

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

**BERNARDO ABAN TERCERO,**  
*Petitioner*

v.

**WILLIAM STEPHENS,** Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,  
*Respondent*

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NO.

CAPITAL CASE

**MOTION FOR STAY OF EXECUTION**

Mr. Tercero asks this Court to stay his execution currently scheduled for August 26, 2015 after 6:00 p.m. in order that his counsel can meaningfully investigate the factual bases for and then prepare a habeas corpus application raising an Eighth Amendment claim that he is incompetent to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). A stay is required to give meaningful effect to Mr. Tercero's right to representation in a post conviction proceeding under 28 U.S.C. § 2254 challenging the legality of his execution. *See* 18 U.S.C. § 3599; *McFarland v. Scott*, 512 U.S. 849 (1994). Moreover, the due process clause requires that he be given a meaningful opportunity to be heard on his claim. *Panetti*, 551 U.S. at 949. Because the state court deprived Mr. Tercero of this process by summarily denying his claim raising a substantial Eighth Amendment claim without holding a hearing, due process requires that this Court enter a stay of execution to permit him an opportunity to prepare and file a habeas corpus application and to be afforded a fair hearing.

## **I. PROCEDURAL HISTORY**

Mr. Tercero filed a motion to determine his competency to be executed under Art. 46.05, V.A.C.C.P. on Monday, August 17, 2015.<sup>1</sup> The State district court ruled that Mr. Tercero had failed to make a substantial showing of incompetence to be executed and denied his request for a hearing and stay of execution on August 21, 2015. As the Art. 46.05 motion was not filed more than 30 days in advance of the execution date, no appeal would lie to the Texas Court of Criminal Appeals.<sup>2</sup>

## **II. ENTITLEMENT TO STAY OF EXECUTION UNDER 18 U.S.C. § 3599.**

A district court has jurisdiction to entertain an application for writ of habeas corpus and is empowered to stay a capital prisoner's execution in advance of the filing of an application. 28 U.S.C. § 2251. Such a stay is intended to give meaningful effect to the right to quality representation contained in 18 U.S.C. § 3599. The right to representation "necessarily includes a right for that counsel meaningfully to

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<sup>1</sup> The delay in filing the motion occurred because of the length of time it took to find a psychologist who could interview and administer psychological testing to Mr. Tercero. Because Mr. Tercero's primary language is Spanish, his language skills are rudimentary at best and psychological testing instruments that are written in English are of little use. See footnote 3, report of Dr. Antolin Llorente. Counsel located Dr. Llorente at the end of July who agreed to come to Texas to assess Mr. Tercero. He also agreed to a reduced fee which counsel, Walter Long, paid out of his own pocket. It took some time for Dr. Llorente to clear his schedule and find two days where he could travel to Livingston, Texas, the site of the Polunsky Unit where Mr. Tercero is housed. The tests were administered on August 3 and 4, 2015. After the test administration, it took Dr. Llorente 13 days to score the testing and write a 23 page report. The Art. 46.05 motion was filed the next day, August 17, 2015; the state court ruled that Mr. Tercero could not satisfy the Art. 46.05 threshold requirement on Friday, August 21, 2015, after holding hearings on this issue, three times over a two day period.

<sup>2</sup> Mr. Tercero has asked the Court Reporter of the 232<sup>nd</sup> District Court of Harris County Texas to prepare a transcript of the proceedings on an expedited basis; that transcript will be filed with the Court as soon as it is received.

research and present a defendant's habeas claims." *McFarland*, 512 U.S. at 858. Moreover, Applicant can make a preliminary threshold showing of possible merit to permit the action to proceed. *See Panetti*, 551 U.S. at 946 (threshold preliminary showing may be required before stay is granted).

