusted lawyers because they had lied to him. ROA.5095-96.

During trial, Green actively defended himself. ROA.6419, invoking the Rule, ROA.6414, asking relevant questions, including whether the prosecutor had "passed the witness," ROA.6464; examining exhibits before agreeing to admission, ROA.6473; and objecting to testimony, ROA.6660-61. Green continued to reaffirm his desire to represent himself throughout voir dire and trial. *E.g.*, ROA.5421, 5523, 6414, 6697.

Faced with a mountain of eyewitness testimony and physical evidence, the jury nonetheless found Green guilty. ROA.6849. As the trial moved into the punishment phase, Green informed the court that he relinquished his right to self-representation. ROA.6861. Moncriffe assumed Green's representation. ROA.6861, 6863.

Green was ultimately sentenced to death.[2] ROA.7026. The Texas Court of Criminal Appeals affirmed on direct appeal. Pet.App.222a-223a.

III. State-Habeas Proceedings

The trial court appointed Ken McLean to represent Green in state-habeas proceedings, ROA.7417, who timely filed a state-habeas application on October 15, 2001. ROA.7422-35. The application raised seven claims. ROA.7423-7432. Four of the claims raised were presented only as headings. ROA.7432. McLean stated that he "intend[ed] to develop the facts and law of these extra-record grounds for habeas relief with all deliberate speed." ROA.7432. Green himself had previously filed a habeas application pro se, ROA.7382, but the court dismissed it because McLean represented Green, ROA.7448. Absent from McLean's petition on behalf of Green was any claim that Green, who had been found competent twice, was nonetheless incompetent to stand trial.[3]

The last possible date on which McLean could have supplemented Green's state-habeas application was November 12, 2001. ROA.7372-73. After that deadline lapsed, "McLean had no contact with Green and made no filings on his behalf" for the next six years. Pet.App.5a.

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[2] Green's DNA was also found in a glove near the body of Kassie Lynn Federer, another 19-year-old college student who was shot to death in her own Baton Rouge home just 11 days after Kristin's brutal murder. Emily Shapiro, *Man on death row for 1999 slaying now linked by DNA to another woman's murder that same month*, ABC News (Oct. 17, 2018), https://tinyurl.com/2czdhewb. By the time that Louisiana authorities matched that DNA to Green in 2018, he had already been sentenced to death in Texas.

[3] Although this finding was made in the context of a *Faretta* hearing, the competency needed to stand trial is the same competency needed to waive counsel. *Godinez v. Moran*, 509 U.S. 389, 396-401 (1993). The level of competency needed to represent oneself is at least as high. *See McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (requiring that a defendant "knowingly and intelligently foregoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol."); *see also Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

In November 2007, the State moved for disposition of the writ, and the state court ordered the parties to file any supplemental materials. ROA.7576-78. In April 2008, after obtaining mental-health records from the Texas Department of Criminal Justice, McLean filed a "Statement of Counsel" saying he could not "in good faith file Proposed Findings of Fact and Conclusions of Law" warranting habeas relief. Pet.App.239a. McLean included that he reviewed Green's most recent mental-health examination from May 2007 and stated, incorrectly, that it contained no indication of mental illness or incompetency at that time. Pet.App.239a. Around 2009, McLean died, and the state-habeas trial court appointed successor counsel. ROA.7662.

The state trial court recommended denying Green's application for habeas relief. Pet.App.219a-221a. The Texas Court of Criminal Appeals denied relief in 2013. Pet.App.195a-196a.

IV. Federal-Habeas Proceedings

Green sought federal-habeas relief in 2014. ROA.77-316, 352-647. He argued that he was incompetent to stand trial and that Moncriffe provided ineffective punishment-phase assistance. Pet.App.13a. Green does not dispute that both claims were procedurally defaulted because he failed to raise them in state-habeas proceedings. Pet. 2; Pet. for Rehearing En Banc 3-4, *Green v. Lumpkin*, No. 20-70021 (5th Cir. May 4, 2023), ECF No. 93.

The federal district court found cause to overcome the default of Green's competency claim because it concluded that McLean abandoned Green within the meaning of *Maples v. Thomas*, 565 U.S. 266. Pet.App.30a. The district court also found cause to overcome the default of the punishment-phase ineffective-assistance claim because McLean provided

ineffective assistance as state-habeas counsel. Pet.App.85a-87a. The district court granted relief on both claims. Pet.App.13a.[4]

A panel of the Fifth Circuit reversed. Pet.App.2a. It held that it need not decide whether McLean abandoned Green because "any abandonment that might have occurred here" was not the cause of his default as it "did not take place until after the November 12, 2001 deadline for McLean to supplement Green's habeas petition." Pet.App.7a. The panel further explained that "Texas law requires capital habeas petitioners to present all state-habeas claims in their initial application," Pet.App.7a (citing Tex. Code Crim. Proc. art. 11.071 § 5(a)). Because Texas courts generally "will not entertain claims that appear for the first time in a successive application," Pet.App.8a, the court concluded "the default of Green's incompetency claim is attributable to McLean's failure to raise it in Green's initial habeas application—rather than any subsequent abandonment under *Maples*." Pet.App.9a. In other words, the Fifth Circuit concluded that the gravamen of Green's claim was that McLean did not raise a claim in his initial habeas application that Green now wishes he had, *not* that McLean had later abandoned him. *See* Pet.App.9a.

