No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PERRY AUSTIN, *Petitioner,*

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION, *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

1. Whether a capital defendant seeking to represent himself and plead guilty in order to obtain a death sentence and be executed is competent to be tried when he suffers from a mental disease, disorder or defect that substantially affects his capacity to make a rational choice as to whether to seek his own execution or not but does not prevent him from having a factual and logical understanding of the proceedings and their consequences?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Perry Austin respectfully requests that the Court grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals affirming the denial of his application for habeas relief.

The petitioner is the petitioner and petitioner-appellant in the courts below. The respondent is Lorie Davis, the respondent and respondent-appellee in the courts below.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals affirming the denial of Mr. Austin's application for writ of habeas corpus is at *Austin v. Davis*, 876 F.3d 757 (5th Cir. 2017) and is reprinted in the Appendix at App. A.

The opinion of the Fifth Circuit Court of Appeal denying rehearing is at *Austin v. Davis*, 13-70024 (5th Cir. 1/11/18), and is reprinted in the Appendix at App. B.

The opinion of the Fifth Circuit Court of Appeal granting a Certificate of Appealability is at *Austin v. Davis*, 647 F. App'x 477 (5th Cir. 2016), and is reprinted in the Appendix at App. C.

The opinion of the United States District Court granting summary judgment for Respondent denying habeas relief is at *Austin v. Thaler,* 4-2387 (S.D. Tex 8/21/12); 2012 U.S. Dist. LEXIS 191265 and is reprinted in the Appendix at App. D.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeal on the basis of 28 U.S.C. § 1254. The Court of Appeal denied Petitioner's appeal on November 30, 2017. The Court of Appeal denied Petitioner's application for rehearing on January 11, 2018.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the following provision of the United States Constitution:

U.S. Const. am. 14:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

A. Overview

In 2001 Perry Austin, a severely mentally ill prisoner serving a lengthy sentence in Texas, wrote to a detective offering to confess to a murder if the detective could guarantee that he would receive a death penalty.

In the prosecution that followed, Mr. Austin made absolutely clear his desire to plead guilty, receive a death sentence and be executed as soon as possible. He was permitted to represent himself, enter a guilty plea before the jury and ask for a death sentence, which was promptly returned. Mr. Austin was permitted to waive his appellate and post-conviction rights and came within six days of execution before a stay was granted to allow Mr. Austin to seek collateral review.

Mr. Austin's state post-conviction application was dismissed as time barred but the federal courts held the particular time bar applied by Texas to be a novel procedural rule and Mr. Austin's federal habeas application was not subject to the limitations of 28 U.S.C. 2254(d).

In federal habeas proceedings several legal claims centered around Mr. Austin's competence during the pre-trial and trial period: substantive Due Process, procedural Due Process and ineffective assistance of counsel claims.

It was not disputed that Mr. Austin had a factual and logical understanding of the proceedings and their consequences. Nor was it disputed that he could make plans to carry out his suicidal intent and communicate his desires to the court.

In his federal habeas petition, Mr. Austin presented extensive evidence that he suffered from severe depression and an organic brain impairment which caused

him, during the relevant period, to experience fervent and irrational suicidal ideation that substantially affected his capacity to make a rational decision as to whether to seek his own execution or defend the charges. Mr. Austin's habeas petition was supported by: historical mental health records, contemporaneous accounts of professional and lay witnesses from the time of trial; and expert opinions describing the nature and effect of Mr. Austin's impairments and concluding that Mr. Austin was not competent.

Mr. Austin's petition was directed to the definition of competence announced in *Rees* and incorporated in *Godinez* that holds a person incompetent if he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity to make a rational choice in the case.

Mr. Austin was denied an evidentiary hearing and summary judgment was granted for Respondent. The Fifth Circuit Court of Appeals affirmed, holding that even upon *de novo* review under a summary judgment standard, "nothing suggests he suffered any impairment that would bear on his competency to stand trial." *Austin*, 876 F.3d at 786. This was because the circuit court accepted Respondent's argument that at trial level, the constitution requires no more than that the defendant understand the process and ramifications of his choice and that any other impairment to his capacity for rational decision-making is irrelevant.

Both medical science and jurisprudence recognize that mental illness may impair or eliminate a person's capacity for rational choice while not significantly impairing their capacity for factual and logical understanding. The circuit court

found evidence of this type of impairment irrelevant to the question of trial competence.

This Court should grant certiorari to consider the extent to which impairments of a defendant's capacity for rational choice are relevant to his competence to stand trial and whether the competency standard for trial is a different and lower standard of competency than that required for waiver of collateral review.

B. While initially unknown to the trial court, a longstanding mental illness and aversive conditions of confinement lead up to Perry Austin's false confession to the instant offense

Perry Austin was born on June 3rd, 1959 and spent a childhood abused at home and isolated and bullied at school. [1]

In March 1975 at the age of 15, Perry ran away from home and attempted suicide by overdosing on medication.[2] He was hospitalized for three days at the Darnell Army hospital and diagnosed with severe and acute adolescent adjustment reaction in a mixed personality.[3] He was referred for counseling at the Bell County MHMR.

Perry enlisted in the army in September 1976 and was stationed in Germany. His army medical records reflect depression and excessive worry, frequent or severe headaches and frequent trouble sleeping.[4] He was referred for a psychiatric

[1] Pet. Exs. 82; 42; 43; 45; 57; 46; 76;

[2] Pet. Ex. 76. Perry was abusing prescription medicines as well as abusing illicit drugs at this time. Pet. Ex. 12

[3] Pet. Ex. 97 ROA.787.