**A. This Court Would Have Jurisdiction to Entertain an Application for Writ of Habeas Corpus Presenting an Eighth Amendment Incompetency Claim and Thus Is Empowered to Grant a Stay of Execution.**

Mr. Tercero seeks to file a habeas corpus application raising an allegation that he is incompetent to be executed. He could not have raised this claim in his previously filed habeas corpus application because the claim became ripe for adjudication only once his execution became imminent. *Panetti*, 551 U.S. at 943. Thus, an application raising an Eighth Amendment incompetency claim will not be subject to the successive application requirements of 28 U.S.C. § 2244(b), and this Court will have jurisdiction to entertain it. *Id.* at 947. Because this Court has jurisdiction to entertain a habeas corpus application raising an Eighth Amendment incompetency claim, the Court may grant a stay of execution before the filing of an application. 28 U.S.C. § 2251.

**B. Undersigned Counsel Has Not Had a Meaningful Opportunity to Research and Prepare a Habeas Corpus Application.**

While counsel for Mr. Tercero has read the trial transcripts, reviewed prior proceedings, obtained Mr. Tercero's prison records and used the services of a neuropsychologist, much remains to be done. As Dr. Llorente noted in his report conclusions:

Behavioral and emotional indicators obtained during this evaluation as well as a detailed review of TDCJ medical records revealed that Mr. Tercero is probably experiencing significant psychiatric symptoms at this time, and he has similarly experienced such problems in the past. More important, the presence of severe psychopathology cannot be ruled-out at this time in response to one of the referral questions, particularly because he is not being medicated at this time and he exhibited blatant delusions during the course of this evaluation. In addition, his neuropsychological and emotional profile in all likelihood and at least has met criteria for several diagnoses (e.g., ICD-9, 309.81, Posttraumatic stress disorder, PTSD; Depressive disorder, recurrent with psychotic features [ICD-9, 296.34], and Delusional disorder, paranoid type [ICD-9, 297.1]). More important, his past history and medical records including TDCJ and his current symptoms suggest that his profile continues to meet criteria for other debilitating and more severe diagnoses, and although his diagnoses relating to depressive and delusional disorders are easier to contemplate, similar to his diagnoses of PTSD, more complex diagnoses also are supported by his past medical history documentation and his current profile without the need to speculate including the presence of a psychosis (Psychosis, NOS; ICD-9, 298.9). **However, more complex diagnoses such as the presence of schizophrenia would require further and more costly a comprehensive assessment in his native country and in the U.S. If present, a diagnosis of schizophrenia or schizoaffective disorder of course, as part of a differential process and bydefinition, would subsume several of the diagnoses noted above (see Footnote 23).**<sup>3</sup>

To research and prepare a habeas corpus application under these circumstances, federal counsel must conduct additional investigation to identify the factual bases of an Eighth Amendment incompetency claim (and, if so, create an investigation plan, seek authorization to retain relevant ancillary services, and conduct that investigation), and then draft and file an application pleading detailed

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<sup>3</sup> Dr. Llorente's footnote 23 expands on the importance of getting a better history of Mr. Tercero's life. "A diagnosis of delusional disorder would assume that he has never been given a diagnosis of schizophrenia. However, if he was ever given a diagnosis of schizophrenia, this his delusions would have to be interpreted within such a context. The diagnoses shown above are noted in reference to his present psychological functioning, report from his past symptoms and TDCJ medical records." Llorente report p. 16, fn 23.

factual allegations. As the state court summarily denied Mr. Tercero's motion making a threshold showing, it is anticipated that federal counsel for Mr. Tercero will need to request additional expert services from Dr. Llorente to assist his preparation of an application.

Counsel must also research the procedural implications of the state court competency proceeding on a federal habeas corpus proceeding. Specifically, counsel must ascertain:

- whether the state court disposition constituted an "adjudication on the merits" within the meaning of 28 U.S.C. §2254(d);
- whether the state court decision adjudicating the merits, if any, was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, including whether due process was violated in the course of the adjudication, *see Panetti*, 551 U.S. at 948; and
- whether the state court's decision adjudicating the merits, if any, was based on an unreasonable determination of the facts in light of the evidence.