The Fifth Circuit rejected Green's alternative argument based on "his incompetence throughout the state-habeas proceedings" under existing circuit precedent. Pet.App.9a (at n.2). Specifically, the court applied *Gonzales*, where the court had held that mental incompetency does not satisfy cause to overcome procedural default because it is "not a cause external to the petitioner." 924 F.3d at 244 & n.4.

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[4] The district court technically granted relief on two separate claims alleging that Moncriffe was ineffective for different reasons. Pet.App.13a, 120a. As Green does not discuss those claims in his petition before this Court, the distinction between the claims is irrelevant, and respondent will discuss it no further.

Green moved for rehearing en banc, which the Fifth Circuit denied without any member of the court requesting a poll. Pet.App.12a. This petition followed.

REASONS FOR DENYING THE PETITION

As this Court has held, generally, "a federal court may not review federal claims that were procedurally defaulted in state court." *Davila v. Davis*, 582 U.S. 521, 527 (2017). But a "state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and actual prejudice resulting from the alleged constitutional violation." *Id.* at 528. To establish cause, "the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). Green asserts that this Court's intervention is necessary because the lower courts are confused about the standard for reviewing whether cause exists, and whether mental incompetence during state habeas proceedings can constitute cause. Green is wrong.[5]

I. The First Question Presented Does Not Warrant Review.

A. There is no circuit split requiring this Court's attention.

"The procedural default doctrine . . . refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). The doctrine "has its roots in the

[5] Green pointedly does *not* raise a claim that he is currently incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), or *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). Such a claim would, in any event, be unripe as Green lacks an execution date. *See Green v. Thaler*, 699 F.3d 404, 410 n.3 (5th Cir. 2012).

general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Id.* An "equitable exception" exists "when a habeas applicant can demonstrate cause and prejudice for the procedural default." *Id.* at 393. The existence of cause is a "legal conclusion," which is properly reviewed de novo. *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). By contrast, factual findings supporting that legal conclusion are reviewed for clear error. *Id.* at 223.

As Green admits (at 19 & n.9), the Fifth Circuit follows this principle: It has held that "in reviewing a grant of habeas relief, [the court] review[s] issues of law de novo and findings of fact for clear error." *Prible v. Lumpkin*, 43 F.4th 501, 513 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2644 (2023); *see* Pet. 19. And consistent with this Court's precedent, it treats "whether a petitioner has shown cause and prejudice to excuse a procedural default" as a legal question that "is reviewed de novo." 43 F.4th at 513. Those statements are entirely consistent with the notion in which findings of fact, which underlie that legal question, are reviewed for clear error. Green nonetheless insists that the Fifth Circuit's rule splits with its sister circuits in two different ways. Those splits are illusory, irrelevant, or both.

1. No circuit split exists as to the proper standard of review for procedural default and cause to overcome it.

Green first contends (at 18) that this Court's intervention is necessary because the courts of appeals apply inconsistent standards of review in determining whether cause exists to excuse procedural default. But Green conflates the difference between reviewing the ultimate legal question of whether procedural default and cause exist with reviewing factual findings *supporting* the existence of procedural default or cause to overcome it.

Because those are different questions, which are correctly subject to different standards of review, there is no circuit split requiring this Court's attention.

The cases from other circuits that Green cites are not to the contrary—as Green effectively concedes. Citing cases with incomplete or generalized standards of review, Green contends that the Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, along with the Fifth, simply review "procedural default rulings" de novo, Pet. 20, and writes off clarifying or more specific cases as showing "a lack of intra-circuit consistency," Pet. 21. He then asserts that these standards of review are inconsistent with those employed by the Second and Fourth Circuits, which examine factual questions for clear error. *See* Pet. 21. No inconsistency exists because (unlike Green), these courts recognize the difference between reviewing a factual finding and reviewing a legal conclusion that may flow from that finding.

To begin, the Sixth Circuit has explained that "[i]n appeals of federal habeas corpus proceedings," it reviews "factual findings under a 'clearly erroneous' standard." *Cvijetinovic v. Eberlin*, 617 F.3d 833, 836 (6th Cir. 2010). It reviews "a district court's legal conclusions in a habeas petition de novo" and "accordingly" reviews "the district court's decision applying the cause and prejudice rules to the procedural bar issues de novo." *Id.* (cleaned up). "The district court's determination regarding procedural default and its resolution of whether cause and prejudice exist to excuse the default are . . . subject to de novo review." *Id.* (cleaned up). That standard applies because "cause and prejudice and procedural default are questions of law, which [the court] review[s] *de novo*." *Burroughs v. Makowski*, 411 F.3d 665, 667 (6th Cir. 2005). Green acknowledges that in *Hall v. Mays*, 7 F.4th 433, 443 (6th Cir. 2021), the Sixth Circuit expressly held that "'in an appeal of a district

court's finding of procedural default, [it] review[s] the district court's legal conclusions de novo and its findings of fact for clear error.'" Pet. 21.