[4] Pet. Ex. 13.

evaluation and barred from handling weapons or classified material until that review was complete.[5] In December 1977, Perry was discharged from the army as a result of a failure to adapt socially and emotionally.[6]

Following his discharge Perry returned home and became increasingly isolated, spending his time in his room with no friends and having virtually no communication with his family.[7]

In October 1978 Perry violently attacked and sexually assaulted two of his sisters as well as robbing his mother and older sister at gunpoint.[8] A year later, while confined awaiting trial for this offense Perry once again attempted suicide through an overdose of pills.[9]

In preparation for trial Perry was seen and assessed by clinical psychologist Dr. Franklin Lewis.[10] Dr. Lewis conducted a two hour clinical examination and administered an MMPI and MAT which produced valid results indicating no deception and which confirmed the presence of mental illness.[11] Perry denied he had any mental illness. Dr. Lewis diagnosed Perry with severe personality disturbance with schizoid thinking, noted the presence of depression and suggested that brain

[5] *Id.*

[6] *Id.*

[7] Pet. Ex. 17

[8] Pet. Ex. 33.

[9] Pet. Ex. 12

[10] Pet. Ex. 17, 29

[11] Pet. Ex. 29.

dysfunction/damage may be present. Dr. Lewis opined that Perry met the legal definition of insanity at the time of the offense.

At trial Perry entered a plea of not guilty by reason of insanity but was ultimately convicted as charged. Following the trial, Perry wrote to the trial judge asking for psychiatric help, stating that he knew there was something wrong with him and wanted help before it was too late.[12]

In June 1979 Perry was assessed by TDCJ staff, received a diagnostic impression of an emotionally unstable or explosive personality and was referred for ongoing psychological consultation.[13] His treatment notes indicate observation of Perry's nervous condition, possible hyperactivity, self-mutilation and possible self-threat.[14] Another inmate housed with Perry during this period described his obsession with routines and how irrationally upset he would become with even small alterations in his life.[15] Perry, an identified homosexual in prison, was subject to harassment and death threats.[16]

Following his release from prison in July 1991, Perry was described as having behavioral problems, as always "freak[ing] out" in public and as having extreme mood swings.[17]

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[12] Pet. Ex. 11

[13] Pet. Ex. 12

[14] Pet. Ex. 12

[15] Pet. Ex. 87.

[16] Pet. Ex. 87

[17] Pet. Ex. 40, 92.

He formed a relationship with a co-worker at a bakery and then she introduced him to her 14 year-old daughter, J.O.[18] He formed a sexual relationship with J.O., who even to this day describes the relationship as consensual.[19]

It was at around this time that Perry met D.K., the juvenile for whose murder Perry was ultimately convicted and sentenced to death.

Following D.K.'s disappearance on August 19, 1992, Perry came under suspicion but denied responsibility and was not charged. However, the investigation resulted in Perry's arrest in September 1992 as a result of his relationship with J.O. Perry pled guilty to the charges resulting from this relationship, receiving a thirty year sentence.

Back in prison, Perry was held in extremely psychologically aversive conditions which were seen by those around him to have a direct impact on his mental health. Perry continued to be an identified homosexual and lived as a cross-dresser during part of this period. Inmates housed with Perry describe conditions including physical abuse, and a denial of basic items such as toilet paper or warm meals.[20] A number of inmates became suicidal as a result of the conditions.

Responding to death threats to himself and to other identified homosexual inmates, in 1995 Perry Austin stabbed another prisoner, resulting in his placement

[18] Pet. Ex. 59

[19] Pet. Ex. 59

[20] Pet. Ex. 52, 71, 88

in administrative segregation for a period of years and an additional twenty year sentence.[21]

Perry coped very poorly and his mental state deteriorated in the segregation environment. The conditions in segregation included unlawful violence by staff,[22] sub-standard physical conditions[23] and food[24], unlawful denial of exercise and educational materials, and prolonged periods of isolation.

He is described by other inmates as experiencing a worsening mental state, increased isolation and reduced communication, self-harming behavior and, at times, a near catatonic condition, not moving or even eating for days at a time.[25]

When released from administrative segregation Perry was observed by other inmates to be very depressed, withdrawn and isolated.[26] The conditions in which Perry was kept continued to be appalling and following an allegation of assaulting a guard, Perry was returned to isolation.

C. The confession to the current offense and the pre-trial proceedings disclosed substantial evidence of mental illness

On January 20, 2001, Perry mailed[27] a letter to Sgt. Allen, asking for the death penalty in return for his confession to the murder of D.K.. "I want to help you out if

[21] Pet. Ex. 76, 87

[22] Pet. Ex. 71, 53, 52

[23] Pet. Ex. 52

[24] Pet. Ex. 71, 52

[25] Pet. Ex. 71, 70

[26] Pet. Ex. 85

[27] The letter is marked as having been written on September 7, 2000.

you can help me out." Mr. Austin wrote. "I know you want to close that murder case concerning [D.K.] and I will help you. I will confess on several conditions. First the charge must be capital murder. Second, I must be guaranteed the death penalty. . . . if not then I will kill a TDCJ guard and guarantee myself the death penalty." RR.X.25. Perry was visited by Sgt Allen on January 30, 2001 and signed a confession.

In post-conviction, Perry passed a polygraph indicating that his confession to the murder was, in fact, false.[28]

On February 28, 2001 Mr. Austin, was indicted in Harris County for the capital murder of D.K. on August 19, 1992 and on March 14, 2001, Mr. Austin was moved to the Harris County Jail to await trial.

On March 21, 2001, the trial court appointed Mr. Arnold to represent Mr. Austin at trial. RR.XIV.24.

On May 1, 2001 Perry was moved to administrative segregation.[29] On May 9, 2001, a pen pal, contacted the jail because of Perry's repeated discussion of suicide in his letters and his concrete plan to commit suicide with a razor.[30] As a result, Perry was referred to a psychiatric evaluation on May 14, 2001. At that session he denied any psychiatric history and refused medications.[31]

On May 15, 2001 Perry wrote a letter to the trial court stating that his "mental stability had steadily decreased" and that he had turned back to drugs; that he wished

[28] Pet. Ex. 60 (Letter from Joe Bartlett, Jr., Polygraph Examiner)

[29] Pet. Ex. 14

[30] Pet. Ex. 14

[31] Pet. Ex. 15

no attorneys appointed, and intended to plead guilty, give up any appeals and request an execution date CR.5.