Applicant's execution is scheduled for August 26, 2015. A stay of execution is required to permit federal counsel to meaningfully conduct this work. *McFarland*, 512 U.S. at 858. Especially in light of the threshold showing Mr. Tercero can currently make, a stay of execution to permit counsel to conduct these activities is warranted. *See In re Hearn*, 376 F.3d 447, *clarified by* 389 F.3d 122 (5th Cir. 2004) (granting stay of execution to give meaningful effect to federal statutory right to counsel upon colorable showing of possible merit).

## **II. ENTITLEMENT TO STAY OF EXECUTION UNDER THE DUE PROCESS CLAUSE.**

**A. A Substantial Threshold Showing of Insanity Entitles a Prisoner to a Stay of Execution for a Fair Adjudication of His Eighth Amendment Claim.**

*Ford* claimants are entitled to certain procedural protections mandated by due process when litigating competency. At its core, “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Such due process protections are triggered once the defendant has established a threshold showing of incompetency. *Panetti*, 551 U.S. at 949 (“Once a prisoner seeking a stay of execution has made ‘a substantial threshold showing of insanity,’ the protection afforded by procedural due process includes a ‘fair hearing’ in accord with fundamental fairness” (quoting *Ford*, 477 U.S. at 424, 426 (Powell, J., concurring))); see also Memorandum and Order at 2, *Eldridge v. Stephens*, No. 05-cv-01847 (S.D. Tex. Nov. 17, 2009) (“If . . . a [substantial threshold] showing [of insanity] is made, the execution must be delayed to permit a ‘fair hearing’ to determine competency to be executed”).

**B. Applicant Can Make a Substantial Threshold Showing of Insanity.**

The Eighth Amendment forbids the execution of prisoners “who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in judgment). In *Panetti*, the Supreme Court rejected a “bare factual awareness” standard because it “treats a prisoner’s delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution.” 551 U.S. at 958.

[T]he *Ford* opinions nowhere indicate that delusions are irrelevant to “comprehen[sion]” or “aware[ness]” if they so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

*Id.*

A proper *Ford* inquiry must probe the prisoner’s rational understanding of his punishment, the reason for it, and the role his rationality plays in preventing or distorting that understanding to the point where the execution no longer serves the purpose intended, and instead violates the Eighth Amendment. As the Supreme Court emphasized, “[a] prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.” *Id.* at 959. Thus, if a prisoner is “aware” of the State’s rationale for the execution, but still does not have a rational understanding of the execution, then the prisoner is not competent to be executed. Although *Panetti* did not “attempt to set down a rule governing all competency determinations,” *id.* at 960-61, the Court explained that a “rational understanding” test is appropriate and consistent with the reasons supporting the ban on executing the insane announced in *Ford*. *Id.* at 958-62.

Mr. Tercero can make that showing.

1. TCDJ mental health records

Almost from the moment of his incarceration on Texas Death Row at the Polunsky Unit of the Texas Department of Criminal Justice, Mr. Tercero has received extensive psychiatric and psychological care by the staff of the Polunsky Unit. Initially, he was provided a mental health screening but with no

consideration given to his lack of fluency in English. He was given 90 Mental Health Assessments though nothing was reported. On December 27, 2004, the evaluator noted that Mr. Tercero was “hard to understand as he thinks he speaks better English than he does. He reports a lot of recent short term memory loss, beyond t his it is hard to understand what else he is trying to talk about.” Exhibit 1. A few weeks later, on January 11, 2005, with an interpreter present, Mr. Tercero told a psychologist that he did not want to talk about memory problems. He would speak in English but only in a one on one situation and not in front of other inmates. Exhibit 2. On January 28, 2005, Mr. Tercero again told a psychologist that he wanted to talk about his “psych problems and memory loss” but no one took him from his cell to the medical ward. Exhibit 3.