As to the Seventh Circuit, Green cites (at 20) a case reciting that it reviews the ultimate question of "procedural defaults and related issues de novo." *Richardson v. Lemke*, 745 F.3d 258, 269 (7th Cir. 2014). But the same circuit has also held that "[w]hen reviewing a district court's ruling on a habeas corpus petition, [it] review[s] the district court's factual findings for clear error and rulings on issues of law de novo." *Mata v. Baker*, 74 F.4th 480, 485 (7th Cir. 2023). Again, as to the final question of "whether a claim is procedurally defaulted," the court reiterated that "[its] review is de novo." *Id.*

Regarding the Eighth Circuit, Green cites a case holding that it reviews "a district court's finding of procedural default *de novo*." *Schawitsch v. Burt*, 491 F.3d 798, 802 (8th Cir. 2007); Pet. 20. But on the next page of his petition, Green acknowledges that the same court has explained that it reviews "the factual findings of the district court for clear error and a finding of procedural default de novo." *Anderson v. Kelly*, 938 F.3d 949, 954 (8th Cir. 2019); Pet. 21. Green calls this "intra-circuit inconsistency," Pet. 21, but it is nothing more than one opinion written more specifically than another. No inconsistency exists.

Green continues the same routine with the Ninth Circuit, citing a case holding that a "district court's dismissal of the petition for writ of habeas corpus on the ground of state procedural default presents issues of law that we review de novo." *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001); Pet. 20. And then two pages later, he acknowledges that the same court reviews "the denial of a petition for writ of habeas corpus brought under 28 U.S.C. § 2254 de novo. But to the extent it is necessary to review findings of fact made in

the district court, the clearly erroneous standard applies." *Schneider v. McDaniel*, 674 F.3d 1144, 1148 (9th Cir. 2012) (cleaned up); Pet. 22.

Green's proffered Tenth Circuit case states that it "reviews de novo whether claims are procedurally barred." *Anderson v. Attorney General of State of Kansas*, 342 F.3d 1140, 1143 (10th Cir. 2003); Pet. 20. But the same circuit has held that in habeas cases, "[w]hen the state court did not determine the issue on its merits, and the district court decided the issue in the first instance, [it] review[s] de novo the district court's conclusions of law. [The court] review[s] its findings of facts for clear error." *Fairchild v. Workman*, 579 F.3d 1134, 1140 (10th Cir. 2009).

Finally, Green points to an Eleventh Circuit case holding that "[a] district court's dismissal of a habeas claim for procedural default is . . . reviewed de novo." *Fortenberry v. Haley*, 297 F.3d 1213, 1219 (11th Cir. 2002); Pet. 20. But he cites another Eleventh Circuit case explaining that it reviews "*de novo* a district court's grant or denial of a habeas corpus petition. The district court's factual findings are reviewed for clear error, while mixed questions of law and fact are reviewed *de novo*." *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); Pet. 22.

So too with the Second and Fourth Circuits. The Second Circuit has explained that in a procedural default case, the "grant or denial of habeas corpus is reviewed de novo, and the underlying findings of fact are reviewed for clear error." *Clark v. Perez*, 510 F.3d 382, 389 (2d. Cir. 2008). Similarly, the Fourth Circuit reviews "de novo the district court's denial" of a § 2254 petition. *Juniper v. Davis*, 74 F.4th 196, 208 (4th Cir. 2023). "In doing so" it reviews "the district court's legal conclusions de novo and findings of fact for clear error." *Id.*

In sum, no circuit split exists regarding the standard of review to apply in a procedural-default context.[6] Green simply cites cases that abridge the relevant standard of review, while ignoring others that provide a more fulsome discussion.

2. No circuit split exists as to whether the doctrine of equitable tolling applies to cases like this.

Green also argues that courts of appeals apply different standards of review to this Court's equitable doctrine permitting tolling of the habeas corpus statute of limitations in 28 U.S.C. § 2244(d)(1). Pet. 22-23. To start, even if true, this argument is irrelevant, and Green does not suggest that the statute of limitations is at issue in this case. But even if the standard of review for tolling were somehow relevant, the courts of appeals that Green cites apply the same standard of review as described above: legal conclusions regarding equitable tolling are reviewed de novo, and factual findings are reviewed for clear error. The only difference is that courts have some amount of discretion to determine whether to grant the equitable relief of tolling even if the legal standard is met.