On May 30, 2001**,** in the first and only substantive motion filed by defense counsel, Mr. Arnold requested a psychological evaluation of Perry in response to the defendant's "highly unusual behavior" "for the past several months." CR.12. Counsel stated that expert assistance was "vital to the defense preparation, as it impacts every aspect of the case from voluntariness of any statements to mental health defense to mitigation." CR.13. The state court granted this motion on July 13, 2001. Defense counsel neither prepared for nor procured the evaluation. CR.8.

On July 19, 2001 Perry wrote a letter to the trial court stating that he was in segregation and could not handle prolonged isolation; that he had "a very bad problem with depression"; that when depressed he thought about suicide a lot and that he might commit suicide before trial; that he planned to plead guilty, put up no defense and request an immediate execution date; and, that he did not plan on being in this world much longer. CR.16.

On August 8, 2001 Perry wrote a letter to the trial court stating that he wished for the trial to be conducted sooner than scheduled because "the sooner we get this circus over with the sooner I can die". The letter also stated "[n]o, I don't have a death wish, or at least you all can't prove it." Perry stated that he was willing to waive the psychological evaluation and that the psychologist would find him to be a sociopath with no feelings of guilt. Perry stated that he was definitely competent and knew the

difference between right and wrong before finishing "[s]o let's get this show on the road please." CR.18.

On August 14, 2001, Perry wrote a letter to the trial court stating that he believed that his sincerity in not defending the charge was being doubted and that he needed to do something to prove that he meant what he said. He stated that he wished the appointed attorneys discharged; and that he did not wish any motions filed nor to participate in jury selection. CR.20.

On August 27, 2001 the trial court conducted a chambers conference and the court stated that it would not consider the request without a prior psychological evaluation. RR.II.3-4. The court ordered Dr. Jerome Brown to evaluate Perry to assess his competency. RR.II.3-4.

On September 25, 2001, psychologist Jerome Brown saw Perry briefly. Dr. Brown reviewed no records, performed no testing and spoke to no collateral sources. Dr. Brown was not given a copy of the letters from Perry to the court. During the interview, Perry declined to inform Dr. Brown, or was not asked about, his extensive mental health history. Perry refused to discuss his criminal history in any detail. *See* CR.24-26.

On October 7, 2011, Perry began a hunger strike that lasted for ten days. Guards recorded his behavior as very "agitated" during this period.[32]

On October 11, 2001, the day of the *Faretta* hearing, the court received a three page report from Dr. Brown, opining that Perry was competent. CR.24-6.

[32] Pet. Ex. 14

The *Faretta* hearing, on October 11, 2001, involved a colloquy and a written waiver of court appointed counsel, both conducted according to a form titled "Faretta Warnings Waiver of Court Appointed Counsel Court Findings and Order Allowing Defendant to Proceed Pro Se." CR.31-2; RR.II.5-14.

During the colloquy, which focused on Mr. Austin's understanding of his rights, the court asked only four questions relating to his mental health:

Court: Have you ever been declared mentally incompetent?

Austin: No, ma'am.

Court: Have you ever been treated for any mental health disorder?

Austin: No, ma'am.

* * * *

Court: Ever have any mental health problems while you were in the Army?

Austin: No, ma'am.

Court: Ever seek any mental health counseling while you were in the Army?

Austin: No, ma'am.

RR II.6-7.

The last three answers were untrue.

Dr. Brown was not present in court and the court briefly referenced his report as "probative information for the Court on making a determination on his ability to represent himself. And so it is in the file." RR II.4.

Perry's appointed counsel were present, but had conducted no investigation or preparation for the hearing and made no attempt to represent him. When asked by

the court whether he had anything to say, defense counsel stated that he believed that Perry was competent. RR II.4.

The court concluded that Perry was capable of understanding the implications of self-representation and did understand the applicable penalties. RR II.14-5. The court granted Perry's motion to proceed *pro se*. *Id.* The circuit court subsequently held that the trial court's finding included an implied finding of competence to proceed to trial subject to deference under 28 U.S.C. 2254(e)(1). *Austin v. Davis*, 876 F.3d 757, 777-80 (5th Cir. 2017).

A week later, on October 18, 2001, Perry was again referred to mental health services by staff at the jail. He again refused psychiatric assistance, but complained of sleeplessness.[33]

On January 24, 2002, Perry wrote to staff at Harris County jail asking to be moved from regular segregation to double-door segregation. Perry stated that he had "been feeling and thinking violent and aggressive thoughts lately and they get worse as time goes on." The letter went on, "I'm facing the death penalty now and will be dead in another two or three years. . . What more can you possibly do to me?"

On January 24, 2002, Lt. Moore referred Perry for psychiatric screening, noting that he is "very depressed" and requesting that he be seen that day. The referral also notes that the lack of a support system for Perry "could potentially increase the likelihood of self-harm."[34] On the same date, Perry was seen by counselor

[33] Pet. Ex. 14

[34] Pet. Ex. 14

Karen Wilson. She reported Perry as angrily refusing services and denying any mental health problems. She decided to refer him to a psychiatrist despite his refusal of psychiatric assistance "due to specific situational factors that could potentially increase the likelihood of self harm."[35]

On January 25, 2002, Harris County Sherriff's medical department screening notes record that Perry was diagnosed as depressive. Sleeplessness and crying spells were also noted.[36]

On February 21, 2002, Perry gave a second taped statement to Sgt. Allen regarding the murder. In it, he said that he'd seen psychiatrists as a child and had behavioral problems, and that he wrote the original letter because he was depressed while locked up in solitary. He stated that the only reason he had not killed himself is because he believed there is a hell. Pet. Ex. 101, ROA.838. After the session, Sgt Allen informed the sheriff's office that Perry was engaging in sexual acts with HIV positive inmates in order to contract HIV. Sgt. Martinez confronted Perry regarding this and Perry admitted doing so, additionally stating that he was "hoping to get a death sentence." Sgt Martinez recommended that Perry be placed on suicide watch, stating "Due to the fact that inmate Austin seems too calm and peaceful on the resolution to get the death penalty, it is recommended that he is placed on suicide watch to prevent him harming himself while in custody."[37]

[35] Pet. Ex. 15

[36] Pet. Ex. 15

[37] Pet. Ex. 14

On February 22, 2002, counselor Karen Wilson saw Perry. She wrote that he was crying frequently, and subject to racing thoughts and nightmares. She referred him to psychiatrist.[38]

