No. 17-8528

In the Supreme Court of the United States

PERRY ALLEN AUSTIN, PETITIONER

v.

LORIE DAVIS, 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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QUESTION PRESENTED

In *Godinez v. Moran*, 509 U.S. 389 (1993), this Court held that a single standard for competency to stand trial, waive counsel, and plead guilty—that a criminal defendant is competent if he has a rational and factual understanding of the proceedings to which he is subject, *see Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)—applies in all situations. Petitioner here, like the petitioner in *Godinez*, waived counsel, pleaded guilty to capital murder, and acquiesced in the death penalty. The question presented is:

Was the Fifth Circuit correct to reject, as every other court has, the argument that a criminal defendant who satisfies the *Dusky* standard for competence is nonetheless incompetent because he is acquiescing in the death penalty for his admitted crime?

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BRIEF IN OPPOSITION

After confessing to kidnapping and murdering a child, petitioner actively, lucidly, and rationally participated in his criminal proceedings. Each of the most commonly invoked indicia of "adjudicative competence"—the trial court's observation of the defendant's behavior and the opinions of a defendant's counsel and a neutral expert—supported the trial court's conclusion that petitioner was competent to stand trial and thus competent to waive his right to a trial and to the assistance of counsel. On federal habeas review, the district court and the Fifth Circuit faithfully applied this Court's precedent in ruling that the state trial court's factual finding should not be disturbed. The Fifth Circuit's decision was consistent with this Court's decisions and the decisions of courts throughout the country. Petitioner's argument, in contrast, distorts this Court's precedent, the precedent of other courts, and the Fifth Circuit's decision.

Review is thus unwarranted. There is no conflicting authority on any relevant question. And there is no basis for altering this Court's precedent, which is petitioner's true aim. Moreover, none of the evidence on which petitioner now relies was presented to the state courts that adjudicated his competence, so none is admissible on federal habeas review.

STATEMENT

1. In 1991, having recently been released from prison after serving time for sexual assault, petitioner began a sexual relationship with a 14-year-old girl, Jennifer. R.616.[1] Through this relationship, petitioner became acquainted with David, the 9-year-old boy he would later murder. R.616.

When David went missing, police suspected that petitioner was involved. While investigating the murder of David, police discovered petitioner's illicit relationship with Jennifer. R.617-618. Although investigators were unable to build a successful case against petitioner for the murder of David at that time, the State obtained a conviction against him for sexual assault based on his relationship with Jennifer. R.831.

Petitioner was sentenced to 30 years in prison. R.831. In 1997, while serving his sentence, petitioner tried to murder a fellow prisoner and was sentenced to an additional 20 years of prison. R.620, 831.

Petitioner subsequently wrote a letter to the detective investigating the murder of David offering to confess to the crime. 14.RR Ex. 68.[2] Following up on petitioner's letter, the

[1] "R" refers to the record in the Fifth Circuit.
[2] "RR" refers to the court reporter's trial transcripts in petitioner's state proceeding.

detective visited petitioner in prison. See Pet. Ex. 33 at 2079.[3] During this visit, petitioner provided a detailed confession to the murder of David. *See id.* at 2080-82. Later, the detective questioned petitioner further. R.839-853. The detective asked petitioner why he had confessed to the murder of David. R.840. Petitioner responded, "Why? Because I did it." R.840. The detective pressed petitioner about what "made [him] decide to come forward." R.852. Petitioner said:

> Depression, I guess.
>
> . . .
>
> I couldn't stop dreaming about [the murder], I couldn't stop seeing pictures of it . . . . I had to stay high every day or else I would have to think about it. And it really comes up mostly when I'm locked up in seg—in solitary, you know. Cause in seg and solitary I can't do no drugs . . . . I'd gotten locked up in solitary when I mailed [the letter confessing to the murder].

R.852. Explaining to the officer why he was "not putting on a defense," petitioner said, "I regret something I did; I'm gonna pay for it." R.853. Petitioner was charged with capital murder. *See* R.831.

2. The trial court concluded that petitioner was competent and allowed him to waive his right to counsel and plead guilty. Before trial began in 2002, petitioner regularly communicated in writing with the trial court. On May 15, 2001, the trial court received a letter from petitioner in which he correctly recounted that he was charged with capital murder and that his attorney was Mack Arnold. CR.5.[4] Petitioner stated that he had told his counsel that he

[3] Many of the exhibits to petitioner's operative federal petition are not included in the electronic record on appeal. These are referenced by the exhibit number and the exhibit's native pagination.

[4] "CR" refers to the clerk's record in petitioner's automatic direct appeal.

wished to proceed pro se and told the trial court that he wished to plead guilty. CR.5. Petitioner insisted that he was "fully aware of [his] rights" and that he was "fully competent to stand before you and make these decisions." CR.5. Petitioner once again stated that he was pleading guilty and accepting the death penalty because of the overwhelming guilt he felt for killing David. CR.5.

On July 19, 2001, petitioner wrote to the trial court again, this time requesting to be released from administrative segregation. R.629. Petitioner lucidly advocated for himself and demonstrated a factual and rational understanding of his position and the proceedings to come. For example, petitioner argued that he should not be in segregation, because he had "not had a disciplinary case since [he had] entered the county jail." R.629. Petitioner knew that he faced "a Capital Murder charge," but suggested that alone should not justify segregation because "there are others . . . with similar charges" that were not in segregation. R.629. Petitioner also cogently presented an alternative request, asking the trial court to move up his trial date, explaining:

> My trial should last no longer than two or three days as I will be pleading guilty and will not put up a defense in this case. Also, as soon as I am able to . . . after sentencing I will be dropping all appeals and will request an execution date as soon as is conveniently possible.

R.629.

A few weeks later, petitioner again wrote to the trial court "in hopes that" it would "consider [his] previous request to move [his] trial to an earlier date." R.629. Petitioner again demonstrated that he rationally and factually understood the consequences of his coming trial: "I will be pleading guilty so the only thing the jury will have to assess is my

punishment[,] which you and I both know will be death." R.629. Anticipating that his competency could be an issue that could delay his trial, petitioner insisted: "No, I don't have a death wish, or at least you all can't prove it .... I am fully competent and definitely know the difference between right and wrong. So let's get this show on the road please." R.629.