Green suggests that the Seventh Circuit applies a "'deferential'" standard of review to equitable tolling. Pet. 23 (quoting *Perry v. Brown*, 950 F.3d 410, 414 (7th Cir. 2020) (citing *Mayberry v. Dittmann*, 904 F.3d 525, 530 (7th Cir. 2018)). But that merely references the Seventh Circuit's rule that a decision to toll limitations is reviewed "for an abuse of discretion." *Mayberry*, 904 F.3d at 530. But "an abuse of discretion occurs if the district court reaches erroneous conclusions of law or premises its holding on a clearly erroneous assessment of the evidence." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010); *see also*

[6] Any "intra-circuit inconsistency" is similarly illusory. *See* Pet. 21. In any event, such inconsistency could be grounds for a habeas petitioner in the relevant circuit to seek en banc review—not a reason for this Court to involve itself in Green's case.

United States v. McMutuary, 217 F.3d 477, 483 (7th Cir. 2000). Thus, "[l]ittle turns, . . . on whether [courts] label review of this particular question abuse of discretion or de novo" because "a district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996), or clear error of fact, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

The Eleventh Circuit, to which Green also points, Pet. 23, likewise reviews "de novo the district court's application of equitable tolling law to the facts," and the "district court's factual findings are reviewed for clear error." *Thomas v. Attorney General*, 992 F.3d 1162, 1179 (11th Cir. 2021).

Finally, Green cannot create a certworthy issue by pointing out (at 23) that "faced with lingering questions of fact in confronting an equitable tolling argument," the Sixth Circuit has "remand[ed] [cases] for further factual development and legal argument." *Nassiri v. Mackie*, 967 F.3d 544, 548 (6th Cir. 2020). That statement does not change the Sixth Circuit's standard of review. Where "the facts are undisputed or the district court rules as a matter of law that equitable tolling is unavailable," like its sister courts, the Sixth Circuit "appl[ies] the de novo standard of review to a district court's refusal to apply the doctrine of equitable tolling." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). In "all other cases, [it] appl[is] the abuse of discretion standard" *Id.* But a "district court abuses its discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or uses an incorrect legal standard." *Id.*

Again, even if equitable tolling were relevant to the standards of review raised in the question presented, Green has not shown a split of authority requiring this Court's attention.

B. This case presents a poor vehicle to resolve Green's nonexistent circuit split.

Even if the Court were to find tension in how the lower courts assess procedural default, this would be a poor case to resolve it for two reasons. *First*, if the Court were to conclude that abandonment under *Maples* is a factual question then it would be subject to the state court's factual findings under AEDPA. Here, the state-habeas court concluded, as a matter of fact, that Green was represented even after the deadline for McLean to amend Green's state-habeas petition had lapsed. *Second*, under any standard of review, McLean did not abandon Green during a time when his assistance could have been useful—namely, before the state-habeas court's deadline to amend his state-habeas petition had lapsed.

1. If the time of abandonment is a factual finding, then the outcome of Green's case would not change under AEDPA.

This is a poor vehicle to resolve any hypothetical tension over the standard of review for the time at which abandonment occurs because even if the Court were to conclude that the time of abandonment is a factual finding, then it would not change the outcome of this case. Under AEDPA, federal courts are required to defer to a state court's factual findings. "[A] determination of a factual issue made by a State court shall be presumed to be correct," and petitioners bear "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Here, a state court found that McLean had not abandoned Green but was instead acting as counsel during the relevant time of his state-habeas proceedings. Specifically, when Green filed a pro se state-habeas application, the state-habeas court dismissed it because it noted that Green had court-appointed counsel, McLean, who had also filed a state-habeas application. ROA.7448. That is a factual finding that occurred on February 11, 2002,

ROA.7448, after the November 2001 deadline passed to add an incompetency claim to Green's application. ROA.7372-73. That finding directly contradicts the district court's holding that McLean abandoned Green "'from the beginning,'" Pet. 25 (citing Pet.App.34a), and Green does not address it.

Nor could Green show by "clear and convincing evidence," 28 U.S.C. § 2254(e)(1), that he had been abandoned as early as 2002. He points to (at 24-25) McLean's poor performance in filing and subsequently litigating Green's state-habeas application. In particular, Green focuses on McLean's 2008 "Statement of Counsel" that he could not in good faith file findings of fact and conclusions of law warranting habeas relief. Pet. 25, 27; Pet.App.239a. But actions that McLean took years after filing the state-habeas application cannot overcome AEDPA's required deference to the state-habeas court. And *Maples* itself reaffirmed that simple attorney negligence is not cause to overcome procedural default. 565 U.S. at 280-81.

2. McLean did not abandon Green under any standard of review at the relevant time.

Apart from the deference owed to the state court's determination that McLean continued to represent Green at least as late as 2002, this is a poor vehicle to address the standard of review for cause because under any standard of review, McLean did not abandon Green within the meaning of *Maples* at the *relevant time*.