On February 25, 2002, Perry for the first time reported his psychiatric history to mental health professionals at the jail, including early suicide attempts, early psychiatric assessments, and his current symptoms, including, inter alia, crying spells, nightmares, and sleeplessness.[39]

On February 28, 2002, Dr. Ferguson at the Harris County Jail diagnosed Perry with a depressive disorder and prescribed the anti-depressant Remeron. His symptoms included crying spells, nightmare, depression, ruminative thought, irritable mood, and poor concentration.[40]

D. Trial proceedings disclosed further evidence to the court of Mr. Austin's incompetence and further displayed the unfairness of the proceeding

On March 18, 2002 jury selection began and was completed on March 21, 2002. By this point, the trial court was convinced that Perry was only representing himself because he wanted the jury to give him a death sentence – even stating as much to jurors in voir dire. RR VI.10. The state questioned prospective jurors about how they would feel about Perry having a death wish and seeking death for himself. *E.g.* RR IV.49.

[38] Pet. Ex. 15

[39] Pet. Ex. 15

[40] Pet. Ex. 15

Perry represented himself during jury selection and made no cause challenges. The state also made no cause challenges, though they asked Perry to join them in 63 consent challenges, which he did.[41]

On March 28, 2002, Perry's counselor, Karen Wilson, described his mood as dysphoric and tearful at times. He conceded that it was "probably true" that he was manipulating the system in such a way that Harris County had no choice but to sentence him to death.[42]

Trial began on April 1, 2002.

Perry confirmed to the court that he wished to plead guilty to the charges. The trial judge conducted a colloquy in which Perry was asked if he was of sound mind and whether he was of sound mind at the time of the offense. RR IX.4. Perry said "yes, ma'am." *Id.* The court concluded that Perry was freely and voluntarily entering his plea of guilty and referring to Dr. Brown's earlier evaluation found Mr. Austin mentally competent to enter his plea of guilty. RR IX.6.

During the state's case Sergeant Allen read to the jury Perry's January 2001 letter and the state played the audiotaped confession Perry had given on February 21, 2002. RR X.25; RR X.35, ROA.838. This material clearly presented to the court that the factual basis on which it had relied for its earlier finding of competence was false.

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[41] *See generally* vol. 3-8 of Reporter's Records

[42] Pet. Ex. 15

The state introduced into evidence two sets of correctional records containing notations describing "emotional problems," "very disturbed individual", and "severe character disorder." State's Trial Exhibits, 79, 81. These correctional records also include references to two prior suicide attempts, substance abuse problems beginning at a young age, psychiatric treatment as a juvenile, and mental health treatment and assessment both prior to and during his service in the army. These documents also detailed Perry's first criminal offense, indicated that Perry had been assessed for sanity in relation to that offense, and described the request for psychiatric assistance that he made after that trial. *See Petition* [38], 19, and n.51 and 52. Once again, this directly contradicted the information previously acted upon by the trial court and Dr. Brown.

Perry presented no evidence and asked only five questions, apparently designed to show that he had been introduced to J.O by her mother, that she looked old enough to be in bars and that she did not look like a fourteen-year-old. RR IX.125-126. During his penalty phase closing argument, Perry discussed his homosexuality, his engagement in anal sex and informed the jury that if they did not sentence him to death he would kill again. RR XI .15 *et. seq.*

The trial judge directed the jury to return a verdict of guilty of first degree. The jury then deliberated for approximately ten minutes on the question of punishment,[43] taking longer to choose a foreperson than to decide on the death penalty.[44] The jury

[43] Pet. Ex. 94 (Juror Finnegan)

[44] Pet. Ex. 68 (Juror Erwin)

returned a verdict of guilty of capital murder and answers to the special issues questions that mandated the imposition of a death sentence. RR XI.29-30. The trial judge promptly sentenced Petitioner to death. RR XI.31.

E. Appellate and post-conviction proceedings in state court did not result in an adjudication on the merits

A day after sentencing Mr. Austin to death, on April 4, 2002, the trial court engaged in another pro forma colloquy regarding his desire to waive appellate and post-conviction counsel. RR XII.4-8. Once again accepting Perry's denial that he had been treated for any mental health disorder the court accepted Perry's waiver of appellate and post-conviction counsel. R XII.4-8. The trial court found that Perry's was knowing, voluntary and intelligent.

Mr. Austin filed no appellate brief and neither did the state. On April 2, 2003 the CCA affirmed Mr. Austin's conviction and sentence. *Austin v. State* (Tex. Crim. App. April 2, 2003).

On June 2, 2003 the trial court issued a death warrant setting an execution date of September 8, 2003. ROA 595-96. On September 2, 2003 a motion for stay of execution was granted. *Id.* On September 24, 2003 the state court appointed counsel to represent Mr. Austin in state habeas proceedings. *Id.*

On April 22, 2004 the trial court entered orders granting Mr. Austin's unopposed motion that an amended state habeas petition filed by June 21, 2004 would be considered timely. However, on May 26, 2004 the Texas Court of Criminal Appeals (CCA) issued an order effectively quashing the order and holding that any

filing would be untimely. *Ex Parte Austin*, No. 74372, slip op. at 3 (Tex. Crim. App. May 26, 2004) (not designated for publication).

On June 21, 2004 Mr. Austin filed his petition in state court and on July 6, 2004 the CCA dismissed Mr. Austin's application as untimely filed.

F. Habeas proceedings revealed the extent and importance of the evidence of Perry's mental illness and his lack of competence to proceed

On June 21, 2004, Mr. Austin timely filed his *Petition for Writ of Habeas Corpus* in federal court. ROA.20. On January 18, 2005, the district court denied Respondent's motion to strike due to procedural default under the state court's statute of limitations because the CCA had never previously announced the method of counting time it applied in this case. *Austin*, 876 F. 3d at 769.

Mr. Austin was permitted to amend his filing, including exhaustion of additional state court claims.

On November 28, 2006, Mr. Austin filed his Second Amended Petition for Writ of Habeas Corpus [38].