On February 4, 2005 Mr. Tercero “reported: ‘I need some meds, BUT I need to be called out so I can explain myself better. . . no, I don’t want an interpreter. . . I want to talk in private.’ When MHL questioned him further, he put his finger to his mouth often saying in a low voice, ‘SSH, I don’t want other to hear.’ ‘Let me tell you this . . . it scares me.’ At that time, he picked up a bottle of shampoo and showed it to MHL. ‘I know what this is, I know this is shampoo for my hair, but the other day I looked at it and didnt [sic] remember what it was for. Other like that happened before.’ Offender is concerned by this memory loss.” Exhibit 4.

On February 29, 2005 there was another outpatient interview with a psychologist. “Pt. said he would lay things down and then forget where he laid them down. He said he could not remember names of people. He said sometimes he

would forget words of songs that he used to know. He said he also felt very sad. The therapist asked how much sleep he was getting. He said he was sleeping about 7 hours every 24. It was suggested that he write a daily routine for himself and/or a weekly routine that would help him keep up with things. To help improve his memory, he should start memorizing things. It was explained to him that the memory is a skill like other things and can be improved.” Exhibit 5. He was continually assessed every 90 days.

On April 25, 2006 in one of the 90 day assessments, the psychologist noted A/V hallucinations (A/V refers to audio/visual). Three days later, the psychologist entered the following note:

Reason for referral is difficulty sleeping.  
“Pt. is hesitant to speak about the issue. He does speak, but very quietly. ‘I am seeing shadows and movement. I also hear voices. They are outside my head. It calls my name. I look, but nothing is there. I have a hard time sleeping and concentrating. It began about a year ago.’ ‘I have had a loss of memory also. I did not do drugs in the world. No, I never had black outs.’ Discussed whether the patient can tell the difference between what is real or not. ‘I do want to know if it is possible for it to be real or is it fantasy.’ Will send self-help material to pt. Pt. will send a SCR when completed or has more questions. **Pt. seems to be honestly telling his experiences.**”

Exhibit 6 ( emphasis added).

In 2011, Mr. Tercero reported several bodily symptoms that were attributed to anxiety. On January 31, 2014, the doctor prescribes 20 mg of

Citalopram for Anxiety Disorder. Less than a week later, on February 3, the psychiatrist notes the following:

“Subjective: ‘My mood is much depressed, have poor concentration. I am persecuted by shadow; they follow me in shower, and hear voices telling me that I am demon. I was feeling sleepy after taking medication per your order. I do not get obsessive thoughts or worry about small things. I can exercise; do not get panic or anxiety attacks. I exercise in my cell. I am not having elated mood. I do not hear any voices. I do not feel paranoid.

Diagnosis:

Axis I: Anxiety Disorder due to GMC 293.84

**R/O MDD Recurrent “sever” with psychotic features 296.34**

History of MJ dependence in remission due to incarceration

Axis II: History of Antisocial Personality

Axis III: See medical chart.

Start on “Risperidone for reported psychotic Sx.” 449

Change medication Celexa to Zoloft.

Exhibit 7. Mr. Tercero is prescribed an antipsychotic medication, Risperidone and the Celexa prescription is changed to Zoloft. Exhibit 8. Two days later, he writes Dr. Patel and tells the doctor that when he stops his medication he hears voices insulting him and commanding him to do things “Also, shadows being persecuted me. Also, I feel Abraham Lincoln’s spirit, Reincarnation in me. I did not tell anybody here because they do not believe me.” Exhibit 9. The antipsychotic medication continues to the end of July, 2014.