As explained above, though far from perfect, McLean timely filed a state-habeas application on behalf of Green in October 2001. ROA.7422-35. The application raised seven claims, but none were that Green had been incompetent to stand trial. ROA.7423-7432. The last possible date on which McLean could have supplemented Green's state-habeas

application was November 12, 2001, ROA.7372-73, and he did not do so. Pet.App.5a. Because McLean timely filed the habeas application and the deadline to amend it expired shortly thereafter, he did not abandon Green at that time within the meaning of *Maples* under any standard of review.

Maples addressed abandonment in the most traditional sense of the term: While Maples's postconviction petition was pending in an Alabama trial court, his attorneys accepted new employment that prohibited them from continuing to represent Maples without "inform[ing] Maples of their departure and consequent inability to serve as his counsel," *Maples*, 565 U.S. at 270, seeking the Alabama trial court's leave to withdraw, or moving for substitution of counsel, *id.* at 270-71. When the Alabama trial court denied Maples's petition, no one received notice of the order, and the deadline to appeal the ruling lapsed. *Id.* at 271. Under these "extraordinary facts," this Court held that cause existed to excuse the procedural default of missing the state appellate deadline. *Id.*

Maples established a narrow basis for cause where a habeas petitioner is actually left without a lawyer without notice. Green does not contend that McLean *actually* stopped representing him. He contends that, despite litigating, McLean *constructively* abandoned him through poor representation. *See* Pet. 14-15. But such an expansion of *Maples*, would run headlong into *Coleman*, which held that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." 501 U.S. at 753. Far from overturning *Coleman*, *Maples* relied on it to reaffirm that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'" 565 U.S. at 280 (quoting *Coleman*, 501 U.S. at 753).

The Court never "disturb[ed] that general rule," either in *Maples*, *id.* at 281, or in the intervening decade. Respondent is unaware of a case in which this Court has ever held that abandonment occurs when an attorney files a timely but poorly done habeas petition. *See Young v. Westbrooks*, 702 F. App'x 255, 265 (6th Cir. 2017) ("To our knowledge, no other court of appeals has held that a lawyer abandons his client despite filing a brief on his behalf, and we will not be the first to extend *Maples* in this fashion."). And Green has pointed to none. To do so now would require the Court to expand *Maples* in such a way as to swallow the basic rule that attorney negligence is not cause.

As a result, if McLean abandoned Green, it did not happen until after the deadline to supplement his state-habeas application, regardless of any standard of review. Once that deadline passed, no attorney could have added the incompetency claim that Green now seeks to pursue. Texas law requires that if "a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application" with exceptions not relevant here. Tex. Code Crim. Proc. art. 11.071 § 5(a). Accordingly, as the Fifth Circuit held, "the default of Green's incompetency claim is attributable to McLean's failure to raise it in Green's initial habeas petition." Pet.App.9a. Any actions that he or any other attorney took or could have taken beyond that deadline changed nothing as to the default of Green's incompetency claim, making this a poor vehicle to resolve any lingering questions about the standard of review.

C. The Fifth Circuit correctly concluded that whether (and by extension when) an attorney has abandoned his client presents a question of law.

Though the Fifth Circuit did not expressly state the standard of review, it properly refused to defer to the district court's finding of abandonment, or when it occurred. *See* Pet.App.2a. Green is mistaken that the district court's holding that McLean abandoned him "from the beginning" is a factual finding. Pet. 25. The time at which McLean took various actions are factual findings. Whether (and, by extension, when) those actions rose to the level of abandonment is a legal conclusion.

Maples itself determined de novo both that abandonment occurred and when it did. This Court has long held that the existence of cause is a "legal conclusion." *Amadeo*, 486 U.S. at 222. In *Maples*, the "sole question" the Court reviewed was "whether, on the extraordinary facts of Maples' case, there is 'cause' to excuse the default." 565 U.S. at 271; *see id.* at 280 ("[This Court] granted certiorari to decide whether the uncommon facts presented here establish cause adequate to excuse Maples' procedural default."). In answering this question, the Court conducted a de novo review of a legal conclusion based on an undisputed set of facts.

The material facts of *Maples* were, by the time they reached this Court, undisputed: two associates at the law firm of Sullivan & Cromwell represented Maples in state postconviction proceedings in Alabama. *Id.* at 274. As noted above, both left their client without a lawyer and without notice. *Id.* at 275. Because no other Sullivan & Cromwell lawyer entered an appearance on behalf of Maples, *id.*, no one received notice that relief had been denied, and no notice of appeal was filed, *id.* at 277-79.

The Court reviewed de novo whether cause existed to overcome the default on this set of facts. The State argued that Sullivan & Cromwell represented Maples "throughout" his state postconviction proceedings, but the Court "disagree[d]." *Id.* at 283; *cf.* Pet. 26. The Court explained that the two associates severed their agency relationship with Maples by accepting new employment in positions that prevented them from continuing to represent Maples. *Id.* at 283-84. The Court also explained that because no other relevant attorneys at Sullivan & Cromwell "had the legal authority to act on Maples' behalf before his time to appeal expired," they were not Maples' agents "at the time critical to preserving Maples' access to an appeal." *Id.* at 286-87. The Court ultimately concluded that for reasons entirely outside Maples' control, "Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief." *Id.* at 289. At no point did the Court even mention the "clearly erroneous" standard of review or defer to the district court's determinations as to the legal conclusion of cause. Rather, it reversed the district court as affirmed by the Eleventh Circuit. *Id.* at 279, 290.

The Fifth Circuit correctly applied *Maples*. It treated the state-habeas attorney's actions taken during his representation as facts, but it reviewed the legal conclusion of when abandonment occurred de novo. Pet.App.4a-9a. The Court need not, and given the already-lengthy delay in providing justice to Kristin's family should not, grant review to reaffirm that conclusion.

II. The Second Question Presented Does Not Warrant Review.

The Court should also decline to review any circuit split regarding whether incompetence during state-habeas proceedings forms cause to overcome procedural

default. Pet. 30. Contrary to Green's contentions, only one circuit, the Eighth, has held that such mental illness can serve as cause—over 20 years ago and even then, in only limited circumstances. *Compare Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993) *with Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999). The duration of the split underscores how few cases it actually effects. This is not one of them. Because Green had state-habeas counsel who could have raised Green's incompetency claim based on information apparent on the face of the trial-court records, any mental illness Green may have suffered in 2001 would not represent cause under the law of any circuit. The Fifth Circuit was thus correct to reject this claim.

A. Any circuit split is shallow, longstanding, and not worthy of this Court's review.

Respondent does not dispute that several circuits have addressed whether mental incompetency during state-habeas proceedings can excuse a procedural default. Green is incorrect, however, to assert (at 30-32) that the Fifth Circuit decision below, together with two other circuits, splits from the Fourth, Eighth, Ninth, and Eleventh Circuits in rejecting such a claim. In reality, only the Eighth Circuit has accepted that under certain limited circumstances incompetency can form the basis for cause to excuse default of a claim in state-habeas proceedings—more than two decades ago. That no circuit has joined, and this Court has never reviewed, the Eighth Circuit's rule in the intervening time suggests that the Court's intervention is unwarranted now. Perhaps more importantly, this case does not implicate the narrow range of circumstances where the circuits have arguably diverged, so review is unwarranted.

1. The panel below correctly noted (at Pet.App.9a n.2) that this is not the first time the Fifth Circuit has addressed the issue of whether incompetence during state-habeas proceedings represents cause to excuse a procedural default. In *Gonzales*, the Fifth Circuit held that it did *not* because mental incompetency is not "external to the petitioner." 924 F.3d at 244. Other circuits agree. The Third Circuit has held that a mental disability is not "external" to a petitioner's "defense within the meaning of *Carrier*." *Hull*, 991 F.2d at 91. The Seventh Circuit has followed suit, also holding that mental illness is not cause for default because "something that comes from a source within the petitioner is unlikely to qualify as an external impediment." *Harris v. McAdory*, 334 F.3d 665, 669 (7th Cir. 2003).[7]

Green is wrong to suggest (at 31-32) that the Fourth, Ninth, or Eleventh Circuits have adopted a different view. The cases that Green cites from the Fourth and Eleventh Circuits merely "assum[e] that profound mental illness may constitute cause to excuse a procedural default in certain circumstances," before rejecting a habeas petition for other reasons. *Farabee v. Johnson*, 129 F. App'x 799, 802 (4th Cir. 2005) (denying a claim because "Farabee has not demonstrated that any mental illness actually caused his procedural defaults"); *Smith v. Newsome*, 876 F.2d 1461, 1465 (11th Cir. 1989) ("[W]e assume that a pro se habeas petitioner who lacked the mental capacity to understand the nature and

[7] Green is correct (at 30-31) that the Sixth Circuit has also held in an unpublished opinion that "a borderline mental impairment is not cause for excusing procedural default." *Johnson v. Wilson*, 187 F. App'x 455, 458 (6th Cir. 2006). But the same court has subsequently noted in a published opinion that the question remains open in the jurisdiction. *Clark v. United States*, 764 F.3d 653, 660 n.3 (6th Cir. 2014); *see also Terry v. Jackson*, No. 16-4330, 2017 WL 5664915, at *2 (6th Cir. July 17, 2017); *Nelson v. Shoop*, No. 19-3667, 2019 WL 7578382, at *2 (6th Cir. Dec. 23. 2019).

object of habeas proceedings and to present his case for habeas relief in a rational manner would have cause for omitting a claim in such proceedings.").

At most, the Ninth Circuit has suggested—but again did not hold—that mental illness might, in limited circumstances, serve as cause to excuse procedural default in *pro se cases,* not cases in which the petitioner was represented by counsel during state-habeas proceedings as Green was. *Contra* Pet. 32. *Schneider* opined that its precedents "do not *necessarily foreclose* the possibility that a pro se petitioner might demonstrate cause in a situation where a mental condition rendered the petitioner completely unable to comply with a state's procedures and he had no assistance." 674 F.3d at 1154 (emphasis added). But the Ninth Circuit also expressly said that even "a pro se petitioner's mental condition *cannot* serve as cause for a procedural default, *at least* when the petitioner on his own or with assistance remains able to apply for post-conviction relief to a state court." *Id.* (emphases added). In other words, the Ninth Circuit did not even expressly rule that mental illness served as cause but suggested that, if it could, such a rule would apply only to pro se petitioners who lacked assistance, such as from other inmates—let alone from a licensed lawyer. *See id.*

2. The Eighth Circuit has held that mental illness may serve as cause in limited circumstances—in the 1990s. But since then, its rule has never been adopted by another circuit or deemed to necessitate review by this Court. The Eighth Circuit has explained, in cases where a mentally ill petitioner "never had post-conviction counsel," *Holt*, 191 F.3d at 973, that "[i]n order for mental illness to constitute cause and prejudice to excuse procedural default, there must be a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and make rational decisions regarding

his or her case at the time during which he or she should have pursued post-conviction relief." *Id.* at 974. "Mental illness prejudices a petitioner if it interferes with or impedes his or her ability to comply with state procedural requirements, such as pursuing post-conviction relief within a specific time period." *Id.* Indeed, the Eighth Circuit has applied this rule in other cases where a pro se petitioner procedurally defaulted. *See Gordon v. Arkansas*, 823 F.3d 1188, 1191, 1196-97 (8th Cir. 2016).

But other Eighth Circuit cases confirm the importance of counsel in the analysis. For example, one case found that a petitioner with depression who had once filed a pro se postconviction motion did not show cause to excuse procedural default because that petitioner otherwise "was represented by postconviction counsel[,] and there is no evidence [petitioner] was unable to consult with her." *Ervin v. Delo*, 194 F.3d 908, 916 (8th Cir. 1999). In another case, the Eighth Circuit rejected a claim that mental illness overcame procedural default because there was "no evidence that mental illness hindered [petitioner's] ability to consult with counsel, file pleadings, or otherwise comply with Missouri requirements for postconviction relief so mental illness is not cause to excuse his procedural default." *Malone v. Vasquez*, 138 F.3d 711, 719 (8th Cir. 1998).

This Court has never deemed it necessary to review this longstanding split, likely because the issue rarely arises. To respondent's knowledge, the Eighth Circuit has never granted relief by applying *Holt* to a case with counsel. Further, in *Maples*, this Court recognized that nearly all States have guaranteed counsel in postconviction proceedings in habeas cases. *See Maples*, 556 U.S. at 272 (noting that Alabama was "early alone among the States" in not providing such counsel); Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079,

1086 (2006) (finding that 89% of death-penalty States provide for counsel). More recent Eighth Circuit case law rejected a claim that default "should be excused due to . . . mental incompetence" because "regardless of how incompetent [petitioner] now contends he was, [petitioner] was represented during the state court proceedings, and [petitioner's] incompetence did not prevent *his counsel* from raising the competency issue." *Lyons v. Luebbers*, 403 F.3d 585, 592-93 (8th Cir. 2005) (emphasis in original).

B. This case presents a poor vehicle to determine whether mental incompetence may excuse procedural default.

This case presents a poor vehicle for this Court to consider whether mental incompetence may excuse default because the circuit split isn't implicated. After all, even in the Eighth Circuit, petitioners with state-habeas counsel typically cannot assert cause based on mental illness. *Id.* And Green had counsel. Green argued to the district court that his incompetence during state-habeas proceedings nonetheless should be considered cause to excuse the default of his competency claim because "McLean had grounds to investigate [his] mental condition before he filed the state habeas application." Pet.App.130a. The district court explained that it need not consider that issue because it found that McLean abandoned Green under *Maples*, which satisfied cause. Pet.App.35a n.13. But in so holding, it made factual findings—which Green fully embraces for the purpose of the first question presented—which doom this claim. Specifically, the court found that there was "no indication McLean did any investigation or had any communication with Green," Pet.App.31a, and that he "completely failed . . . even to communicate with Green, for roughly seven years." Pet.App.34a. If that is true, then the default may have been caused

by negligence on McLean's part. *Supra* p. 20. But it could not have been caused by any mental illness from which Green may or may not have suffered.