A week later, petitioner wrote another letter to the trial court again asking that he be permitted to represent himself. Demonstrating an understanding of criminal procedure, petitioner stated:

> I make this decision fully aware of the consequences and am also aware that this is within my right. I will permit one (1) attorney to be present to assist in any legal advice although I fail to see what purpose that would benefit.
>
> September 12, 2001 is my next court date, for pre-trial motions. I do not wish for any motions to be filed on my behalf.
>
> I do not wish to participate in jury selection. I will not contest any juror the prosecution selects.

R.648.

In December 2001, after he was allowed to proceed pro se, petitioner wrote again to the trial court asking to see all of the evidence in his case. CR.60. Petitioner further inquired about what he should do about obtaining "proper clothing for trial." CR.60. Several months later, petitioner sent another letter to the trial court in which he stated that he was "out of [segregation] now" and was "no longer suffering bouts of depression." CR.58. Nonetheless, petitioner remained "firm about [his] decision not to fight this case." CR.58.

At the order of the trial court, a neutral expert evaluated petitioner's competency before trial. On September 20, 2001, Dr. Jerome Brown evaluated petitioner to determine his competency to stand trial, or "adjudicative competency." CR.24. Dr. Brown's evaluation,

which "consisted of a clinical interview and a mental status examination," led him to conclude that petitioner was competent to stand trial. CR.24.

Evaluating petitioner's functional characteristics, Dr. Brown found that petitioner "had no trouble providing relevant and coherent background information." CR.24. Petitioner described his charges to Dr. Brown and explained that he had confessed because his conscience was bothering him. CR.25. Petitioner also reported that his feelings of guilt were driving him to use drugs. CR.25. Petitioner went on to accurately recount the details of the court, his lawyers, and proceedings up to that point. CR.25. Petitioner also provided a cogent explanation for why he was choosing to represent himself and plead guilty: petitioner explained that "he believe[d] that trying to defend himself would be 'like trying to get out of what [he] did.'" CR.25. Dr. Brown found petitioner "to be alert, well-oriented, and able to communicate his ideas without difficulty." CR.26. Dr. Brown also found "no evidence of hallucinations, delusions, . . . [or] any other unusual behaviors." CR.26. In sum, Dr. Brown "believed" petitioner "to be COMPETENT to stand trial" because "[h]e demonstrated a rational as well as factual understanding of the charges against him," as well as "the ability to consult with his attorney with a reasonable degree of rational understanding." CR.26.

The trial court concluded that petitioner was competent and that he knowingly and voluntarily waived his right to counsel. On October 11, 2001, the trial court considered petitioner's request to proceed pro se. 2.RR.1-21. At the beginning of the hearing, the trial court noted that it had read petitioner's letters and had spoken to petitioner at least once before the hearing. *See* 2.RR.3. The trial court indicated that it had waited to hold a hearing on petitioner's request to proceed pro se until after a psychological evaluation had been completed. 2.RR.4. At the hearing, the trial court asked petitioner's counsel, who had interacted

with petitioner on numerous occasions, *see* CR.1678, for his opinion on petitioner's competency:

> The Court: All right. Anything—for the record, is there anything in the report that is inconsistent with your own personal determination as to Mr. Austin's competency?
>
> Mr. Arnold: No ma'am. And as a matter of fact it is my opinion that Mr. Austin is competent to stand trial and to be honest it has been my opinion from the first time I met him but out of an abundance of caution I requested the psychiatric evaluation.

2.RR.4.

The trial court went on to question petitioner about his background and education. 2.RR.5-8. Petitioner told the trial court that he had no mental-health history. 2.RR.6. As petitioner notes, this was false; he has a long history of mental illness. Pet. 14.[5] As petitioner's expert observed, petitioner purposely "sought to minimize the appearance of mental illness to ensure that" the trial court would find him competent. Pet. Ex. 95 at 11. Petitioner also testified that while in prison he had received his G.E.D. and more than 20 hours of college credit towards a degree in business administration and that he had received training in "several vocational trades." 2.RR.7-8. The trial court then asked petitioner to detail the charges against him and the punishment he faced, which he did correctly. 2.RR.9. The trial court then went through various consequences of self-representation, which petitioner indicated that he understood. 2.RR.10-12.

[5] Contrary to petitioner's suggestion, Pet. 18, 27 n.56, the trial court *was* aware at that time that petitioner was being untruthful. "[T]he trial court knew, prior to the pretrial hearing, that Austin had 'a very bad problem with depression' and that Austin contemplated suicide often when depressed." *Austin v. Davis*, 876 F.3d 757, 782 (5th Cir. 2017) (quoting CR.16); *accord* CR.5.

Petitioner agreed to standby counsel, which petitioner said was "[f]or legal advice only. But as far as every other decision [regarding] my testifying or jury, I want all that." 2.RR.12-13.

The trial court went on to question petitioner about his reasons for wanting to represent himself, which petitioner explained was because he wanted complete control over trial strategy. 2.RR.13-14. Petitioner's then-counsel confirmed that he had discussed this decision with petitioner. 2.RR.16.

The trial court concluded that petitioner was competently, knowingly, and voluntarily waiving counsel, and thus granted petitioner's request. 2.RR.14-15. The trial court, however, went out of its way "to make certain" that petitioner understood that he had "the right to change [his] mind about representing [him]self." 2.RR.15.

Months later, petitioner entered a guilty plea to the capital murder of David. 9.RR.3-7, 14-15. Before the trial court accepted petitioner's plea, it questioned him about his knowledge of the charges against him, the potential punishment, and whether he was pleading guilty voluntarily. *See* 9.RR.4-7. Petitioner indicated that he understood the circumstances and that he was entering his plea voluntarily. *See* 9.RR.4-7. The trial court accepted petitioner's plea: "Having been fully admonished by the Court and the Court having determined that Mr. Austin is mentally competent to enter his plea of guilty and that he is entering this plea freely and voluntarily with full knowledge of the consequences the Court has accepted his plea of guilty." 9.RR.16.

Petitioner confirmed his competency when participating in the punishment phase of his trial. During sentencing proceedings, petitioner cross-examined a witness, spoke lucidly to

the jury, and never once uttered anything even arguably delusional. The State put on various witnesses who described the circumstances of David's murder and the evidence linking petitioner to the murder. *See, e.g.*, 9.RR.22-173. Although petitioner chose not to cross-examine most of these witnesses, he did cross-examine FBI Special Agent Tami Johnson about the circumstances surrounding petitioner's relationship with Jennifer. Petitioner's apparent goal was to show that he was not a sexual predator:

> Q: (By Mr. Austin) When you questioned Jennifer's mother, did Jennifer's mother also tell you that I used to date her for a while before I dated Jennifer?
>
> A: No.
>
> Q: And that she was the one that introduced me to Jennifer?
>
> A: She did tell me that.
>
> Q: In a bar? That Jennifer looked old enough to hang out and drink in bars? Did she tell you that?
>
> A: No.