On December 19, 2008, Respondent filed his *Answer with Brief in Support* [62] ROA.1687, including new affidavits from Dr. Brown and another mental health professional, Dr. Allen.

On March 5, 2012, Mr. Austin filed his Response. ROA.1930.

Mr. Austin's petition claimed, *inter alia*, that he was incompetent during pretrial and trial proceedings; that the state court's procedures were inadequate to prevent him from proceeding to trial while incompetent; and, that his appointed counsel was ineffective in failing to investigate his lack of competence.

Dr. McGarrahan, a neuropsychologist, and Dr. Woods, a neuropsychiatrist, were retained by the defense and both diagnosed Perry as suffering from Major Depressive Disorder, Severe, Recurrent, combined with a cognitive disorder. Their testing showed depression and suicidality as well as a cognitive disorder, consistent with and supportive of their diagnoses. Pet. Exs. 93, 95; Pet. Ex. 108, ROA.2144; Pet. Ex. 109, ROA.2161.

Attached to Mr. Austin's Petition were hundreds of pages of records documenting mental illness at each stage of Perry's life, as well as affidavits from doctors McGarrahan and Woods. As Dr. Mcgarrahan stated, the records clearly show "a history of severe mental illness." Pet. Ex. 108, ROA.2151.

In his first and second affidavit, Dr. Woods conducted a detailed analysis of Mr. Austin's mental functioning and expressly opined that Mr. Austin was not competent prior to trial, during trial, or at the time of his waiver of appeal and post-conviction.[45]

Dr. Woods opined that "Mr. Austin suffers from longstanding severe depression, is intermittently suicidal, and in addition suffers from frontal lobe dysfunction, obsessive-compulsive disorder and temporal lobe dysfunction.[46] Dr. Woods opined that Mr. Austin's "pre-existing and serious mental illness . . . [was] the operating cause in his decision to kill himself"[47] and that his "decision to pursue the

[45] Pet. Ex. 95 & 109.

[46] ROA.2173-4.

[47] Pet. Ex. 95 at p.16.

death penalty was a direct result of contemporaneous depression and active suicidality."[48]

Dr. Woods explained that Mr. Austin factually understood the proceedings and their consequences but that, as a result of his mental illness, he lacked the capacity for rational choice:

> Mr. Austin was not able to rationally assist in the preparation of his defense, given his steadfast desire to die by the hands of the state. This suicidal ideation, based upon his mental disease and reinforced by his cognitively derived inability to effectively weigh and deliberate decisions at the time of their presentation, rendered Mr. Austin incompetent to rationally weigh and deliberate his legal decisions at the time of his trial. His incompetence continued through the period of time that Mr. Austin had to weigh and deliberate his legal options to appeal.[49]

Dr. Woods expressly opined that Perry did not have the capacity for rational choice[50] and was incompetent in the relevant period:

> Mr. Austin's decision to pursue the death penalty was a direct result of contemporaneous depression and active suicidality, and [ ] the various decisions he made in order to achieve that outcome – to author and send the letter to Sgt. Allen, to waive counsel at trial, to plead guilty, to conduct voir dire and the penalty phase in a particular manner, and to waive appellate counsel and appeals – were irrational, involuntary and substantially affected by his mental illness.
>
> * * * *
>
> This mental health history and history of assessment, combined with the records of the waivers and trial and with Mr. Austin's internally consistent accounts of that time, establish to a reasonable degree of medical certainty that Mr. Austin was incompetent at the time of the

[48] ROA.2177.

[49] Pet. Ex. 95 at p.16

[50] In a civilian context it is well understood that all suicides are, in a sense, voluntary actions but that not all suicides are a product of rational choice. *Brandvain v. Ridgeview Institute, Inc.*, 372 S.E.2d 265, 275 (Ga. Ct. App. 1988).

trial and at the time of his various waivers of rights.[51]

Directly addressing Perry's ability to act in a goal directed fashion, Dr. Woods stated:

> Individuals suffering from depression and suicide can be goal driven; pathology can drive the goal. Indeed, if a depressed person were unable to be intentional within the context of suicidality, there would be very few if any successful suicide attempts.

Dr. McGarrahan concurred with Dr. Woods' opinions regarding Perry's impairments in rational understanding and his ability to reason in a rational manner.[52] ROA.2152.

Also, attached to the Petition were affidavits from Drs. Kirk Heilbrun and Mary Connell, both experts in the prevailing professional standards for conducting mental health assessments. Both maintain an extensive critique of the methodology of Dr. Brown's abbreviated competency assessment and conclude that his assessment fell below the standard of care and was unreliable.[53]

In Respondent's *Answer*, Dr. Brown rejected the newly available evidence of incompetence and the critique of his methodology. He explained that only brain damage, mental retardation or psychosis could render a defendant incompetent and that such impairments would have to be severe. Dr. Brown conceded that Perry's desire to be executed by the system was irrational but opined that this was not sufficient to trigger his understanding of the competency standard. He further stated that once the minimal standard of competence is reached it does not matter what

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[51] Pet. Ex. 109, ROA.2177-8.

[52] ROA.2179. *See also In re Involuntary Hospitalization of C.M.,* No. 15-0997, 2017 W. Va. LEXIS 240, at *4, *6-7 (Apr. 10, 2017) (a person presenting lucid and cogent testimony denying their mental illness does not counteract their need to be involuntarily committed for their mental illness and attendant risk of suicide).

[53] Pet. Exs. 90, 91

additional difficulties remain, are hidden, or are not inquired about. The state also attached an affidavit from Dr. Allen to support Dr. Brown's methodology and critique the defense experts.

In Mr. Austin's *Response*, affidavits were obtained from Drs. Woods, McGarrahan and Heilbrun responding to Drs. Brown and Allen. These affidavits demonstrated that Dr. Brown applied the wrong standard and methodology in assessing competence and confirmed that his evaluation failed meet prevailing standards and was unreliable.[54]

G. Federal habeas relief was denied based upon the premise that the competency standard is satisfied by mere understanding and substantial impairment of the capacity to make a rational choice is irrelevant

On March 5, 2012, Mr. Austin filed his Motion for Evidentiary Hearing, which was denied on April 25, 2012. ROA.2126, 2747.

On August 21, 2012 the District Court granted Respondent's motion for summary judgment, denied the petition in its entirety and denied a COA. *Austin v. Thaler,* 4-2387 (S.D. Tex 8/21/12); 2012 U.S. Dist. LEXIS 191265.

On May 6, 2016, the circuit court granted Mr. Austin's application for certificate of appealability as to fourteen of his claims and briefing followed. *Austin v. Davis*, 647 F. App'x 477 (5th Cir. 2016).

Critically, on the merits appeal, Respondent argued that in *Godinez v. Moran*, 509 U.S. 389 (1993) this Court had held that "to the extent that there is any requirement that a defendant be able to make a reasoned choice among the

[54] Pet. Exs. 107, 108, 109

alternatives it requires no more than that the defendant make the choice based upon a rational understanding of the proceedings." *Answer* at 50 (internal quotation marks and citations omitted). Respondent argued, a defendant need only understand the process and ramifications and the constitution does not require rationality in any other sense. *Id.* This argument prevailed in the circuit court.

Addressing the standard of review, the Fifth Circuit held that no deference was due under 28 U.S.C. 2254(d) as there was no adjudication on the merits of any of Mr. Austin's claims in state court. *Austin*, 876 F.3d at 776.

As to the substantive Due Process claim that Mr. Austin was not competent to be tried, the Fifth Circuit first held that the state court should be understood to have made an implied pretrial determination of competency to stand trial when permitting Mr. Austin to represent himself and then held that this determination was due deference under 28 U.S.C. 2254(e)(1) as a factual finding. *Austin*, 876 F.3d at 777-80; s*ee also Austin*, 647 F. App'x at 487 (Holding that the state court made a pre-trial finding of competency).

The circuit court then held that the evidence presented by Mr. Austin did not demonstrate incompetence whether by clear and convincing evidence or assessed on a *de novo* basis, stating that Mr. Austin "clearly demonstrated an understanding of the charges against him and the possible consequences, as well as an ability to make strategic choices and to communicate clearly to the state trial court." *Austin*, 876 F.3d at 780. The circuit court held that Mr. Austin's evidence "was simply insufficient to support a determination that Austin was incompetent." *Id.* at 781.

Addressing Mr. Austin's decision to seek his own death, the circuit court held that such behavior is not sufficient to support a finding of incompetency and that under Fifth Circuit law, "a defendant's deliberate use of the system to obtain the death penalty is evidence of rationality, not incompetence." *Id.* at 780.[55]

As to the procedural Due Process claim that competency should have been properly investigated pre-trial, the Fifth Circuit held that Mr. Austin could not prevail because he could not demonstrate that he was not competent to stand trial. *Austin*, 876 at 781-2.

As to the procedural Due Process claim that competency should have been investigated mid-trial, after the state court became aware that its earlier information regarding competence was incomplete or false, the circuit court acknowledged that the new information "clearly contradicted" Mr. Austin's previous statements. However, the circuit court again denied relief based upon the state court's earlier finding of competence,[56] emphasizing Mr. Austin's demonstrated "ability to reason logically and strategically". *Id.* at 782.

As to the ineffective assistance of counsel claim, the Fifth Circuit held that Mr. Austin "did not allege any facts that would have alerted counsel to the need to investigate Austin's competency." *Id*. at 785. Further, that the prejudice prong was

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[55] The circuit court cited citing *Roberts v. Dretke*, 381 F.3d 491, 494, 498 (5th Cir. 2004) (concluding that the defendant's instruction to trial counsel to "steer the trial towards imposition of the death penalty" was not irrational nor evidence of incompetency, but instead suggested that the defendant was "quite capable of conversing with his trial counsel regarding trial strategy, and was not only able to participate in his defense but was also able to direct it").

[56] Somewhat illogically, the circuit court relies upon the state court's colloquy with Mr. Austin and Dr. Brown's opinion even as it acknowledges that both are now shown to be based upon materially false information.

"wholly" unsupported because Mr. Austin demonstrated an ability to understand the proceedings, remained articulate and focused in his aim of representing himself and refusing to present a defense. *Id.* The circuit court accepted that Mr. Austin had presented evidence of mental illness in his post-conviction proceedings[57] but held that

> though Austin details various psychiatric treatments, interactions with mental health professionals, and the opinions of experts hired post-conviction, **nothing suggests he suffered any impairment that would bear on his competency to stand trial**.

Austin, 876 F.3d at 786 (emphasis added).

With this, the circuit court affirmed the grant of summary judgment against Mr. Austin because, on its understanding of the competency standard, none of Mr. Austin's post-conviction evidence would even bear upon his competency to stand trial.

Put in other words, it did not matter if Mr. Austin could prove that he had been suffering from the combination of a major mental disorder and an organic brain impairment that caused him to seek his own death and substantially affected his ability to make rational decisions in that regard. Under the circuit court's analysis, impairments to rationality of this type do not "bear on his competency" and all that matters is whether he has a factual and logical understanding of the case and its possible outcomes.

REASONS FOR GRANTING THE PETITION

I. This Court should decide whether trial competence depends solely upon factual and logical understanding or whether a suicidal capital

[57] *Id.* at 780.

defendant is incompetent when his capacity to rationally decide to seek death is substantially affected by his mental illness

A. The Fifth Circuit's decision decides an important federal question in a way that conflicts with relevant decisions of this court

The Fifth Circuit's affirmance of summary judgment on the substantive and procedural Due Process and ineffective assistance claims relating to competence all rise from the one source: a determination that the impairments to Mr. Austin's capacity to make a rational choice alleged in the petition do not bear upon the question of competence at all.

This Court in *Dusky v. U.S.*, 362 U.S. 402 (1960) articulated the competency standard as follows: (1) "whether he (the defendant) has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding" and (2) "whether he has rational as well as factual understanding of proceedings against him."