Moreover, the record belies any notion that incompetence "prevent[ed] [Green's] *counsel* from raising the competency issue." *Lyons*, 403 F.3d at 592-93. To the contrary, McLean was on notice of the potential issue from the fact that two different judges conducted two separate *Faretta* hearings before allowing Green to exercise his constitutional right to defend himself. *Supra* p. 5. And the petition points to the fact that when Moncriffe took over representation of Green at the penalty phase, he made "Green's mental condition the central theme of his closing argument" and pled with jurors that "'[w]e don't kill sick people.'" Pet. 13 (quoting Pet.App.91a). That is, notwithstanding that the trial court had found Green competent, it permitted Moncriffe to argue to the jury that Green should nonetheless not be executed because:

> Something unusual about this case to you? Guy representing himself? Doesn't know how to ask questions. Having difficulty presenting questions. You tell me if you didn't see something wrong. We had no psychiatric examinations or reports to bring in. And the reason I couldn't bring them in is because I was not the lawyer . . . But folks, look, I want you to use some of your common sense with me. Something [is] wrong.

ROA.6988. Thus, Moncriffe's closing statement would have alerted McLean to the existence of a possible incompetency claim without any need to speak to Green.

With these facts, Green could not show that any mental illness during his state-habeas proceedings established cause even under the Eighth Circuit's rule because he had state-habeas counsel and his mental illness would not have prevented McLean from raising Green's defaulted competency claim. As a result, this is a poor vehicle to resolve any tension that may remain between the Eighth Circuit and the Fifth Circuit regarding whether and

when mental illness should be deemed a cause "external to the petitioner" sufficient to overcome a procedural default. *Gonzales*, 924 F.3d at 244.

C. At least with representation, mental incompetence does not establish cause to overcome procedural default.

Finally, review is unwarranted because, at least when a state-habeas petitioner has counsel, mental incompetence is not cause to overcome procedural default. "Together, exhaustion and procedural default promote federal-state comity." *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022). Flipsides of the same coin, these rules give meaning to the bedrock principles that "[u]nder our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution," and that "States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman*, 501 U.S. at 731; *see also, e.g.*, *Shinn*, 596 U.S. at 379. They also reflect a specific application of the larger principle that this Court cannot—or at least should not—disturb a state-court judgment that rests on an "independent and adequate state ground." *Coleman*, 501 U.S. at 731-32; *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (noting that this "principle . . . is based, in part, on "the limitations of our own jurisdiction.") (*Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)).

In putting these principles into practice, the Fifth Circuit correctly recognized (at Pet.App.6a) that to establish cause, Green must "show that some objective factor external to the defense impeded *counsel's* efforts to comply with the State's procedural rule." *Davila*, 582 U.S. at 528 (emphasis added). "A factor is external to the defense if it cannot fairly be attributed to the prisoner." *Id.* This Court has not interpreted "external to the defense" to refer to any health problems of the petitioner, and it should not do so now.

"Presently, there are four methods for a petitioner to establish 'cause' for the failure to comply with state procedural rules," all of which focus exclusively on the actions of others, whether they be state actors or the petitioner's attorney. 7 Wayne R. LaFave et al., Criminal Procedure § 28.4(d) (4th ed. Dec. 2023 update): (1) governmental interference, *Murray*, 477 U.S. at 488; (2) denial of the right to the effective assistance of counsel at a time when the right attaches, *Coleman*, 501 U.S. at 753-54; (3) actual abandonment by counsel during postconviction proceedings, *Maples*, 565 U.S. at 271; and (4) a substantial claim of ineffective assistance of trial counsel with ineffective counsel during state-habeas proceedings, *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (citing *Martinez v. Ryan*, 566 U.S. 1 (2012)).

Green argues that it is unfair "to attribute responsibility for incompetence to the person suffering from a disease." Pet. 35. But the same could be said of other health problems such as deafness, blindness, or various learning disabilities, not to mention impediments caused by socio-economic conditions outside the petitioner's control (*e.g.*, illiteracy or limited fluency in English). Such ambiguous notions of fairness, however, cannot be held as cause to excuse procedural default without fatally undermining the comity and federalism concerns that animate the procedural default rule. After all, as more than one court explained, to "hold that illiteracy is cause for state procedural default would allow those petitioners who happen to be illiterate to engage in forum shopping." *Smith*, 876 F.2d at 1466. "Claims could be reserved for federal court if the petitioner perceived that the federal fact-finder might be more sympathetic to those claims than the state fact-finder." *Id.*

Mental illness and illiteracy are obviously not the same, but when the petitioner is represented, they present the same problem: Like illiteracy, if the Court were to accept

mental-illness by a represented petitioner as "a legitimate cause for failing to appeal to the state supreme court," it "would allow petitioners"—or their lawyers—"to wait until the jurisdictional period lapsed and then proceed directly to federal court. Such a result would be contrary to the principles of comity underlying the cause and prejudice rule." *Schneider*, 674 F.3d at 1153-54. The Fifth Circuit was entirely correct to reject Green's proposed rule, which would create incentives to litigate in ways that would disregard "finality, comity, and the orderly administration of justice." *Shinn*, 596 U.S. at 379.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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