9.RR.126. Petitioner was thus able to defend himself when he felt it necessary and appropriate.

Petitioner also gave a closing statement to the jury in which he again demonstrated a factual and rational understanding of the ongoing proceedings, their potential consequences, and his position:

> Mr. Austin: I'm not going to argue about what the State said anything about me.
>
> . . .
>
> Pretty much everything they said about me is true.
>
> . . .
>
> One of the reasons why I went ahead and confessed was it was bothering me, what I did. Regardless of what everybody thinks, it does. I've never killed anybody before. And, so, but I also knew that my acts of violence would not stop even though I was in prison.
>
> . . .
>
> On these special issues, there's no doubt that you will answer yes to No. 1 because if you do send me to prison, I will commit further acts of violence. Prison is a violent place. A lot of people don't realize that. Jail is a violent place, especially for somebody like me. I'm a homosexual. So, yes, I will commit further acts of violence in prison.
>
> Special Issue No. 2, there were no mitigating circumstances that contributed to killing David. And fear, anger or whatever can never be considered anywhere near a reason for killing. So I suspect, you know, y'all, by law, have to answer that number as no.

11.RR.15-16, 19-20.

Petitioner also took the opportunity in his closing statement to cogently dispute the State's characterization of him as a sexual predator:

> [O]ne thing I will argue that the State has tried to insinuate is that I'm a pedophile.
>
> . . .
>
> [T]o say that [Jennifer] looked like a little 14-year-old girl—the State does not have a picture of her at that time. The State does not have a picture of me other than my face at that time. Her whole family are very big, big-boned. All right. If they would have had a picture of her at that time, they would have

> seen Jennifer was bigger than I was. I only weighed 133 pounds; and she weighed 146 pounds, 5'9". All right.
>
> Also, in the testimony, Sergeant Allen did admit that Lora, Jennifer's mom, had admitted to him that [Jennifer] was in the bars drinking with us, partying. Okay. So Jennifer was old enough to pass without getting carded, to hang around in bars and drink but she looked like a 14-year-old girl? And, yet, I couldn't even step in to a door in a bar without getting carded. But other than that, yes, I was wrong. I should have left her alone. I should have backed off.

11.RR.16, 19. The jury concluded that petitioner should receive the death penalty, and the trial court sentenced petitioner to the death penalty. 11.RR.29-31.

3. After sentencing, the trial court held a hearing on petitioner's request to waive appellate and post-conviction counsel. In concluding that petitioner was competently, knowingly, and voluntarily waiving his appellate counsel, the trial court relied on its previous determination that petitioner could properly waive trial counsel, its observation of petitioner during trial, and its questioning of petitioner at the April 4 hearing. *See* 12.RR.8. The trial court concluded "that Mr. Austin fully understands the posture in which he presently finds himself and that he is knowingly intelligently voluntarily waiving his right to assistance of counsel both as to the direct appeal of his conviction and sentence and as to the Writ of Habeas Corpus with respect to that conviction and sentence." 12.RR.8.

Petitioner chose not to appeal his conviction and sentence. In Texas, however, when a defendant is sentenced to death, his conviction and sentence are automatically reviewed by the Court of Criminal Appeals. Tex. Code Crim. Proc. art. 37.071, § 2(h). On automatic review, the Court of Criminal Appeals reviewed and affirmed the trial court's conclusion that petitioner competently, knowingly, and voluntarily waived his right to counsel. *See Austin v. State*, No. 74372, 2003 WL 1799020, at *1 (Tex. Crim. App. Apr. 2, 2003) (unpublished) (citing U.S. Const. amends. VI, XIV; *Faretta v. California*, 422 U.S. 806 (1975)).

4. In 2004, petitioner belatedly sought habeas review of his conviction and penalty. *See Ex parte Austin*, No. 59,527-01, 2004 WL 7330939, at *1 (Tex. Crim. App. July 6, 2004) (per curiam) (unpublished). The Court of Criminal Appeals dismissed petitioner's petition as untimely. *Id.* Texas law requires a state habeas petition in a capital case to be filed "not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever is later." Tex. Code Crim. Proc. art. 11.071 § 4(a). Petitioner was allowed to act as his own counsel and, because he filed no petition immediately following his conviction, the State filed a notice waiving briefing. *Ex parte Austin*, 2004 WL 7330939, at *1. The statute of limitations does not expressly address what happens when a putative petitioner acts as his own counsel and declines to file a petition, thus obviating the need for the State to file a brief. The Court of Criminal Appeals interpreted the statute to require a habeas petition to be filed within 180 days of the State's notice that it had waived briefing, which petitioner failed to do. *Id.* Because there is no binding precedent on the application of the statute of limitations to this uncommon situation, *cf.* Tex. R. App. P. 77.3 ("Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court."), respondent has declined to press the dismissal of petitioner's state habeas petition as a procedural default. *Cf. infra* p. 29 n.10, 32.

While petitioner's untimely state habeas petition was pending, he sought federal habeas relief in the district court, asserting essentially the same claims: Notwithstanding the substantial evidence of his competency described above, petitioner's operative federal habeas petition asserted that he was incompetent during his trial and obviously so.

Petitioner relied primarily on affidavits from mental health professionals, only one of whom retrospectively opined on petitioner's competence to stand trial. *See* Pet. Ex. 95 (Affidavit of Dr. George Woods). Dr. Woods believed that petitioner was not competent to stand trial because he was, in Dr. Woods's view, irrationally pursuing a death sentence when he pleaded guilty, waived counsel, and sought out the death penalty. *Id.* at 11. Dr. Woods, however, did not diagnose petitioner with any delusional disorder and failed to conclude one way or another whether petitioner had a rational understanding of his proceedings at the time of trial. To the contrary, Dr. Woods conceded that:

> Mr. Austin certainly understood the factual issues of his trial. He knew what he was being charged with. He also understood the potential consequences .... In fact, he was capable of managing impressions and sought to minimize the appearance of mental illness to ensure that his planned death could proceed.

Pet. Ex. 95 at 11; *accord* R.2171 (Dr. Woods opining that petitioner "underst[ood]" his "options ... and the attendant consequences."). In fact, Dr. Woods later made clear that his opinion on competency was not tied to the minimal level of competence required by the Constitution. *See* R.2172 (distinguishing "the legal standard of competency" from "[t]he question for mental health professionals in a case like Mr. Austin's").