On October 27, 2014, there is another psychiatric evaluation which noted the following:

Complained of excessive sedation with Risperdal and Celexa. “Hx of being treated for depression in his teens in Nicaragua. . . . Hx of smoking pot. . . .He says that his family members have hx of mental illness. He has been incarcerated for the past 15 years. In 2010, he thought that his sister was going to be killed. She was stabbed, but she escaped. He says that he saw her spirit coming out of her body. He says that he is having ‘paranormal’ experiences. ‘I see spirits and shadows . . . hear voices . . . hey curse me out . . . they order me stop eating. . . they are angels or devils . . . people like [H]itler are trying to reincarnate into my body . . . spirit is trying to go into my body. I don’t want people to think I am crazy. . . My grandfather is watching me . . . he is not saying anything.’ There is no hx of depression or mania.”

Diagnosis: Psychosis NOS R/O Schizophrenia.  
Started on Perphenazine.

Exhibit 10. Perphenazine is a powerful antipsychotic. This prescription continues though January, 2015. This last April, Dr. Nathan Pradan opined that Mr. Terceo “needs to remain s3nr at the least for 2 years in my opinion. He was narrating symptoms of active psychosis. He does not have to be monitored in tarp since he is refusing it. (He will become hostile otherwise). . . . Do not delete requirement for MH rep to be present for cases.” Exhibit 11.

## 2. Interview with Anne Nisenson

Anne Nisenson, a mitigation investigator, interviewed Mr. Tercero on at least five occasions since June of this year; three of those visits were substantive. During those visits, Ms. Nisenson noted that Mr. Tercero “exhibited severe anxiety and

tended to be unable to transition or switch topics appropriately.” Nisenson Declaraton p. 1. He would fixate and find it difficult to move him to another topic. Throughout the interviews, Mr. Tercero would frequently look behind him even though his door to the visitation booth was locked and no one was there.

Tercero believed that the Nicaraguan government was trying to harm him. He believed the government had taken photos of him and that a Nicaraguan general was looking into him and asking questions. He warned Ms. Nisenson to be careful. He believed that one of his current counsel, Michael Charlton did not have his best interests at heart and was being manipulated by prior counsel, Don Vernay. He thought that Mr. Charlton would trick Ms Nisenson.

Mr. Tercero did not want people to think him crazy and was worried that the disclosures to Ms. Nisenson would create such an impression.

After a few interviews, Mr. Tercero disclosed that he heard voices. He described his body as separate from him head; it was like a television channel being changed. He would be taken elsewhere even though he wanted to return. He found himself staring a a wall in his cell for hours.

Affidavit of Ann Nisenson, Exhibit 12

## 2. Evaluation by Dr. Antolin Llorente

At the behest of counsel, Mr. Tercero was given a neuropsychological battery on August 3 and 4, 2015. Dr. Llorente’s full report is attached as Exhibit 13 and the following is taken from that report.

He admitted to the presence of active auditory (e.g., voices) and visual hallucinations (e.g., shadows) similar to those he experienced in the past as

indicated in his jail medical records requiring the use of psychotropic medication in the past. He is suffering from current, active delusions (e.g., he continues to believe that he is there as a result of a plot from the “CIA and “dark” forces, and he feels they were responsible for his incarceration, etc.). Per verbal report, he is not being medicated while in prison at this time in spite that he was diagnosed with a severe mental disorder (psychosis) as noted in his medical records while imprisoned, and he has exhibited a history of psychiatric symptoms. When queried, he denied the presence of a current established plan to hurt himself at this time, but he has experienced such thoughts and has exhibited such gestures in the past. He has experienced depersonalizations and delusions multiple times in the past and continues to experience them at this time. When a discussion of his childhood took place, such a discussion elicited blunt affect, particularly when a discussion took place related to his mother. Overall, affect appeared to be flat. Mood appeared to be somber

Llorente report pp. 7-8

Llorente then administered a battery of psychological instruments which are noted on pp. 8 and 9 of his report. Several testing instruments were administered to determine whether Mr. Tercero was maligning; the scores on those instruments ruled that out. *Id.* at 9. His reading level, in his native language of Spanish, was determined to be at roughly the 3<sup>rd</sup> or 4<sup>th</sup> grade level. <sup>4</sup> Llorente report p. 9. His visual and perceptual skills were impaired as were his learning and memory functions, a deficit consistent with what he told the mental health staff at Polunsky. *Id.* at 12. Testing revealed impairments in Executive Functioning.

