

No.

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LEE TABLER,

Applicant,

-v-

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

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO
FILE PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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Dated: January 26, 2024

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice to the United States Court of Appeals for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.2, applicant Richard Lee Tabler respectfully requests a thirty- (30-) day extension of time, up to and including March 13, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Mr. Tabler has not previously sought an extension of time from this Court in this matter. In support of this request, Mr. Tabler submits the following:

1. The Court of Appeals for the Fifth Circuit denied Mr. Tabler's petition for rehearing on November 14, 2023. *See* Exhibit 1. Without an extension, the time to file a petition for a writ of certiorari in this Court will expire on February 12, 2024. *See* S. Ct. R. 13.1, 13.3, 30.1. This application is being timely filed, in compliance with Rule 13.5, more than 10 days before that date. A copy of the Fifth Circuit's opinion is attached. *See* Exhibit 2. This Court will have jurisdiction over Mr. Tabler's future petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant 28 U.S.C. § 2254.

2. In this case, state habeas counsel completely abdicated their role at a hearing to determine whether the court would allow their client to waive his right to state habeas review. Lead counsel announced that they would take no position, refused to participate in the hearing, and never disclosed a

lengthy expert evaluation that would have allowed the judge to make an informed decision. The case presents a question this Court has not yet addressed: whether an attorney's renunciation of agency duties to a client seeking to waive state collateral review can provide cause to excuse a procedural default and allow federal habeas review on the merits. The ruling below flatly conflicted with fundamental agency principles, and the circuits have reached diverging positions in similar cases. The question is important because death-sentenced persons frequently seek to waive further review. *See* Supreme Court Rule 10(a), (c).

3. Mr. Tabler stood trial in 2007 before a jury in Bell County, Texas, on two counts of capital murder for intentionally or knowingly causing the deaths of Haitham Zayed and Mohamed Amine Rahmouni on November 26, 2004. The jury found him guilty on March 21, 2007. It rendered verdicts on the special issues that compelled imposition of the death penalty on April 2, 2007, and the trial court formally imposed the death sentence the same day.

4. Mr. Tabler's direct appeal and state habeas corpus cases proceeded simultaneously, as required by Texas law. *See* Tex. C.C.P. Art. 11.071(4)(A). During a brief hearing conducted on September 30, 2008, the state habeas court ruled that Mr. Tabler was competent to waive his state habeas rights and accepted his waiver. At the hearing, lead counsel announced that he and his co-counsel would not take a position "one way or the other" on whether the court should allow his client to waive his state habeas rights. Counsel had made the renunciation clear to Mr. Tabler beforehand in a letter, telling him

that it was “not my job” to help him waive or argue against it, and “this will just be between you and Judge Trudo.” He said nothing of substance during the hearing and made no objection as the court repeatedly gave his client inaccurate advice about the deadline for any waiver to take effect. Counsel never told the court about a comprehensive neuropsychological report diagnosing Mr. Tabler as severely mentally ill or the fact that Mr. Tabler changed his mind frequently about wanting to waive his rights. The court directly elicited Mr. Tabler’s assurance that he was “competent enough.” At the end of the hearing, counsel asked the court to confirm that it had relieved him and his co-counsel of their duties in the case.

5. Within months, Mr. Tabler moved to withdraw the waiver, but the Texas Court of Criminal Appeals (“CCA”) denied the motion as untimely, although the filing complied with the incorrect information Mr. Tabler had received from the state habeas court, which counsel, standing mute at the hearing, had never corrected.

6. On December 16, 2009, the CCA affirmed the convictions and death sentence on direct appeal. *Tabler v. State*, No. AP-75,677, 2009 WL 4931882 (Tex. Crim. App. 2009). This Court denied certiorari on October 4, 2010. *Tabler v. Thaler*, 562 U.S. 842 (2010).

7. Represented by the same attorneys appointed in the state proceedings, Mr. Tabler petitioned the District Court for the Western District of Texas for a writ of habeas corpus, which the district court denied on February 9, 2012.

8. Thereafter, Mr. Tabler moved for new unconflicted counsel in light of this Court's recent decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court appointed undersigned counsel Marcia A. Widder, who filed a notice of appeal and sought a certificate of appealability ("COA") in the Court of Appeals for the Fifth Circuit. The COA application sought *inter alia* a remand to allow the development of an ineffective assistance of trial counsel ("IATC") claim in light of *Martinez*. The Fifth Circuit denied a COA on October 3, 2014. *Tabler v. Stephens*, 588 F. App'x 297 (5th Cir. Oct. 3, 2014). On January 27, 2015, on panel rehearing, the court vacated its order in light of this Court's decision the previous week in *Christeson v. Roper*, 574 U.S. 373 (Jan. 20, 2015). The court remanded to the district court with directions to determine whether state habeas counsel's inadequate performance could excuse the default of Mr. Tabler's state habeas rights. *Tabler v. Stephens*, 591 F. App'x 281 (5th Cir. 2015).

9. On remand, Mr. Tabler filed an amended petition raising a multifaceted claim that he had received ineffective assistance of trial counsel ("IATC") under the Sixth Amendment. This included a well-developed claim that trial counsel had failed to conduct an adequate mitigation investigation at sentencing. He supported his claim with extensive new documentary evidence, including numerous lay and expert declarations. To excuse the default of his IATC claim in state habeas proceedings, he maintained that his state habeas counsel had abandoned their role as advocates at the waiver hearing and provided inadequate assistance, and that his IATC claim was substantial.

10. On June 10, 2021, the district court denied habeas relief without holding a hearing. *Tabler v. Lumpkin*, 543 F. Supp. 3d 461 (W.D. Tex. 2021). The court ruled that counsel neither abandoned Mr. Tabler nor rendered ineffective assistance for “complying” with his “instructions,” and there was no cause to excuse the default. The court alternatively rejected each of Mr. Tabler’s IATC claims on the merits. In doing so, it made a critical error, erroneously concluding that Mr. Tabler had failed to submit evidence to support his claim, apart from a few expert reports, and overlooking a supplemental appendix containing affidavits from twenty-four lay and expert witnesses. It granted COA on the questions whether “state habeas counsel rendered ineffective assistance for failing to challenge [Mr. Tabler’s] competency” to waive state habeas review, and whether he suffered prejudice from trial counsel’s potentially deficient failure to object to inadmissible “victim impact” and character evidence.

11. On appeal to the Court of Appeals for the Fifth Circuit, Mr. Tabler maintained that his trial counsel were ineffective in violation of the Sixth Amendment, not only on the ground on which the district court had granted COA, but also on other grounds, for which he sought to expand the COA. He argued that counsel’s refusal to advocate at the waiver hearing was an abandonment that severed the agency relationship under *Maples v. Thomas*, 565 U.S. 266 (2012), that it constituted inadequate performance under *Martinez*, and that the IATC claim was substantial.

12. In a per curiam opinion issued on October 19, 2023, the Fifth Circuit affirmed the district court’s ruling and denied Mr. Tabler’s motion to expand COA. *See* Exhibit 2. The court did not address the underlying IATC claims but held them procedurally defaulted. It distinguished *Martinez* and *Maples* and held the procedural default was not excused.

13. Beginning to prepare this petition has required intensive research into how other circuits address the issues decided by the Fifth Circuit in this appeal, as well as related issues—including the law of agency and the law governing lawyers; procedural default in federal habeas review and the cause-and-prejudice doctrine allowing excuse for default under *Maples* and *Martinez*; equitable tolling; Rule 60(b) of the Federal Rules of Civil Procedure; and rules governing a defendant’s competency for various criminal proceedings. Preparing to demonstrate cause and prejudice has required review of a lengthy state court record and the voluminous mitigation proffer in the federal habeas court. Undersigned counsel need more time to complete a professional petition that will assist the Court.

14. Lead counsel, Ms. Van Wyk, carries a heavy caseload of other capital cases at the Capital Habeas Unit of the ACLU. Among other projects, she is currently responsible for drafting (1) part of an original writ to be filed directly in the California Supreme Court, in March, which will marshal voluminous empirical evidence of unequal capital charging and sentencing practices and (2) a petition for certiorari on behalf of Leslie Galloway, whose petition for rehearing was denied by the Mississippi Supreme Court on

December 7, 2023. *See Galloway v. State*, Docket No. 2013-DR-01796-SCT (Miss. Dec. 7, 2023). In addition, Ms. Van Wyk is supervising empirical studies of capital sentencing in Sacramento County, California, and is preparing for an anticipated evidentiary hearing on other empirical studies in two cases in Riverside County, California. Both the Sacramento and the Riverside matters involve claims under the California Racial Justice Act, Cal. Penal Code § 745. *See State v. Mosby*, Docket No. E080924 (Cal. Superior Ct. 4th Dist., Div. 2, Oct. 10, 2023) (tent. opn granting hrg; argued Dec. 6, 2023); *State v. Austin*, Docket No. E080939 (Cal. Superior Ct. 4th Dist., Div. 2, Oct. 10, 2023) (same). A final opinion granting the hearing, but denying some relief sought, issued in *Mosby* and *Austin* on January 25, 2024. Ms. Van Wyk is responsible for drafting a petition for review on the aspects of that opinion that denied relief, due on February 5, 2024. Finally, in January, Ms. Van Wyk's work on Mr. Tabler's petition was interrupted by vacation time taken to provide family assistance after the birth of a new grandchild.

15. Undersigned counsel, Ms. Widder, carries a full caseload of capital post-conviction cases in state and federal court in Georgia, and has had a steady stream of deadlines in these cases during December, January, and February, including the following: supplemental briefing ordered by the district court in *Rivera v. Warden, Georgia Diagnostic Prison*, Case No. 1:13-cv-00161-JRH (S.D. Ga.) (filed December 8, 2023); petition for writ of certiorari in *King v. Emmons*, No. 23-668 (U.S.) (filed December 18, 2023); application for extension of time in *Heidler v. Emmons*, No. 23A585 (U.S.)

(filed December 21, 2023); reply brief in state habeas proceedings in *Esposito v. Warden*, Georgia Diagnostic Prison, Butts County Civil Action No. 2022-SV-HC-0003 (filed January 5, 2023); proposed order in *Esposito* (filed January 23, 2023); supplemental reply brief in *Rivera* (due January 30, 2023); reply brief in support of petition for writ of certiorari in *King* (anticipated filing date in early February); petition for certiorari in *Heidler v. Emmons*, No. 23A585 (U.S.) (due February 7, 2024).

16. Ms. Van Wyk's and Ms. Widder's conflicting obligations have thus far prevented, and will continue to prevent, them from having sufficient time to devote to Mr. Tabler's certiorari petition. In light of their competing obligations and the complexity of the issues in this case, counsel respectfully requests an additional 30 days in which to prepare an appropriate petition for consideration by this Court, *i.e.*, up to and including March 13, 2024.

Respectfully submitted,

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