In response, the State provided an affidavit from Dr. Brown, on whose previous evaluation of petitioner the trial court relied. Dr. Brown averred that, having reviewed all of petitioner's habeas materials, "there [was] nothing in these [materials] that would justify changing [his] opinion." R.1806.

The district court denied petitioner relief on all claims. R.2767-2796. The district court concluded that petitioner had failed to overcome 28 U.S.C. § 2254(e)(1)'s presumption that the state trial court correctly determined that petitioner was competent. R.2780-2781. The

district court also concluded that petitioner could not make the necessary showing that his waivers of counsel and plea of guilty were not made competently, knowingly, and voluntarily. R.2781-2784.

5. The Fifth Circuit affirmed. *Austin v. Davis*, 876 F.3d 757 (5th Cir. 2017). Applying *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), and *Godinez v. Moran*, 509 U.S. 389 (1993), the Fifth Circuit explained that "[a] defendant is competent to stand trial if he has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and if] he has a rational as well as factual understanding of the proceedings against him.'" *Austin*, 876 F.3d. at 777 (quoting *Dusky*, 362 U.S. at 402). The Fifth Circuit concluded that petitioner could not overcome AEDPA's presumption, *see* 28 U.S.C. § 2254(e)(1), that the trial court correctly found him to be competent "based on Austin's demeanor, Dr. Brown's evaluation, the opinion of Austin's counsel, and the court's interactions with Austin, including correspondence from Austin indicating an ability to reason logically and strategically," *Austin*, 876 F.3d. at 782. In the alternative, the Fifth Circuit held that, even on de novo review, "Austin has failed to demonstrate that he is entitled to habeas relief. His prior mental health issues as well as his strategy before, during, and after trial are simply insufficient to support a determination that Austin was incompetent." *Id.* at 781.

The Fifth Circuit rejected petitioner's argument that his evidence of mental illness suggested incompetency, reasoning that "[a] history of suicidality and depression . . . does not render a defendant incompetent." *Id.* at 780. Because petitioner "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," he could not establish that he was incompetent at the time of trial, notwithstanding his mental illness.

Id. The Fifth Circuit also rejected petitioner's suggestion that "his decision to waive counsel and plead guilty to capital murder demonstrates incompetency." *Id.* As the court explained, "a defendant's deliberate use of the system to obtain the death penalty is evidence of rationality, not incompetence." *Id.*

ARGUMENT

I. THE FIFTH CIRCUIT'S CORRECT APPLICATION OF *DUSKY* DOES NOT WARRANT REVIEW.

This case concerns the state court's, the district court's, and the Fifth Circuit's straightforward application of the *Dusky* standard for judging a defendant's competence to stand trial, plead guilty, and waive appeals. The *Dusky* standard asks whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and if] he has a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. This standard was reaffirmed in *Godinez*, 509 U.S. at 396, which explained that the *Dusky* standard applies universally and has a "modest aim": "to ensure that [a defendant] has the capacity to understand the proceedings and to assist counsel." *Id.* at 402; *accord id.* at 401 n.12 ("The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings."). The Fifth Circuit applied *Dusky* and *Godinez* and affirmed that petitioner was competent because all available evidence suggested that he had the capacity to rationally understand his proceedings notwithstanding his desire to confess to his crime and accept punishment. *Austin*, 876 F.3d at 777-81. The Fifth Circuit's correct application of *Dusky* and *Godinez* does not warrant review.

The crux of petitioner's case for incompetency is that, because he was suicidal, he could not make rational decisions. *See* Pet. i, 5 (arguing that petitioner's "fervent and irrational suicidal ideation . . . substantially affected his capacity to make a rational decision as to whether to seek his own execution or defend the charges"). Petitioner, however, has not pointed to any decision, and respondent is aware of none, holding that suicidal thoughts render a defendant incompetent under *Dusky* notwithstanding his capacity to rationally

understand his proceedings. To the contrary, decisions from this Court and other circuit courts of appeals only undermine petitioner's argument and confirm that the Fifth Circuit's decision here was correct.

In *Drope v. Missouri*, for example, this Court declined to hold that a defendant's suicide attempt during trial necessarily raised sufficient doubt about his competence to require an evidentiary hearing on the subject. *See* 420 U.S. 162, 166, 170, 179 (1975) (applying *Dusky* and *Pate v. Robinson*, 383 U.S. 375 (1966)).[6] If suicidal ideation were sufficient to raise serious doubts about incompetence as petitioner claims, *Drope* would have stopped at the defendant's "bona fide" suicide attempt, *id.* at 179 & n.16 (quotation marks omitted)—behavior far more extreme than any petitioner exhibited during his criminal proceedings. But *Drope* did not. *Drope* declined to even "address the Court of Appeals' conclusion that an attempt to commit suicide does not create a reasonable doubt of competence to stand trial as a matter of law." *Id.* at 180. Rather, the Court considered the suicide attempt as only one piece of a larger picture—it suggested "mental instability contemporaneous with the trial" and prevented the trial court from being "able to observe [the defendant] in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him." *Id.* at 181. In contrast, petitioner made no bona fide suicide attempt contemporaneous with his trial and the trial court was able to observe his demeanor regularly. In any event, *Drope* took pains to "recognize . . . that a suicide attempt need not always signal an inability to perceive reality

[6] A "*Pate* claim" considers whether the trial court should have held an evidentiary hearing to test a defendant's competency to stand trial. *See Pate*, 383 U.S. at 385. It is closely related to a claim that a defendant was, in fact, incompetent to stand trial. Both rely on the same standard of competence. *See Drope*, 420 U.S. at 169-70.

accurately, to reason logically and to make plans and carry them out in an organized fashion," which was the ultimate inquiry in judging a defendant's adjudicative competency. *Id.* at 181 n.16 (quotation marks omitted). Petitioner easily met this standard, as every court to consider his competence has held.

Gilmore v. Utah, 429 U.S. 1012 (1976), also undermines petitioner's position. By the time the petitioner's case had reached this Court, his motivation for waiving all appeals was indisputably suicidal: he had attempted to kill himself six days after he personally told the Utah Supreme Court that he wished to withdraw an appeal previously filed without his consent. *See id.* at 1014-15 nn.4-5 (Burger, C.J., concurring). The petitioner's mother attempted to file an appeal with the Court. The Court denied the application for a stay, explaining:

> [T]he Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed, and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.