Most importantly, for purposes of this motion, Dr. Llorente concluded that Mr. Tercero easily met the standards for Delusional Disorder, Paranoia. Llorente Report p. 14.

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<sup>4</sup> This belies trial counsel’s efforts at trial to establish that Mr. Tercero did well in school.

In this regard, Mr. Tercero's current and past psychological status easily satisfied and meets criteria for delusional disorder (Delusional Disorder, [paranoid]).<sup>5</sup> Similarly, based on his history and current interview, his profile met and meets criteria for a recurrent, severe psychotic disorder at the very least (if not schizophrenia or schizoaffective disorder) and posttraumatic stress disorder (PTSD). Although his diagnoses relating to depressive and delusional disorders are easier to contemplate, similar to his diagnoses of PTSD, more complex diagnoses also are supported by past medical history documentation without the need to speculate and from his psychiatric background and history including the presence of psychotic episodes (see Summary and Clinical Impressions). However, more complex diagnoses such as the presence of schizophrenia would require further and more comprehensive assessment. If present, a diagnosis of schizophrenia or schizoaffective disorder would subsume several of the diagnoses noted above. However, regardless of past or present diagnostic considerations, what is most relevant and consistent with his current situation, where he finds himself facing capital punishment after he has been accused and found guilty of a homicide, is the fact that this individual appears to suffer from and has suffered for quite some time from severe psychopathology (mental illness) which has not received its due attention or treatment. Unfortunately, his severe mental health problems were attributed or labeled by him and others as stemming from dark forces or demonic possessions or other erroneous attributions, rather than actual, severe psychopathology (severe mental illness).

Llorente report p. 14.

Ultimately, Dr. Llorente concluded that Mr. Tercero was severely mentally ill and had been for some time. *Id.* at 18. Dr. Llorente easily concluded that Mr. Tercero met the requirements of PTSD, depressive disorder and delusional disorder. "More important, his past history and medical records and his current symptoms suggest that his profile continues to meet criteria for other debilitating and more severe diagnoses, and although his diagnoses relating to depressive and delusional

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<sup>5</sup> Such a diagnosis would assume that he has never been given a diagnosis of schizophrenia. However, because he has been given a diagnosis of schizophrenia in the past, then his delusions would have to be interpreted within such a context. The diagnoses shown above are noted in reference to his present psychological functioning, report from his past symptoms, and medical records.

disorders are easier to contemplate, similar to his diagnoses of PTSD, more complex diagnoses also are supported by past medical history documentation and his current profile without the need to speculate including the presence of a psychotic episode (Psychosis, NOS; ICD-9, 298.9). However, more complex diagnoses such as the presence of schizophrenia would require further and more costly and comprehensive assessment in his native country and in the U.S. If present, a diagnosis of schizophrenia or schizoaffective disorder of course, as part of a differential process, would subsume several of the diagnoses noted above.” Id at 18-19.

In addition, and more critical to this case, this is by far not the first time that these disorders have been noted or discovered, and more complex diagnoses (e.g., psychosis) are supported by medical records from his current penal institution. However, an exact determination of the set of diagnoses that best describe his past and current profile would require further assessment and a costly and detailed history conducted in his country of origin and the U.S., and further cooperation from him, his former employers, acquaintances, family, and friends in Nicaragua and the U.S. relating to his past history of psychiatric symptoms. Nevertheless, what is patently clear is that this individual’s present psychological profile and past psychiatric history is not inconsistent with his current situation, where he finds himself facing capital punishment after he was accused and found guilty of a homicide that took place during the course of an armed robbery that may have been significantly impacted by his psychiatric symptoms not excluding delusions, and the critical fact is that this petitioner appears to suffer and has suffered from protracted, severe psychopathology (severe mental illness) requiring the administration of powerful psychotropics including those administered to him by the State of Texas while he has been imprisoned.