The circuit court's interpretation of the phrase "rational understanding" in Mr. Austin's case was limited to a factual and logical appreciation of the proceedings. It did not include the ability to make a reasoned choice among alternatives that was not substantially affected by the defendant's mental, disease or defect.[58]

The circuit court's interpretation and application of the competency standard conflicts with relevant decisions of this Court, in particular, *Rees* and *Godinez* which

[58] This limited appreciation of the competency standard was explicitly urged by Respondent who argued that if the defendant understands the process and the ramifications of his choice then he is competent and no enquiry may be made of the extent to which his capacity for rational choice is affected by mental illness. *Appellee's Brief* at 50.

make clear that the phrase "rational understanding" includes the ability to make a reasoned or rational choice or decision.

In *Rees v. Peyton*, 384 U.S. 312, 314 (1966)(*Rees I*), a capital case in which the defendant moved to abandon his petition for certiorari, the Court articulated the competence standard as follows: "whether [Petitioner] has capacity to appreciate his position and *make a rational choice* with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees*, 384 U.S. at 314 (emphasis added).

Rees I was not announcing a standard for waiver of certiorari. Rather, in *Rees I* this Court first sought to determine whether the defendant was competent so that the Court could then decide how to proceed with his request to withdraw his petition for certiorari. *Rees*, 384 U.S. at 313-4; *Ryan v. Gonzales*, 568 U.S. 57, 69-70 (2013)

In *Godinez*, the 9th Circuit applied a line of its own cases that had held that *Dusky* trial competency required a rational and factual understanding of the proceedings but did not require a capacity for "reasoned choice" among the alternatives available to the defendant. *Moran v. Godinez*, 972 F.2d 263, 266 (9th Cir. Nev. 1992) rev'd 509 U.S. 389. In response to this perceived shortcoming, the 9th Circuit had fashioned what it believed was a heightened standard of competency for entry of a guilty plea or waiver of counsel – a requirement that the defendant have "the capacity for 'reasoned choice' among the alternatives available to him." *Id.*[59]

[59] The 9th Circuit had announced this rule in *Sieling v. Eyman*, 478 F.2d 211, 214-215 (9th Cir. Ariz. 1973), a decision which explained that the phrase was drawn from Judge Hufstedler's opinion in

As the State court in *Godinez* had used the standard *Dusky* formulation, the 9th Circuit held that it had applied the wrong legal standard and so afforded no deference to the state court's decision in habeas proceedings.

This Court reversed, holding that the standard for competence to waive was the same as the standard for competence to stand trial but also that the *Dusky* trial competency standard already incorporated the 9th Circuit reasoned choice test and so the state court had applied the correct law. *Godinez*, 509 U.S. at 397-8.

This Court rejected the argument that the 9th Circuit's standard of "'reasoned choice' among the alternatives available to him" was "different from (much less higher than) the *Dusky* standard -- whether the defendant has a 'rational understanding' of the proceedings". *Godinez*, 509 U.S. at 397.

Respondent below turned this passage upside down to argue that this Court was holding that "reasoned choice" requires no more than a "rational understanding" of the proceedings. *Appellee's Brief* at 50.

The opposite is true, as the language of *Godinez* makes clear. The Court held that a "rational understanding" of the proceedings *includes* the ability to make a reasoned choice among alternatives available to the defendant. *Godinez*, 509 U.S. at 397-398.[60]

Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970). *Id.* Importantly, the relevant opinions in both *Schoeller* and *Sieling* rely upon the Supreme Court's earlier formulation of "rational choice" in *Rees*. *Schoeller*, 423 F.2d at 1194; *Sieling*, 478 F.2d at 214-215.

[60] Indeed, the *Godinez* court painstakingly reviewed choices a defendant at trial level must be competent to make, in part to illustrate that the *Dusky* standard necessarily incorporated the capacity for rational choice. *Godinez*, 509 U.S. at 398-9.

In explaining that the capacity to make a reasoned choice was already incorporated within the phrase "rational understanding," the Court specifically equated its use of the phrase "rational choice" in *Rees v. Peyton* with the phrase "rational understanding" from *Dusky*. *Godinez*, 509 U.S. at 398, n.9. This passage makes clear that "rational choice" operates separately and in addition to the defendant's "capacity to appreciate his position." *See also Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990) (incompetence includes "a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision") citing *Rees I*.

This understanding reflects the state of medical science, as Dr. Woods indicated in his affidavit in Mr. Austin's case:

> [t]he forensic literature is clear . . . that a defendant suffering from certain mental illnesses may demonstrate competence in basic cognitive tasks, but still be unable to exercise rationality in decision making. This may be the case even though the defendant's understanding of his options is not impaired by mental illness; defendants may see and understand their options and the attendant consequences but be unable to rationally act on that information due to the imposition of mental illness and cognitive impairment. (Maroney 2006; Freedman 2009).

ROA.2171.

B. The Fifth Circuit has entered a decision in conflict with the decisions of other courts of appeals and state courts of last resort on an important federal question

Since *Godinez*, state and federal courts alike have grappled with the application of the competency standard both at trial level and when condemned prisoners seek to abandon review of their conviction and sentence of death.

The Supreme Court of Kentucky holds that as a matter of constitutional law, when a capital defendant desires to plead guilty, waive jury sentencing and presentation of mitigation evidence, and asks the trial court to be sentenced to death the standard as expressed in *Rees* must be applied. *Chapman v. Commonwealth*, 265 S.W.3d 156, 180 (Ky. 2007). Recognizing that competence must be assessed in light of rational case-specific decision making, rather than only a general capacity for logical or goal directed thought, the court restated the *Rees* test for application at trial level:

> whether he has capacity to appreciate his position and make a rational choice with respect to [pleading guilty, waiving jury sentencing, waiving mitigating evidence, and seeking the death penalty] or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Id. The court describes this as a higher standard of competency than the *Godinez*/*Dusky* standard. *Id.* at 181.[61]

The Kentucky Supreme Court specifically rejected any lesser standard for competency at trial than that for abandoning collateral review as representing "a distinction without a difference" in the circumstances. Chapman suffered from chronic depression and the assessing psychologist was asked by the trial court "whether Chapman's chronically depressed mood would affect his ability to choose the outcome of his case, or to be the 'master of his own ship.'" 265 S.W.3d at 181. The psychologist testified that a defendant could be depressed to that level but though

[61] *See also Dunlap v. Commonwealth*, 435 S.W.3d 537, 555 (Ky. 2013)("in Chapman we held that a different, heightened standard of determining competency applies under a very narrow (and rare) set of circumstances.")

Chapman's depression colored his decision, his depressed mood did not rise to the level described and he was competent to make his decision. *Id.* The trial court nevertheless ordered Chapman treated with medication for his depression and when he nonetheless maintained his desire to be executed, found him competent to proceed as he chose. *Id.* at 181-2. The Kentucky Supreme Court affirmed, finding that the trial court's findings were consistent with the *Rees* standard. *Id.*

The circuit court's opinion in the present case conflicts directly with the constitutional standard found to apply in equivalent circumstances by the Kentucky Supreme Court. It also conflicts with the similar approach adopted in other states and circuit courts.

The Oklahoma Supreme Court holds that the *Rees* standard must be applied to a trial level capital defendant who essentially volunteers for the death penalty, by waiving his rights to a jury trial, presentation of mitigating evidence, and direct appellate review. *Hooper v. State*, 142 P.3d 463, 466, 470 (Ok 2006)(" A defendant whose mental disease or defect either prevents him from understanding his legal position and available options, or prevents him from making a rational choice among his options, will not be found competent under our current law.").

Circuit courts have rejected the view that a factual and logical understanding is sufficient to meet the competency standard at trial level. In *Lafferty*, where the defendant suffered from paranoid delusions but was able to act factually and logically within those delusions, the Tenth Circuit Court of Appeals found that the state court paid lip service to "*Dusky's* requirement that competency requires a rational

understanding which is different from, and more than, factual understanding." *Lafferty v. Cook*, 949 F.2d 1546, 1556 (10th Cir. 1991). The circuit court rejected, as failing to satisfy *Dusky*, the state court's finding that the defendant had a factual understanding of the proceedings and their consequences and "[a]lthough the defendant may be operating within a paranoid delusional system, there is no evidence, except a suicide attempt, of irrational behavior within that system or within the system of his religious beliefs." *Id.* at 1565.

In *Timmins*, an unpublished Ninth Circuit opinion, the court remanded for a competency determination in a case in which the defendant could understand the nature and consequences of the proceedings against him but "[n]o consideration was given to whether Timmins' delusional belief system prevented him from rationally comprehending the evidence against him and considering the prospect of a plea bargain" *United States v. Timmins*, 82 F. App'x 553, 554-55 (9th Cir. 2003). The court held that Timmins' inability to make a choice to plead guilty or not in rational terms would fundamentally impair his ability to assist properly in his defense and render him incompetent. *Id.*

Addressing the standard applicable when a prisoner already sentenced to death wishes to abandon further review, circuit courts, including the Fifth Circuit have held that a defendant is incompetent where "even if the mental illness does not prevent him from understanding his legal position and the options available to him, it nevertheless prevents him from making a rational choice among his options." *Rumbaugh v. Procunier*, 753 F.2d 395, 398 (5th Cir. 1985). *See also Smith v.*

Armontrout, 812 F.2d 1050, 1057-58 (8th Cir. 1987); *Eggers v. Alabama*, 876 F.3d 1086, 1094 (11th Cir. 2017); *White v. Horn (In re Heidnik)*, 112 F.3d 105 (3d Cir. 1997).

The American Bar Association,[62] American Psychological Association,[63] American Psychiatric Association,[64] and the National Alliance for the Mentally Ill[65] have all adopted the policy position that a condemned prisoner not be permitted to abandon review of his conviction and death sentence if his ability to make rational decisions or choices is significantly impaired.

Respondent successfully argued that the circuit court should read down the phrase "rational choice" to incorporate nothing more than a factual and logical understanding of the proceedings. Circuit courts and state court have recognized that "rational choice" extends beyond mere factual and logical understanding because mental illness can affect the capacity for rational choice without impairing factual and logical faculties. See, e.g, *Rumbaugh*, 753 F.2d at 398-99 ; *Smith*, 812 F.2d at 1057-1058; *Eggers*, 876 F.3d at 1094; *White*, 112 F.3d at 111-112; *Timmins*, 82 F.App'x at 554-55; *Lafferty*, 949 F.2d at 1556; *Chapman*, 265 S.W.3d at 180-181); *Hooper*, 142 P.3d at 469-470; *State v. Ross*, 273 Conn. 684, 701-707(Conn. 2005).

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[62] https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/mental-illness-2006.html

[63] APA, Council Policy Manual, Chapter IV (Board of Directors), 2006, Mental Disability and the Death Penalty. http://www.apa.org/about/policy/chapter-4b.aspx#death-penalty

[64]https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2014-Death-Sentence-Mental-Illness.pdf

[65] Nat'l Alliance for the Mentally Ill, *Public Policy Platform § 10.9: Criminal Justice and Forensic Issues: Death Penalty*. https://www.nami.org/About-NAMI/Policy-Platform/10-Criminal-Justice-and-Forensic-Issues

In conflict with this jurisprudence and the opinions of peak legal and mental health bodies, the circuit court in the present case found that evidence of an impairment that substantially affected Mr. Austin's capacity to make a rational decision but did not preclude his factual and logical understanding did not bear upon the question of competence.

While the Fifth Circuit in the present case did not mention *Rumbaugh*, the effect of its ruling is to create a two tier standard for competency: a lower standard for competency at trial under the circuit's narrow reading of *Godinez*; and, then a heightened standard of competency for the abandonment of collateral review under *Rumbaugh*/*Rees*.[66]

This approach is contrary to this Court's efforts to ensure a single standard for competency and conflicts with the approach in other state courts of last resort and circuit courts.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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Dated: April 11, 2018

[66] Indeed, when Mr. Austin sought to abandon his application for COA and be executed, the circuit court remanded with instructions to determine competency under *Rees*. *Austin v. Stephens*, 13-70024 (5 Cir 1/9/15). Mr. Austin withdrew his request before the remand was acted upon.