Id. at 1013. Once again, behavior and ideations far more extreme than those exhibited by petitioner during trial did not establish incompetence.

Petitioner's position is also contrary to *Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam), which reversed the Fifth Circuit's grant of habeas relief. In *Fulford*, the trial court found the defendant competent without a hearing, in the face of a psychiatric report that the defendant was incompetent, based on the defendant's demeanor at trial. Crucial to this Court's decision that the trial court was not required to hold an evidentiary hearing was the trial court's opportunity to observe the petitioner's "conduct during and after the trial," because "[i]n doubtful cases the exercise of [the] power of observation often proves the most

accurate method of ascertaining the truth" about a defendant's competence. *Fulford*, 462 U.S. at 113, 118 (quotation marks omitted). But a defendant's secret motivations—whether suicidal or something else—are not ascertainable through a court's "power of observation," *id.* at 118, so they provide a poor foundation on which to base a competency evaluation. *Cf. Drope*, 420 U.S. at 181 (defendants suicide attempt was relevant because it hospitalized him and prevented the trial court from observing his demeanor during trial); *McGregor v. Gibson*, 248 F.3d 946, 960 (10th Cir. 2001) (en banc) (explaining that counsel's observation is also strong evidence); *Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir. 1996) (same).

The Fifth Circuit's decision is not only in line with this Court's precedent, it is also in line with the reasoning and results of the lower courts in similar cases. For example, on facts that closely parallel this case, the Ninth Circuit affirmed a finding of competency notwithstanding the petitioner's suicidal thoughts. In *Dennis ex rel. Butko v. Budge*, 378 F.3d 880 (9th Cir. 2004), there was no dispute that the petitioner's acquiescing in the death penalty was "the product of a mental disease," *id.* at 890; specifically, his "desire to both seek the death penalty and to refuse appeals in his behalf [were] directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred," *id.* at 884. *Compare id.*, *with* R.2078 (petitioner's expert opining that he was incompetent because his "decision to pursue the death penalty was a direct result of contemporaneous depression and active suicidality"). The Ninth Circuit concluded that this was not enough to show incompetence because "[e]vidence showing that a prisoner's decision is the product of a mental disease does not show that he lacks the capacity to make a rational choice. It is the latter—not the former—that matters." *Dennis*, 378 F.3d at 890; *see also Deere v. Cullen*, 718 F.3d 1124, 1126 (9th Cir. 2013) (relying on *Dennis* and concluding, on facts similar to this case, that

there was no question as to the petitioner's competence to plead guilty and accept the death penalty). Petitioner also relies on evidence of mental disease (the former), not evidence of lacking the capacity to make rational choices (the latter); so his evidence is likewise insufficient. His interactions with the trial court, his counsel's observation, and a neutral expert's opinion all showed that he had capacity for rational understanding when he pleaded guilty and acquiesced in the death penalty.

Similarly, in *United States v. Abdulmutallab*, 739 F.3d 891 (6th Cir. 2014), a defendant who had attempted to blow himself up on an airplane chose to represent himself and plead guilty. *Id.* at 895. He later raised the issue of his competency on appeal. The Sixth Circuit did not see the defendant's martyrdom mission as evidence of irrationality. To the contrary, the court viewed "the steps that Abdulmutallab took in preparation for his mission" as "show[ing] the deliberate, conscious, and complicated path Abdulmutallab chose to pursue in the name of martyrdom." *Id.* at 901-02. "Unlike the defendants in *Pate* and *Drope*, Abdulmutallab not only acted rationally, but was (nearly) able to execute a complex martyrdom mission." *Id.* at 902. Like Abdulmutallab, petitioner's "deliberate, conscious, and complicated path" to the death penalty confirms his rationality. *Id.*

In *Taylor v. Horn*, 504 F.3d 416 (3d Cir. 2007), the petitioner, like petitioner here, confessed to murder, pleaded guilty, and sought the death penalty. *Id.* at 420-23. The Third Circuit concluded that there were insufficient indicia of incompetency to require a hearing by the trial court on the subject. Rather, like here, the trial court observed the petitioner acting rationally, the petitioner's trial counsel observed him acting rationally, and a neutral expert examined him and declared him competent. *Id.* at 433-35. Rejecting the petitioner's argument that his "suicidal thoughts indicated that he was incompetent to participate in the

proceedings," the court explained that the petitioner's "desire to confess and receive the death penalty as punishment, and refusal to allow witnesses during the penalty phase, are not indications that he was incompetent"; they "are consistent with [his] repeatedly expressed desire to plead guilty and accept the consequences." *Id.* at 434-35. The same is true here. *See, e.g.*, R.852-53 (petitioner expressing remorse and feelings of guilt); 11.RR.15 (same); CR.25 (same).

As a final example, in *Hunter v. Bowersox*, 172 F.3d 1016 (8th Cir. 1999), a defendant sought to withdraw a guilty plea that subjected him to the death penalty, arguing, with the support of an expert, that he had done so as a result of depression. *Id.* at 1021. The Eighth Circuit declined to disturb the state court's refusal to allow the defendant to withdraw his plea. Commenting on the petitioner's assertion "that his decision to plead guilty and virtually invite the death penalty was not rational," the court said, "the Constitution does not require that a plea of guilty be rational in that sense." *Id.* at 1023. So long as a defendant rationally "understood the charges against him and the options available to him," as petitioner demonstrably did, his choice to submit to the death penalty would be respected. *Id.* at 1021.

Each of the above decisions support the Fifth Circuit's reasoning and conclusion. The Fifth Circuit's faithful application of this Court's precedent does not warrant review.

II. REVIEW IS ALSO UNWARRANTED BECAUSE OF A SEPARATE VEHICLE PROBLEM: PETITIONER'S QUESTION PRESENTED IS ACTUALLY NOT FAIRLY PRESENTED.

As just demonstrated, the Fifth Circuit's decision complies with the decisions of this Court and the other circuits that have considered whether a defendant acquiescing in the death penalty is competent. Trying to get around this fact, petitioner distorts the Fifth Circuit's reasoning. Petitioner's question presented asks whether a defendant can have a logical and factual understanding of his proceedings and still be incompetent. Pet. i. This question is not fairly presented because it relies on a false premise—that the Fifth Circuit ignored *Dusky*'s additional requirement that a defendant be able to *rationally* understand his proceedings. *See id.*; Pet. 28 ("Under the circuit court's analysis, . . . all that matters is whether [a defendant] has a factual and logical understanding of the case and its possible outcomes.").

Before analyzing petitioner's claim, the Fifth Circuit set forth the standard established by *Dusky* and reaffirmed by *Godinez*: "A defendant is competent to stand trial if he has 'sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding [and if] he has a *rational* as well as factual understanding of the proceedings against him.'" *Austin*, 876 F.3d at 777 (quoting *Dusky*, 362 U.S. at 402, and citing *Godinez*, 509 U.S. at 396) (emphases added). The Fifth Circuit went on to examine evidence of petitioner's *rationality*. *See, e.g.*, *id.* at 780 n.209 (reasoning that "refusing to 'plead for mercy' in a capital murder case does not necessarily mean that a defendant is incompetent or acting irrationally"); 780 & n.210 (examining additional "evidence of rationality").[7] As its opinion

[7] Petitioner's suggestion (at 29 n.58) that respondent argued for some lower standard is incorrect. *See, e.g.*, Respondent's CA5 Br. 25 (setting forth the *Dusky* standard); *id.* at 49 (arguing that "rationality in [this] context" is the "'ability to perceive reality accurately, to

shows, the Fifth Circuit correctly recited and applied the full *Dusky* standard. Because petitioner's attack on the Fifth Circuit's decision rests on a false premise and thus fails, this is an independent vehicle problem further confirming that certiorari review is unwarranted.

Relatedly, petitioner cites (at 34-36) additional decisions in which courts have had held that a defendant's factual understanding of his proceedings is not sufficient alone to show competency where a defendant is also suffering from irrational delusions. None of these decisions helps petitioner because (1) the Fifth Circuit did not omit a rationality requirement from its *Dusky* analysis, as just explained, and (2) petitioner was not delusional, *see supra* pp. 2-11. So any supposed split of authority on that basis is illusory.

III. PETITIONER'S TRUE AIM IS TO CREATE A NEW STANDARD FOR COMPETENCY, BUT THAT QUESTION IS NOT FAIRLY PRESENTED.

The question petitioner presents masks his true aim: to cast aside the *Dusky* standard and to overrule *Godinez*. Towards the end of his petition, and for the first time in this case, petitioner expressly advocates for "a higher standard of competency than the *Godinez/Dusky* standard." Pet. 33. Petitioner has not preserved any argument that a higher standard of competency should apply to him, so his petition should be denied for that reason alone. And while petitioner, like the dissent in *Godinez*, insists that this Court's per curiam decision in *Rees v. Peyton*, 384 U.S. 312 (1966), requires a higher standard of competency for a defendant who is suicidal and actively seeking the death penalty, *e.g.*, Pet. 4-5, 33-34,[8] *Godinez* already rejected that argument. *Godinez* also arose from a situation

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reason logically and to make plans and carry them out in an organized fashion'") (quoting *Drope*, 420 U.S. at181 n.16).

[8] *See Godinez*, 509 U.S. at 414-15 (Blackmun, J., dissenting) (arguing that *Rees* requires more than a rational and factual understanding of the proceedings).

where a defendant discarded his lawyer and pleaded guilty in pursuit of the death penalty, and *Godinez* explained that, although *Rees* used different language than *Dusky*, neither it nor any other precedent required anything more than the *Dusky* standard. *Godinez*, 509 U.S. at 398, 401 n.12; *accord, e.g.*, John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939, 945-46 (2005) (explaining that, after *Godinez*, *Rees* is understood to require no more than that a defendant "has a rational and factual understanding of the consequences of his decision"); Brian R. Boch, *Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 J. Crim. L. & Criminology 883, 908 (1994) (similar). In reality, petitioner is asking this Court to overrule this portion of *Godinez*. But petitioner offers no justification for doing so, let alone on collateral review, so his petition is meritless.

IV. THE KENTUCKY SUPREME COURT'S DECISION IN *CHAPMAN* DOES NOT JUSTIFY REVIEW HERE.

Review is also unwarranted because, as demonstrated in Part I, the lower courts have had no problem applying this Court's standard for adjudicative competence to defendants acquiescing to the death penalty. In fact, notwithstanding his argument that a higher standard than *Dusky* should apply in these circumstances, petitioner has failed to identify a single decision in which a defendant acceding to the death penalty was found incompetent notwithstanding his meeting the *Dusky* standard.

In an effort to conjure a split of authority, petitioner cites (at 33-34) the Kentucky Supreme Court's decision in *Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007). *Chapman*, however, is an idiosyncratic opinion involving Kentucky *state* law that does not justify

this Court's review here. In *Chapman*, the court, citing *Godinez*, recognized that the standard for competence to plead guilty was that set forth in *Dusky*. *See Chapman*, 265 S.W.3d at 174-75. But the court went on to hold that "the trial courts of this Commonwealth must use" a "heightened competency standard . . . when a defendant . . . asks [] to be sentenced to death." *Id.* at 179-80. The "heightened" standard the court chose was purportedly that of *Rees*. *Id.* at 180. But, of course, *Godinez*, which involved a defendant who sought the death penalty, rejected the notion that *Rees* added anything to *Dusky*'s "rational understanding" standard. *See Godinez*, 509 U.S. at 397-98 & n.9. So, at best, *Chapman* represents a state's decision to apply a higher standard of competence as a matter of *state law*. *See Chapman*, 265 S.W.3d at 180 (referring specifically to "the trial courts of this Commonwealth"); Stephen Skaff, Note: Chapman v. Commonwealth*: Death Row Volunteers, Competency, and "Suicide by Court"*, 53 St. Louis U. L.J. 1353, 1374 (2009) (describing *Chapman* as "[t]he Kentucky Court [taking this Court] up on the offer" made in *Godinez* to adopt a higher standard as a matter of state law). At worst, it is an obvious misreading of this Court's precedent on federal constitutional standards for competence. *Cf.* 5 Wayne R. LaFave, et al., *Criminal Procedure* § 21.4(b), at 967-68 & n.73 (4th ed. 2015) (recognizing *Chapman* as an outlier).

Even if it is the latter, this Court's review is not necessary here because there is little chance of an inconsistent application of law in practice. This is for at least two related reasons. First, the purportedly heightened standard *Chapman* adopted has never even been cited, let alone adopted, in a decision outside of Kentucky.[9] Second, as applied in Kentucky,

[9] Petitioner cites (at 34, 36) *Hooper v. State*, 142 P.3d 463 (Okla. Crim. App. 2006), as a supposedly similar case. But all *Hooper* did was cite *Rees*. *See* 142 P.3d at 466 n.7, 470 n.16.

the standard is not heightened at all. *Chapman* affirmed the trial court's finding of competency because the facts showed that the defendant, although actively seeking the death penalty and suffering severe depression, did not "lack [the] capacity to appreciate his legal situation," did not "lack [the] capacity to understand the nature and consequences of the proceedings against him," and did not "lack [the] ability to participate rationally in his own defense." *Chapman*, 265 S.W.3d at 182; *accord Windsor v. Commonwealth*, 413 S.W.3d 568, 571-72 (Ky. 2011) (applying *Chapman*, affirming defendant's competence to seek death penalty, notwithstanding bona fide suicide attempt, where expert found defendant competent and trial court observation showed defendant's "demeanor, responses, and affect" to be "appropriate and coherent"). That is no more than *Dusky* requires and no different than the Fifth Circuit's analysis. Petitioner is unable to identify a single instance in which a Kentucky court has deemed a defendant incompetent under *Chapman* to seek the death penalty, let alone an instance that lays in the hypothetical twilight between *Chapman* and *Dusky*.

In all events, even if the Court were concerned with the Kentucky *Chapman* line of cases, it should review a case from Kentucky that actually applies that outlier standard—rather than a case like this one that faithfully abides by this Court's precedent.

It did not mistakenly suggest that *Rees* provides a heightened standard compared to *Dusky*, and it did not apply any heightened standard.

V. REVIEW IS ALSO INAPPROPRIATE BECAUSE NONE OF THE NEW EVIDENCE ON WHICH PETITIONER RELIES TO RETROSPECTIVELY ATTACK HIS COMPETENCE IS ADMISSIBLE ON FEDERAL HABEAS REVIEW.

Petitioner also impermissibly relies on new evidence to support his claim, and that is an independent reason to deny certiorari. A defendant's adjudicative competence is a question of fact. *Thompson v. Keohane*, 516 U.S. 99, 111 (1995); *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (per curiam); *Miller v. Fenton*, 474 U.S. 104, 113 (1985); *Fulford*, 462 U.S. at 117. Attempting to overcome the presumption of correctness AEDPA requires for state court findings of fact, *see* 28 U.S.C. § 2254(e)(1), petitioner relies on evidence—medical records, prison records, and the opinions of his experts—that he never produced in state court. As the various decisions cited in Part I show, the Fifth Circuit correctly concluded that even petitioner's new evidence was insufficient. However, this new evidence is also inadmissible on federal habeas review, as explained below. This is yet another reason certiorari review is unwarranted here.

In AEDPA, Congress chose to limit not only the claims that can be brought in federal habeas, 28 U.S.C. § 2254(a), (b), but also the evidence that can be used to support those claims, *id.* § 2254(d), (e); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The evidence on which petitioner relies in federal court to retrospectively challenge his competency is barred by AEDPA for two different reasons. First, because the question of petitioner's competence was adjudicated on the merits in state court, federal habeas review of those claims must rely only on the evidence before the state court. *Pinholster*, 563 U.S. at 182 (applying 28 U.S.C. § 2254(d)(1)). Second, because petitioner failed to diligently develop the evidence he seeks to rely on in federal court, that evidence is also barred by § 2254(e)(2). *See Williams v. Taylor*, 529 U.S. 420, 424 (2000); *Pinholster*, 563 U.S. at 183-84 & n.4.

A. The Court of Criminal Appeals reviewed petitioner's conviction and sentence and expressly concluded that the trial court did not err in allowing petitioner to waive counsel and represent himself. *Austin*, 2003 WL 1799020, at *1 (citing U.S. Const. amends. VI, XIV; *Faretta*, 422 U.S. 806). In so concluding, the court necessarily affirmed that petitioner was competent. *See Godinez*, 509 U.S. at 396-97; *Faretta*, 422 U.S. at 835. Because the court raised and rejected the claim that petitioner was incompetent, this claim was adjudicated on the merits and no new evidence may be mustered to challenge that adjudication on federal habeas review. *Pinholster*, 563 U.S. at 182.

It makes no difference that petitioner did not raise the issue himself on direct review. A petitioner's faulty presentation is irrelevant where the state court actually adjudicated the question, as it did here. *Cf. Castille v. Peoples*, 489 U.S. 346, 350 (1989) ("[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review.") (quotation marks omitted); *Bear v. Boone*, 173 F.3d 782, 785 n.3 (10th Cir. 1999) ("Read collectively, Supreme Court precedent clearly shows that a claim is exhausted once the state courts have actually passed upon the issue raised."); 2 Brian R. Means, Postconviction Remedies § 29:15, at 191-92 (2016) ("A claim that has not been exhausted by presentation to the state's highest court is nevertheless entitled to § 2254(d)(1) deference if the claim was adjudicated on the merits by a lower state court."). The Court of Criminal Appeals expressly considered and affirmed the propriety of petitioner's waiver of counsel, and thus also affirmed his competence to stand trial. That decision is subject to § 2254(d)(1) and *Pinholster*.

In the Fifth Circuit, petitioner argued that § 2254(d) does not apply because his competency claim was not adjudicated on the merits in his state *collateral* proceedings.[10] Petitioner is wrong. Although it is true that petitioner raised claims concerning his competency in his state habeas petition and those claims were not adjudicated because they were untimely, that cannot change the fact that his competency was adjudicated by Texas's highest criminal court on *direct review*. Petitioner's re-raising his competence on state collateral review was unnecessary. *See Castille*, 489 U.S. at 350 ("[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review.") (quotation marks omitted). It was also inappropriate, because Texas courts do "not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal." *Ex parte Hood*, 304 S.W.3d 397, 402 n.21 (Tex. Crim. App. 2010). Even if timely, petitioner's competency was unreviewable on state habeas because the Court of Criminal Appeals had

[10] Recall that petitioner's state collateral challenge to his competence was dismissed as untimely. *See supra* p. 12. Petitioner argued, and respondent did not dispute, that the Court of Criminal Appeals' construction of the statute of limitations was not firmly established at the time of petitioner's untimely filing. *See id.* For this reason, that procedural bar could not support a defense of procedural default. *Cf. Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed."). Not satisfied, petitioner is trying to use the purported inadequacy of the procedural bar to his state *habeas* proceedings as a gateway to plenary review of decisions made by on *direct review*. This is not how AEDPA—which was designed to ensure deference to state courts except in the most extreme cases—works. If a procedural bar is inadequate, or waived, it means only that a federal claim may proceed to a determination on the merits; it does not provide a windfall to the petitioner by making the remainder of AEDPA inapplicable.

already raised and decided the issue on direct review. Thus, petitioner's state habeas petition's being barred is irrelevant to the state adjudication that a federal court would have to review.

B. Even if petitioner's claim of incompetency was not adjudicated on the merits under § 2254(d), AEDPA still bars his new evidence because he "failed to develop the factual basis of [his] claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Subsection (e)(2) requires diligence in trying to develop facts in state court if those facts are to be relied on in federal court. *See Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam) (citing *Williams*, 529 U.S. at 431-37). Otherwise, a petitioner must satisfy stringent requirements not relevant here. *See* 28 U.S.C. § 2254(e)(2)(A)-(B). "[T]he burden is on" petitioner "to establish the diligence that absolves him of meeting the remaining requirements of § 2254(e)(2)." *Owens v. Frank*, 394 F.3d 490, 500 (7th Cir. 2005).

The only way to avoid § 2254(e)(2)'s opening clause is to prove that no one from the defense is at fault for failing to develop the factual record in state court. *See Williams*, 529 U.S. at 434 (noting defense not at fault where "the prosecution concealed the facts"). Petitioner cannot avoid § 2254(e)(2) because *he* failed to exercise diligence to develop a factual record on his competence in state court. In fact, petitioner concedes that he purposefully misled the trial court on facts related to his competency and failed even to note the existence of records demonstrating his mental health history, let alone provide them to the trial court. *See* Pet. 15; R.2171; Pet. Ex. 95 at 11 (Dr. Woods explaining that petitioner "sought to minimize the appearance of mental illness" in the trial court). Petitioner concedes that as part of his plan to receive the death penalty, he consciously and knowingly lied to and tried to "trick" the trial court in order to assure that the trial court found him competent. Pet. CA5

Br. 76. That is not diligence. *See Williams*, 529 U.S. at 437-38 (the petitioner was not diligent for purposes of (e)(2) where evidence existed prior to trial but the petitioner and his counsel made no effort to look for it); *Conner v. Quarterman*, 477 F.3d 287, 293 (5th Cir. 2007) (failure to provide relevant medical records to the state court triggers subsection (e)(2)); *Roberts v. Dretke*, 356 F.3d 632, 641 (5th Cir. 2004) (same). Subsection (e)(2) bars the consideration of any new evidence on petitioner's competency.

In the Fifth Circuit, petitioner tried to avoid the force of § 2254(e)(2) by focusing on his untimely and disallowed state habeas proceedings, when he was allegedly prevented from developing the record on his competency claims by what he asserts was a procedural bar that was not firmly established or consistently followed. *See supra* pp. 12, 29 n.10. But this argument is misguided for at least two reasons. First, it focuses on the wrong proceeding. Petitioner's competency was decided in the state trial court and affirmed by the Court of Criminal Appeals on direct review. His competency was not subject to re-review on state habeas. *Ex parte Hood*, 304 S.W.3d at 402 n.21. Petitioner's failure to diligently develop facts before the trial court and on direct review triggers § 2254(e)(2) because *those* are the courts that adjudicated the question. Trying to develop facts when it is too late to matter is not diligent and does not satisfy § 2254(e)(2).

The Third Circuit, in a similar case, held the same. In *Taylor*, also discussed above in Part I, the petitioner challenged his competence to stand trial on federal habeas review. He attempted to rely on evidence not presented to the trial court when it considered his competence. *Taylor,* 504 F.3d at 435. Taylor had, however, attempted to present this new evidence to a state habeas court, which had dismissed his state petition on a purportedly inadequate procedural ground. *Id.* at 424-25, 436. Taylor tried to escape § 2254(e)(2) using the

same argument that petitioner makes here. *See id.* at 436. Like petitioner, he relied on cases that addressed the question of what to do "if the state courts had *failed to resolve the . . . issue* for some reason unrelated to [a petitioner]'s diligence." *Id.* at 436 (emphasis added). The Third Circuit correctly distinguished those cases for the same reason that this Court should—here, the trial court and the Court of Criminal Appeal *did* resolve the question of petitioner's competence. "To the extent that the state procedural default of" petitioner's "claims was inadequate, it *only* bears on the" issues "that were *new* to his" defaulted "petition." *Id.* (emphases added). Petitioner's competency was not new to his state habeas petition, and, therefore, his efforts to belatedly develop the facts in that proceeding are irrelevant.

Second, even if one ignores petitioner's failure to develop facts when it mattered, he still cannot clear § 2254(e)(2). The fact that the time bar on petitioner's state habeas petition does not rise to the level of procedural default does not excuse him from § 2254(e)(2)'s requirements, which he cannot satisfy. What makes a procedural bar sufficient to justify barring a federal habeas claim—*i.e.*, that it is firmly established and consistently followed—is part of the equitable doctrine of procedural default, the contours of which are defined by courts. *See Davila v. Davis*, 137 S. Ct. 2058, 2066-67 (2017). But when, as with § 2254(e)(2), Congress has directly addressed a situation through legislation, those statutes supersede any judicially created rules that might otherwise apply in the absence of such legislation. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-16 (1981); *Williams*, 529 U.S. at 433 (explaining that because AEDPA addressed what was once an equitable question, courts must follow AEDPA). Nothing in the text of § 2254(e)(2) provides an exception for this situation. Under § 2254(e)(2), petitioner must show that someone other than himself

was a fault for his inability to develop facts on state habeas. But petitioner was unable to develop evidence on state habeas because *he* waited too long to file a petition; the opposite of diligence.[11] If that procedural bar was insufficient to support a procedural default, it was only because the infrequency of circumstances like this resulted in a rule that was not yet "firmly established and consistently followed." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *see supra* pp. 12, 29 n.10; *Austin v. Davis*, 647 F. App'x 477, 482 (5th Cir. 2016) (per curiam) ("The federal district court concluded that since Austin's case was the first in which the [Court of Criminal Appeals] had construed § 4(a) in this manner, it was not a procedural rule that was regularly followed and therefore could not be the basis for procedurally defaulting Austin's state habeas claims."). That rule, however, is nonetheless a legitimate interpretation of Texas law, and the need for its utilization rests solely at the feet of petitioner. Had he been diligent, the statute of limitations never would have come into play. This case is in the heartland of § 2254(e)(2) and petitioner's new evidence is barred.

[11] Any argument that petitioner's supposed incompetence excused the untimely filing of his state habeas petition is also untimely; it should have been made to the state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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