Llorente report p. 19. Using the standards of Art. 46.05, Llorente concluded that while Mr. Tercero in all likelihood understands that he is about to be executed, “he definitely would not understand the actual reason why he is being executed, and in fact, in his present delusional state he would probably understand that the ‘dark’

forces are the reason behind his execution. Therefore, it is my opinion that in his current state, and without the assistance of rehabilitation that will include medication to reduce his psychotic symptoms and increase his level of competency to be executed, he is not competent to be executed at this time.” Llorente report p. 19-20.

At the state court Art. 46.05 threshold hearing, the prosecution argued and the trial court agreed that Dr. Llorente’s report was equivocal. Cocounsel at the state court hearing, Walter Long of Austin, Texas interviewed Dr. Llorente over the telephone and then submitted his affidavit of what Dr. Llorente told him:

I am providing this affidavit to answer questions that the Hon. Mary Lou Keel raised in a short proceeding early this afternoon regarding Mr. Bernardo Tercero’s Art. 46.05 Motion on competency to be executed.

It is my understanding that Judge Keel wanted to know the specific facts on which Dr. Llorente based his finding of incompetency. More specifically, the court wanted to know what Mr. Tercero told Dr. Llorente that led Dr. Llorente to render his opinion that Mr. Tercero lacks a rational understanding of his upcoming execution.

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Long further recited that Llorente stated that his use of the word “probably” in his conclusion on page 23 was used only because “no one can state with certainty what is in someone else’s head at any given time. . . .” Affidavit of Walter Long, p. 1 The Affidavit of Walter Long and Dr. Llorente’s detailed notes of his meeting with Mr. Tercero are attached as Exhibit 14. Dr. Llorente’s CV is attached as Exhibit 15.

Mr. Tercero has presented a substantial threshold showing of serious mental illness and incompetency to be executed. Mr. Tercero has a documented history of severe mental illness affecting his capacity to rationally understand the world. Accordingly, he is entitled to a meaningful opportunity to be heard, including adequate time and resources to prepare and file a habeas corpus application and a fair hearing at which he may present evidence in support of his allegations. He was deprived of this process in state court, and thus is entitled to receive it by this Court.

### CONCLUSION

For the foregoing reasons, the Court should grant a stay of execution.

Respectfully submitted,



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Appearing Pro Hac Vice

### CERTIFICATE OF SERVICE

This certifies that a copy of this Motion was served by email on Jeremy Greenwell of the Texas State Attorney General's Office on August 24, 2015



Michael B. Charlton

IN THE UNITED STATES DISTRICT COURT  
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HOUSTON DIVISION

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**WILLIAM STEPHENS,** Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,  
*Respondent*

CAPITAL CASE

**PROPOSED ORDER ON MOTION FOR STAY OF EXECUTION**

Mr. Tercero seeks a stay of execution to investigate, prepare and file a habeas corpus application raising a claim that he is not competent to be executed under the Eighth and Fourteenth Amendments. He is currently scheduled to be executed on August 26, 2015 after 6:00 p.m. The Court finds that a stay of execution is required to give meaningful effect to Applicant's statutory right to representation under 18 U.S.C. §3599. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994). The Court also finds that Applicant has made a substantial threshold showing of incompetency entitling him to a fair hearing in accord with fundamental fairness. *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring). The Director is therefore ordered not to carry out the Applicant's execution which is currently scheduled to occur on August 26, 2015 after 6:00 p.m. The stay of execution shall remain in effect until further order of the Court.

HONORABLE MELINDA HARMON  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION