

NO. 17-7165
CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN DAVID BATTAGLIA,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A Texas jury convicted John David Battaglia of capital murder and sentenced him to death for the horrific murders of his two young daughters, Mary Faith and Liberty Battaglia. The petitioner presents one question for review, which may be summarized as follows:

Did the Texas Court of Criminal Appeals misapply this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), in finding that Battaglia is competent to be executed?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

In 2002, John David Battaglia was convicted and sentenced to death for brutally shooting and killing his two young daughters, Mary Faith and Liberty Battaglia. The evidence showed that Battaglia crippled each of his daughters with gunshot wounds that severed their spines, and then held the gun against their heads and shot them again. Battaglia planned the killings in advance as an act of revenge against their mother and his ex-wife, Mary Jean Pearle, and he manipulated the situation so that he could commit the murders while Mary Jean listened helplessly on the phone. Both state and federal courts upheld his conviction and sentence throughout the post-conviction litigation process. He is currently scheduled to be executed on February 1, 2018.

Battaglia was originally scheduled to be executed on March 30, 2016. At the eleventh hour, the United States Court of Appeals for the Fifth Circuit granted Battaglia's motion for a stay of execution and appointment of new counsel so that he could develop a claim in state court that he is incompetent to be executed. Following the stay, Battaglia's newly appointed counsel received funding to retain an expert and to develop and present a claim of execution incompetency. The state trial court held a live evidentiary hearing on November 14 and 15, 2016, during which the parties presented expert and lay testimony and admitted numerous exhibits. After considering all of the competing evidence, the trial court concluded that Battaglia failed to meet his burden of proving, by a preponderance of the evidence, that he is incompetent to be executed. On September 20, 2017, the Texas Court of Criminal

Appeals (“CCA”) affirmed the trial court’s decision.

Battaglia now argues that the CCA misapplied this Court’s precedent in deciding his competency claim. Battaglia is incorrect. The CCA conducted an exhaustive analysis of federal and state cases addressing execution incompetency to ensure that the proper legal standard was utilized in assessing Battaglia’s competency. The CCA’s ruling is consistent with this Court’s precedent and does not conflict with any opinions from the federal courts of appeals or another state court of last resort. Battaglia’s true disagreement is with the state court’s findings and conclusions, not the standard utilized. However, this is not a proper basis for granting certiorari review. In any event, the record supports the CCA’s conclusion that Battaglia is competent to be executed. While Battaglia highlights some of the expert testimony that supports his claim of incompetence, he fails to acknowledge the other evidence to the contrary, which the CCA found was sufficient to support the trial court’s ruling. Accordingly, the instant petition should be denied.

STATEMENT OF THE CASE

I. Trial Evidence

In addressing Battaglia’s competency to be executed on direct appeal, the CCA gave the following summary of the murders and other relevant evidence presented at trial:

John Battaglia was married to his second wife, Mary Jean [Pearle], for nine years. They had two daughters—Faith and Liberty. The couple separated in 1999 and divorced in 2000. According to Mary Jean, Battaglia had been verbally abusive toward her during their entire nine-year marriage. When Mary Jean testified at Battaglia’s trial, she described one Christmas morning after the divorce. Battaglia and his

daughter from a previous marriage, [Christine], came to Mary Jean's house to pick up Faith and Liberty for church. Battaglia and Mary Jean argued, and in his anger Battaglia physically assaulted Mary Jean in front of the three girls. She described how he "pounded" on her, pulled her hair, pushed her to the floor and kicked her, all while the girls were crying and begging him to stop. He left her house, and she called 911. Mary Jean was black and blue behind her head and she had a puncture wound in her heel and bruises on her arm, finger, shin, and both sides of her head. Battaglia was convicted of assault and placed on probation.

The following Easter, Mary Jean gave [Christine] an Easter gift of \$50. Mary Jean said that her gift to [Christine] prompted Battaglia to leave a message on the answering machine that Mary Jean had set up in the girls' room: "Mary Jean, the next time you give my daughter \$50 why don't you tell her how you screwed her out of her college fund, you fucking pig. How does that feel, pig?" Mary Jean reported receiving that message to the police and to Battaglia's probation officer. A warrant was then issued for Battaglia's arrest for violating his probation. On May 2, 2001, a police officer told him that he needed to make arrangements to turn himself in.

That evening, Battaglia had a regular dinner visit with Faith and Liberty. Mary Jean said that she drove the two girls to Highland Park Village parking lot in Dallas where Battaglia picked them up. She said she waited to see that the girls were safely in his car, and then she drove to her friend Melissa's house. Battaglia was supposed to bring the girls back to Melissa's house after dinner. Mary Jean testified that, as she pulled into Melissa's driveway, her mother called her cell phone to tell her that Battaglia had called because the girls wanted to ask Mary Jean something. So Mary Jean went into Melissa's house and called Battaglia's number. Battaglia answered, then put the phone on speaker mode, and instructed Faith to "ask her." Mary Jean then heard Faith ask, "Mommy, why do you want Daddy to go to jail?" Then Mary Jean heard Faith say, "No, Daddy, please don't, don't do it." Mary Jean yelled into the phone, "Run, run for the door!" She heard gunshots and her daughters' screams. She then heard Battaglia yell "Merry Fucking Christmas!" Mary Jean called 911 and drove to Battaglia's apartment. He had already left. The police discovered the girls' bodies in Battaglia's apartment. Nine-year-old Faith was found by the kitchen phone with three gunshot wounds, and six-year-old Liberty was found ten to fifteen feet from the front door with four gunshot wounds and a graze wound to the top of her head. Later that night, Battaglia was arrested outside a tattoo parlor where he had

gone with his girlfriend. It took four officers to restrain and handcuff him.

Mary Jean testified that the day after the murders she went to her house to retrieve the answering machine from the girls' bedroom. The message left on the girls' answering machine was from Battaglia:

Good night my little babies. I hope you're resting in a different place. I love you. I wish that you had nothing to do with your mother. She was evil, vicious, stupid. You will be free of her. I love you very dearly. You were very brave girls. Very brave. Liberty, you were oh so brave. I love you so much. Bye.

After the State presented its case-in-chief, the defense chose to not call any witnesses. In fact, Battaglia took the stand and testified that he agreed with his attorney's strategy to rest his case at that time. The closing argument presented by defense counsel did not articulate any type of defense to the crime, and counsel emphasized that this was not a case of insanity: "Certainly, there was no evidence brought to you of any type of insanity."

The jury found Battaglia guilty of capital murder. During the punishment phase, the defense presented the testimony of a forensic psychiatrist, Dr. Judy Stonedale, who testified that Battaglia had suffered from bipolar disorder since his mid-to-late twenties. She said that some people with bipolar disorder have psychotic episodes and lose touch with reality. She testified that bipolar disorder is a chemical imbalance and Battaglia knew what he was doing, but that he was experiencing a psychotic episode at the time he killed his daughters. The defense also called Dr. Edward Gripon, a forensic psychiatrist who had been appointed by the trial court to evaluate Battaglia. Dr. Gripon also testified that Battaglia had bipolar disorder. At the time he murdered his children, however, Battaglia knew what he was doing and knew that it was wrong.

Forensic psychiatrist, Dr. Richard E. Coons, testified for the State on rebuttal. Dr. Coons concluded that Battaglia killed his children as an act of anger and retribution to punish Mary Jean. He believed that Battaglia had a mild form of bipolar disorder, but that he also had antisocial personality disorder such that he rationalized and blamed others for his actions. Dr. Coons testified that Battaglia had told him that "all [he] wanted to do was to get the girls out of trouble, so they

wouldn't be drug addicts, strippers, hate their parents, or be prostitutes." Dr. Coons believed Battaglia was rationalizing why he killed his two daughters.

The defense called a rebuttal witness, Dr. Jay Douglas Crowder, who testified that Battaglia had "immature personality disorder." Dr. Crowder said that Battaglia's mental illness was a contributing factor in his commission of the offense and that he would not have committed the murders had he been on mood-stabilizing medication at the time. Dr. Crowder admitted, however, that when Battaglia killed his children, "he made a decision to do it and he knew the wrongfulness of his actions." Battaglia took the stand again at the conclusion of the punishment phase of the trial and said that he did not wish to testify, but that it was his intention to rest on the issue of punishment. During the punishment phase closing argument, Battaglia's counsel stated that the defense "never inferred to anybody that there was an issue in this case about the guilt or innocence of John Battaglia. Never tried to raise that issue." And at that time, he reiterated that insanity "was never an issue in this case." It was clear that the defense strategy was to take responsibility for having committed the offense, but avoid the death penalty by arguing that Battaglia was mentally ill: "John Battaglia is acting and suffering from a mental illness," and he should not be executed because he was "in the throws [sic] of a severe mental illness" when he killed his daughters.

Battaglia was sentenced to death.

Battaglia v. State, No. AP-77,069, 2017 WL 4168595, at *1-3 (Tex. Crim. App. 2017) (designated for publication); Pet. App. 4-6.

II. Procedural History

Battaglia was convicted of capital murder and sentenced to death on April 30, 2002. The CCA affirmed Battaglia's conviction and death sentence on direct appeal in 2005. *Battaglia v. State*, No. AP-74,348, 2005 WL 1208949 (Tex. Crim. App. May 18, 2005) (not designated for publication).

Battaglia filed his original application for writ of habeas corpus in the trial court during the pendency of his direct appeal. The CCA adopted the trial court's

findings and denied relief on September 23, 2009. *Ex parte Battaglia*, No. WR-71,939-01, 2009 WL 3042925 (Tex. Crim. App. Sept. 23, 2009) (not designated for publication).

Battaglia filed a petition for writ of habeas corpus in federal district court. On October 9, 2013, the federal district court adopted the magistrate judge's findings and denied relief. *Battaglia v. Stephens*, No. 3-09-CV-1904-B, 2013 WL 5570216 (N.D. Tex. 2013). On July 15, 2015, the Fifth Circuit denied his request for a certificate of appealability. *Battaglia v. Stephens*, 621 Fed.Appx. 781 (5th Cir. 2015) (per curiam). On January 11, 2016, this Court denied Battaglia's petition for certiorari review. *Battaglia v. Stephens*, ___ U.S. ___, 136 S.Ct. 803, 193 L.Ed.2d 725 (2016).

Following the conclusion of state and federal review, the trial court set an execution date of March 30, 2016. On February 22, 2016, Battaglia sought appointment of new counsel in state court to investigate and present a claim of incompetency to be executed. The trial court summarily denied his request on March 2, 2016. Battaglia then filed a motion for appointment of new counsel and a stay of execution in the federal district court, which was also denied. *Battaglia v. Stephens*, No. 3:16-CV-0687-B, 2016 U.S. Dist. LEXIS 35703 (N.D. Tex. Mar. 18, 2016). On the day of Battaglia's scheduled execution, the United States Court of Appeals for the Fifth Circuit reversed the district court's denial of his motion for appointment of counsel and granted his motion for a stay of execution to allow newly appointed counsel time to develop his claim of incompetency to be executed.

Battaglia v. Stephens, 824 F.3d 470, 475-76 (5th Cir. 2016).

Following the stay of execution, the State filed a motion to initiate Article 46.05 proceedings in the state trial court. *See* Tex. Code Crim. Proc. Ann. art. 46.05 (West 2016) (outlining the procedure and standard for determining competency to be executed in Texas). The trial court provided funding to Battaglia’s newly appointed counsel to hire an expert psychologist and to investigate and develop his claim of execution incompetency. The trial court also set a new execution date of December 7, 2016. Battaglia then filed an Article 46.05 motion in state court. *See id.* art. 46.05(c). After determining that Battaglia had made a “substantial showing” of incompetency, the trial court agreed to give Battaglia an adequate opportunity to be heard and submit evidence and argument from counsel. The court appointed two experts, Dr. James Womack and Dr. Thomas Allen, to examine Battaglia for execution competency. *See id.* art. 46.05(f). Battaglia retained Dr. Diane Mosnik and the State retained Dr. Timothy Proctor as experts to evaluate Battaglia for execution competency. An evidentiary hearing was held by the trial court on November 14-15, 2016. On November 18, 2016, the trial court issued findings and conclusions holding that Battaglia failed to prove by a preponderance of the evidence that he is incompetent to be executed. Pet. App. 140-153.

Battaglia filed a notice of appeal and a motion to stay his execution in the CCA. The CCA granted his motion for stay to review the trial court’s ruling. *Battaglia v. State*, No. AP-77,069 (Tex. Crim. App. Dec. 2, 2016) (per curiam). After ordering briefing and hearing oral argument from the parties, the CCA issued its

opinion on September 20, 2017, affirming the trial court's ruling that Battaglia is competent to be executed. *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595 (Tex. Crim. App. 2017); Pet. App. 1-54.

On December 13, 2017, Battaglia filed the instant petition for certiorari review of the CCA's opinion holding that he is competent to be executed.

III. Execution Competency Proceedings

A. The Evidentiary Hearing

During the 2-day evidentiary hearing to determine Battaglia's execution competency, the trial court heard live testimony from five witnesses: Shirley Griffin, the supervisor of the law library at the Polunsky Unit, which houses Texas' death row; Dr. Diane Mosnik, Battaglia's retained expert; Dr. Timothy Proctor, the State's retained expert; Dr. Thomas Allen, a court-appointed expert; and Dr. James Womack, a court-appointed expert.

Shirley Griffin

Shirley Griffin, the law library supervisor at the Polunsky Unit, has been employed with the Texas Department of Criminal Justice ("TDCJ") for 19 years, including two years as a correctional officer assigned to death row. Griffin knew Battaglia from her time as a correctional officer, law library officer, and then as the law library supervisor. As the law library officer, she saw Battaglia possibly three days a week and filled many requests for legal materials for Battaglia. Her testimony showed that, in the weeks leading up to his first-scheduled execution date, Battaglia requested and received the following cases pertaining to execution

competency: *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Wood v. Quarterman*, 572 F.Supp.2d 814 (W.D. Tex. 2008); and *Mays v. State*, 476 S.W.3d 454 (Tex. Crim. App. 2015). Pet. App. 28-29.

Dr. Diane Mosnik, Ph.D.

Battaglia hired Dr. Mosnik, a clinical neuropsychologist who works exclusively for the defense in forensic cases, to evaluate Battaglia for execution competency. Dr. Mosnik's Curriculum Vitae reflects that much of her expertise lies in the field of Dementia and Alzheimer's Disease. Dr. Mosnik found that Battaglia suffers from Bipolar Disorder and Delusional Disorder. She was the only expert in the competency proceedings who did not diagnose Battaglia with a personality disorder and the only expert to diagnose him with Bipolar Disorder. According to Dr. Mosnik, Battaglia believes he is innocent and discusses his innocence as part of a complex delusional cover-up scheme. Dr. Mosnik testified that the tests she administered did not show any indication that Battaglia was malingering or feigning. Dr. Mosnik admitted that Battaglia is aware that he has an execution date scheduled and is aware that he is going to be executed because he was convicted of murdering his daughters. She maintained, however, that due to his mental illness, Battaglia does not have the capacity to rationally understand the connection between his crime and his punishment and is therefore not competent to be executed. Pet. App. 29-30, 36.

Dr. Timothy J. Proctor, Ph.D.

The State hired Dr. Proctor, a psychologist who is board-certified in forensic

psychology, to evaluate Battaglia for execution competency. Dr. Proctor diagnosed Battaglia with Delusional Disorder, Persecutory Type, and Mixed Personality Disorder with paranoid, narcissistic, and antisocial personality traits. In his report, Dr. Proctor stated that Battaglia's beliefs appear to be the product of a vast and complicated delusional system. Dr. Proctor opined that Battaglia did not appear to be malingering, but also acknowledged that an intelligent person like Battaglia has the capacity to feign symptoms of persecutory delusions. He also admitted that Battaglia has what most would consider the highest possible incentive to malingering (i.e., to avoid death). Dr. Proctor concluded in his written report that Battaglia was "presently incompetent for execution because, although he is aware of the State's rationale for his execution, he does not have a rational understanding of such." Pet. App. 30, 36, 109-117.

At the hearing, Dr. Proctor testified consistently with his report. He acknowledged that when evaluating someone like Battaglia, who is aware that a finding of incompetency could result in a stay of execution, the examiner must consider the possibility that person might be trying to manipulate how they are presented. Dr. Proctor reiterated that Battaglia knows he is currently set for execution, knows the execution is imminent, and knows the reason that the State is saying he will be executed—because he was convicted of capital murder for shooting his two daughters. Dr. Proctor concluded, however, that because of the conspiracy that Battaglia was talking about, Battaglia does not have a rational understanding of why he is being executed. Pet. App. 30, 36-37, 109-117.

Dr. Thomas G. Allen, Ph.D.

Dr. Allen, a forensic psychologist, was one of two experts appointed by the trial court to evaluate Battaglia for execution competency. In his report, Dr. Allen noted that Battaglia had no psychiatric admissions prior or subsequent to his capital murder trial, has not been prescribed any psychotropic medications, and does not exhibit any signs of Schizophrenia or Bipolar Disorder, despite having been diagnosed with Bipolar Disorder prior to trial. Dr. Allen stated that Battaglia talked about a complex delusional system involving plots against him by his ex-wives and the legal system, including the defense attorneys, prosecutors, and judges. Dr. Allen concluded in his report that Battaglia is aware of his execution and its imminence, but that his complex delusional system appeared to be impairing a rational understanding of the reason for his execution. Pet. App. 30-31, 102-107.

At the hearing, Dr. Allen retreated substantially from the opinion contained in his report. He expressed grave concerns and skepticism that, over the last fourteen plus years in TDCJ, Battaglia had not had any psychiatric treatment referrals and had not raised any “red flags” during the mandatory 90-day mental status examinations. He found the TDCJ records wholly inconsistent with the way that Battaglia presented to him during his examination. Battaglia’s records and presentation were also wholly inconsistent with his pretrial diagnosis of Bipolar Disorder because he had no history or current presentation of symptoms and had not been on medication since arriving at TDCJ. Dr. Allen also wavered on whether

Battaglia was malingering. He said that he could not prove Battaglia *is* malingering, but he also cannot prove that Battaglia he is *not* malingering. The fact that Battaglia had been reading the *Panetti* case raised concerns regarding the extent to which Battaglia was styling his presentation. Dr. Allen testified that, after reading additional records, he had changed his conclusion to one that was not as certain as that expressed in his written report. Dr. Allen could only conclude that Battaglia “may” not have a rational understanding of why he is being executed. Pet. App. 31-32.

Dr. James Womack, Ph.D.

Dr. Womack, a licensed psychologist who specializes in criminal forensics, was the other expert appointed by the trial court to evaluate Battaglia for execution competency. Dr. Womack worked for the Federal Bureau of Prisons for 21 years evaluating inmates for competency to stand trial and mental state at the time of the alleged offense. He conducted two examinations and issued two reports regarding Battaglia’s execution competency. In his first report, Dr. Womack concluded that Battaglia is aware he was convicted of murdering his two daughters and that his execution is imminent. Although Battaglia denied committing the offense, he showed an understanding of the link between the crime and punishment when he conceded that if another party had, in fact, murdered his daughters, that fact would justify that party’s execution. Based on the evidence he had reviewed and his examination of Battaglia, Dr. Womack concluded that Battaglia is competent to be executed. Pet. App. 32-33, 118-128.

The trial court asked Dr. Womack to further evaluate Battaglia because there was such disparity between Battaglia's emotional presentation during Dr. Womack's assessment and his emotional presentation with the other three experts. After this second interview, Dr. Womack opined that Battaglia does *not* have Delusional Disorder. He explained that Battaglia vacillated in his assertions of innocence, ultimately providing statements that are inconsistent with a fixed delusion. Dr. Womack explained that Battaglia's allegations of a conspiracy were similar to the irritable complaints and denunciations of the legal system and parties in the system that inmates commonly expressed to him during his employment at the Federal Bureau of Prisons. However, there was no emotion or affect connected to the comments and Battaglia easily moved on to other topics, which is inconsistent with an individual with prominent delusions who would meet the criteria for Delusional Disorder. Pet. App. 33-34, 129-135.

Like Drs. Proctor and Allen, Dr. Womack did not see any symptoms of Bipolar Disorder. He agreed that Battaglia has a personality disorder with multiple features, including narcissistic and antisocial features. With regard to malingering, Dr. Womack concluded that Battaglia is sufficiently intelligent and sophisticated to feign symptoms such that an examiner would believe that he has Delusional Disorder or some other mental illness. He also stated that having access to case law regarding execution competency, as Battaglia did here, would help a person fake symptoms and examinations. Dr. Womack confirmed that Battaglia is aware of his execution and its imminence, and he saw no indication of distorted thinking that is

preventing Battaglia from understanding that he is about to be executed because he murdered his two daughters. Dr. Womack ultimately concluded that Battaglia does have a rational understanding of the reason for his execution and is competent to be executed. Pet. App. 33-34, 129-135.

Documentary, Video, and Audio Recorded Evidence

In addition to the reports and testimony of the foregoing witnesses, the trial court also considered the following in determining Battaglia's competency to be executed: Battaglia's motions; his TDCJ records and Dallas County Jail records; a pretrial interview of Battaglia by former WFAA reporter Cynthia Vega; an excerpt of a 2014 interview of Battaglia by Dallas Morning News reporter Sarah Mervosh; the March 2016 interview of Battaglia by documentarian Thomas Leader; an August 2016 interview of Battaglia by a reporter from WFAA news; recordings of jail calls made by Battaglia while incarcerated at the Dallas County Jail prior to the competency hearing; Battaglia's *pro se* filings in federal court; all other evidence and testimony offered at the competency hearing; the argument of counsel; and the transcript of Battaglia's capital murder trial. Pet. App. 27-28.

Battaglia's TDCJ records reflect that, in his fourteen plus years on death row, he has not been prescribed any psychiatric medication, has not been on the mental health caseload, and has not raised any red flags during the mandatory 90-day mental status exams. Moreover, with the exception of his initial intake screening, he has received only one other mental health referral while on death row, which was ultimately determined to be a misunderstanding. Pet. App. 148.

Battaglia's jail calls while incarcerated in the Dallas County Jail awaiting the evidentiary hearing on competency demonstrate his awareness of and insight into his current legal situation. In one call with his father, Battaglia stated the following: "I'm doing the best I can, alright. They're going to kill me December 7th, ok, no matter what. So whatever I do I'm gonna [sic] try to keep that from happening;" "I can't sit here and just do nothing. That's how everybody else gets killed;" "It's a damn chess game." Pet. App. at 38, 149. In another call, when discussing the fact that the defense expert had found him to be incompetent, Battaglia said, "Oh good, I'm glad, I'm glad, I've been trying to let everybody know how competent I was, but I wasn't sure if I was being successful or not." Battaglia described his strategy as "the old Catch-22" that "you can't be incompetent unless unless [sic] you think you're not incompetent." Battaglia told his father, "It's been awhile since I've read Joseph Heller." Pet. App. 38, 149.

B. The Trial Court's Findings and Conclusions

In ruling on Battaglia's claim of execution incompetency, the trial court applied the legal standards set out in Article 46.05 of the Texas Code of Criminal Procedure and this Court's rulings in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Pet. App. 146. After considering all of the evidence, the trial court determined that Battaglia is competent to be executed. Pet. App. 140-153.

The trial court noted that the opinions of the mental health experts, as presented in their reports and testimony, are varied and rely in large part on

Battaglia's self-report. Pet. App. 147. The trial court explained that all four experts found Battaglia competent under Article 46.05; however, three of the four experts opined that Battaglia is incompetent under *Panetti* because of a persecutory delusional disorder. Pet. App. 147. The trial court did not rely on the opinions of those three experts, however, because he found they had ignored the DSM-5 criteria that the delusional beliefs exhibited by a person suspected to have delusional disorder are not normally accepted by other members of the person's subculture. Pet. App. 147-148.

The trial court also found that Battaglia is malingering and does not suffer from a mental illness. Pet. App. 150, 152. The trial court found that Battaglia is highly intelligent with superior IQ and memory ability and, importantly, has an undeniable "motive to lie and/or exaggerate his symptoms of mental illness" since a finding of incompetency would lead to a stay of his execution. Pet. App. 148-149. The trial court noted that Battaglia portrayed symptoms of severe Bipolar I disorder vividly before his trial in 2002, which later miraculously disappeared. Pet. App. 150. The expert testimony highlighted the difficulties in testing for delusional disorder and whether an individual is malingering delusions. Pet. App. 150-151. Two of the experts expressed concerns that Battaglia may be malingering and one expert, Dr. Womack, testified that Battaglia was malingering. Pet. App. 148, 150-151. After consideration of all the available evidence, the trial court found that Battaglia is feigning or exaggerating his symptoms of mental illness. Pet. App. 150, 152.

Ultimately, the trial court concluded that Battaglia understands that he is to be executed and his execution is imminent, and he has a rational understanding of the reason for his execution. Pet. App. 152. Finally, the trial court concluded that Battaglia failed to prove by a preponderance of the evidence that he is incompetent to be executed. Pet. App. 153.

C. Appellate Review of the Trial Court's Ruling

On direct appeal, the CCA did an exhaustive analysis of federal and state law addressing competency to be executed. Pet. App. 9-27. The CCA affirmed that Article 46.05 meets the constitutional standards set out in *Ford* and *Panetti*, and thus the trial court applied the correct legal standard in determining that Battaglia is competent to be executed. Pet. App. 27, 35. The question before the CCA, then, was whether the trial court abused its discretion in applying this standard to the facts presented. Pet. App. 27, 35. Giving proper deference to the trial court's assessment of all the evidence, the CCA concluded that the evidence and the case law support the trial court's determination that Battaglia is competent to be executed. Pet. App. 35-42.

ARGUMENT

Battaglia fails to advance a compelling reason for this Court to review his case, and none exists. *See* Sup. Ct. R. 10 (providing that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons). The state trial court was presented with conflicting evidence regarding Battaglia's competency to be executed. After considering all of

the evidence and applying the correct legal standard, the trial court concluded that Battaglia failed to prove by a preponderance of the evidence that he is incompetent to be executed. On direct appeal, the CCA conducted a thorough analysis of the relevant law addressing execution competency and, after affording the proper deference to the trial court's assessment of all the evidence presented, affirmed the trial court's ruling. This ruling is consistent with this Court's precedent and does not conflict with any opinions from the federal courts of appeals or another state court of last resort. Battaglia's true disagreement is with the state court's findings and conclusions, not the standard utilized. Nonetheless, the record supports the conclusion of the CCA that Battaglia is competent to be executed. Therefore, this Court should decline certiorari review.

I. Because the CCA Applied the Correct Legal Standard in Reviewing the Trial Court's Competency Determination, No Compelling Reason Exists for Granting Certiorari Review

A. Ford and Panetti

In 1986, this Court held in *Ford v. Wainwright* that the Eighth Amendment prohibits the State from carrying out a sentence of death upon a prisoner who is insane. *Ford*, 477 U.S. at 409-410. While the Court did not set forth a precise standard for determining competency to be executed, Justice Marshall, writing for the plurality of the Court, concluded that the Eighth Amendment prohibits the execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Ford*, 477 U.S. at 417. Justice Powell, in his concurring opinion, asserted that the Eighth Amendment "forbids the execution

only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Id.* at 422. (Powell, J., concurring in part and concurring in the judgment).

In 2007, this Court revisited the issue of competency to be executed in *Panetti*. One of the questions before the Court in *Panetti* was the constitutional adequacy of the Fifth Circuit’s standard for execution competency, which deemed a prisoner’s delusional belief system irrelevant if the prisoner knew the State’s rationale for the execution. *Panetti*, 551 U.S. at 956-58. This Court concluded that the Fifth Circuit’s test was too restrictive and inconsistent with *Ford*. *Id.* at 956, 958-59. The Court clarified that the requisite “comprehension” or “awareness” required by *Ford* means more than a prisoner being able to merely recite the proffered reason for his execution—the prisoner must also have a “rational understanding of the reason for the execution.” *Id.* at 958. Noting that a concept like rational understanding is difficult to define, however, the Court declined to provide a specific definition or set down a rule governing all competency determinations. *Id.* at 960-61.

B. Texas’s standard for execution incompetency

Article 46.05 of the Texas Code of Criminal Procedure outlines the procedure and standard for assessing competency to be executed in Texas. First, a defendant has a threshold burden to make a substantial showing of execution incompetency. Tex. Code Crim. Proc. Ann. art. 46.05(d); *Mays v. State*, 476 S.W.3d 454, 457 (Tex. Crim. App. 2015). Once this threshold burden is satisfied, the defendant is entitled

to the appointment of at least two experts to examine him for competency and to a final, adversarial competency hearing. Tex. Code Crim. Proc. Ann. art. 46.05(f),(k); *Mays*, 476 S.W.3d at 457-58. At the competency hearing, the fact finder must consider competing credible evidence of competency and resolve the ultimate issue of whether the defendant has established, by a preponderance of the evidence, that he is incompetent to be executed. Tex. Code Crim. Proc. Ann. art. 46.05(k).

Under Article 46.05, a defendant is incompetent to be executed if he does not understand: (1) that he is to be executed and that his execution is imminent; and (2) the reason he is being executed. Tex. Code Crim. Proc. Ann. art. 46.05(h). With respect to the second prong, a defendant does not understand the reason for his execution unless he has a “rational understanding” of that reason. *Mays*, 476 S.W.3d at 457 n.4 (citing *Panetti*, 551 U.S. at 959).

A trial court’s competency determination is, if not wholly a factual determination, at least a mixed question of law and fact based on credibility and demeanor. *Green v. State*, 374 S.W.3d 434, 441 (Tex. Crim. App. 2012). As such, a trial court’s determination of a defendant’s competency to be executed is reviewed on appeal for an abuse of discretion. *Id.* Reversal is required only if the judgment is outside the zone of reasonable disagreement. *Id.* at 441-42.

In this case, the CCA noted that Article 46.05 remains “constitutionally adequate,” but recognized that the statutory language must be interpreted in accordance with and consistent with *Panetti*. Pet. App. 27. Because *Panetti* did not define rational understanding or set down a rule governing all competency

determinations, the CCA did an exhaustive review of federal and state cases to provide further guidance to Texas courts in assessing execution competency. Pet. App. 9-26. Applying the guidelines from the relevant cases, the CCA further clarified that “a prisoner is competent to be executed under Article 46.05 if he knows he is to be executed by the State, he knows the reason he is to be executed, he knows that the execution is imminent, and, despite any delusional beliefs or other mental illness he may have, and despite the fact that he may deny having committed the capital offense, he comprehends that there is a ‘causal link’ between his capital offense and his imminent execution, beyond merely identifying the State’s articulated rationale for the execution.” Pet. App. 27.

C. Texas’s standard is consistent with this Court’s precedent

In this case, the trial court applied Article 46.05, as well as *Ford* and *Panetti*, in deciding Battaglia’s claim of execution incompetency. Pet. App. 146, 152. Specifically, the trial court found and concluded that Battaglia understands that he is to be executed and that his execution is imminent, and he does understand the reason for his execution. Pet. App. 152. The trial court also found and concluded that Battaglia has a rational understanding of the reason for his execution. Pet. App. 152. On direct appeal, after an exhaustive analysis of federal and state cases addressing execution competency, the CCA affirmed that Article 46.05 still meets the constitutional standards set out in *Ford* and *Panetti*, and concluded that the trial court’s application of that standard to the evidence in this case was not an abuse of discretion. Pet. App. 27, 35-42.

As demonstrated herein, the trial court and CCA applied this Court's precedent in deciding Battaglia's execution incompetency claim. Battaglia spends the entirety of his petition attacking the particular evidence the state court relied on in reaching its conclusion. However, Battaglia's arguments amount to no more than a complaint that he lost in the lower courts; he does not actually identify a flaw in the standard utilized to reject his claim. Because the CCA properly denied Battaglia's claim based on existing law and its opinion does not conflict with any opinions from this Court, a federal court of appeals, or another state's highest court, there is no compelling reason to grant certiorari review in this case.

D. The record supports the CCA's determination that Battaglia is competent to be executed

In his petition, Battaglia affords no deference to the state court's determination that he is competent to be executed. He does so notwithstanding substantial record support for the court's determination. Essentially, he asks this Court to view certain expert testimony regarding incompetency in a vacuum and conclude that the state court's findings were erroneous. However, a petition for writ certiorari is not the appropriate forum for asserting a claim of erroneous factual findings. *See* Sup. Ct. R. 10.

In any event, the record supports the state court's determination that Battaglia is competent to be executed. The testimony of Dr. Womack, whom the trial court found the most credible of the four experts, demonstrated the following: (1) that Battaglia is feigning or exaggerating his symptoms of mental illness, and that Battaglia has the motive and intellectual capability to maintain a deliberate

ruse to avoid his execution; (2) that the PIA test reveals what the questions are looking for so an intelligent person could fake the results on that test; (3) that having access to relevant case law would help a person fake symptoms and examinations; (4) that, had Battaglia suffered from delusions, there would be a high likelihood that TDCJ personnel would have seen evidence of such a mental illness; (5) that the comments Battaglia made denouncing the morals of his ex-wives and law enforcement and the legal system in Dallas were offhanded, inconsistent, and sporadic, and they were not reflective of a true delusional disorder; (6) that intelligence and repetitive test taking could result in a false test result; (7) that Battaglia did have features of a personality disorder relating to narcissistic and anti-social characteristics; (8) that Battaglia changed his story about his factual understanding of the reason he is being executed which is inconsistent with having a fixed delusional disorder; (9) that Battaglia possesses an accurate understanding that he was convicted of murdering his two daughters, he understands his execution date is December 7, 2016, and he understands that someone who killed two girls and was convicted of such a crime would receive the death penalty; and (10) since Battaglia recounted multiple versions of his offense, admitting all or some culpability, his denials of guilt are inconsistent. Pet. App. 39

The trial court concluded based upon Dr. Womack's assessment, along with its own review of the evidence, that Battaglia is intelligent, sophisticated, and motivated enough to invalidate the mental health tests and create delusions reflecting that he does not have a rational understanding of his connection to the

offense as a means of preventing his execution. Pet. App. 39, 149, 152. The trial court concluded that Battaglia is malingering and does not suffer from a severe mental illness. Pet. App. 39, 150. The trial court believed that Battaglia is feigning or exaggerating his symptoms of mental illness. Pet. App. 39, 152. The CCA held that these findings of fact are supported by the record and are within the zone of reasonable disagreement. Pet. App. 39.

In support of his claim that the state court “misapplied” *Panetti*, Battaglia relies exclusively on the findings of three of the four experts – Dr. Mosnik, Dr. Proctor, and Dr. Allen – that Battaglia is incompetent because of a persecutory delusional disorder. Battaglia complains that the state trial court improperly discounted these findings and relied exclusively on those from Dr. Womack.

Battaglia’s argument mischaracterizes the evidence. Although three of the four experts originally found Battaglia incompetent, one of those experts, Dr. Allen, retreated substantially from this opinion at the evidentiary hearing, leaving the trial court with an equal split among the experts regarding Battaglia’s competency. (RR1: 204). Nonetheless, the expert opinions cannot be viewed in isolation, as they were not the only evidence before the trial court. As noted in the trial court’s findings and the CCA opinion, the court also considered the following: Battaglia’s motions; his TDCJ records; his Dallas County Jail records; a pretrial interview of Battaglia by former WFAA reporter Cynthia Vega; an excerpt of a 2014 interview of Battaglia by Dallas Morning News reporter Sarah Mervosh; a March 2016 interview of Battaglia by documentarian Thomas Leader; an August 2016 interview

of Battaglia by a reporter from WFAA news; recordings of jail calls made by Battaglia while incarcerated at the Dallas County Jail prior to the competency hearing; Battaglia's *pro se* filings in federal court; and all other evidence offered at the hearing. Pet. App. 27-28, 145.

As fact finder in the competency proceedings, it was within the trial court's discretion to evaluate the weight and credibility of the conflicting evidence. Pet. App. 36, 37, 41. The trial court disregarded Dr. Mosnik's opinion in its entirety, and the CCA held that this was not an abuse of discretion. Pet. App. 36. Dr. Mosnik was vague in her description of Battaglia's self-reported persecutorial delusions, and she described his mental illness using only conclusory, non-specific observations. Pet. App. 36. The CCA noted that the lack of specificity related to Battaglia's so-called persecutory delusions, and the fact that his symptoms of having a delusional disorder are all self-reported, weigh against finding them true. Pet. App. 36.

Likewise, the CCA held that the trial court's decision to disregard Dr. Proctor's conclusion was not an abuse of discretion. Pet. App. 36-37. The CCA explained that because the trial court had the discretion to assess Dr. Proctor's credibility, it was reasonable for the trial court to discount Dr. Proctor's opinion that Battaglia's self-reported belief in the complex conspiracy against him prevented him from having a rational understanding of the reason for his execution since there is evidence in the record that Battaglia is malingering and that he does have a rational understanding of the reason for his execution. Pet. App. 37.

The trial court also rejected the findings of Dr. Mosnik, Dr. Proctor, and Dr.

Allen regarding Battaglia's alleged delusions because it found they ignored DSM-5 criteria that delusional beliefs are those not normally accepted by other members of one's subculture. Pet. App. 37. Citing *Wood v. Thaler*¹, the trial court found that because claims of wrongful prosecution and conspiracies by judges, witnesses, prosecutors, and defense attorneys are common and normally accepted within a prison subculture, that belief by Battaglia is not a "delusion." Pet. App. 37, 148. The CCA, noting the many similarities between Battaglia and the defendant in *Wood*, agreed with the trial court's application of *Wood* under the facts of this case. Pet. App. 37-39.

Battaglia seems to suggest that the state court cannot rely on Dr. Womack's opinion because Dr. Womack did not conduct any testing and "did not use the *Panetti* standard." Although it is true that Dr. Womack did not conduct any testing, the CCA recognized this fact, stating: "[Dr. Womack] interviewed Battaglia on two separate occasions, and, although Dr. Womack did not conduct his own testing, he reviewed court documents and medical records, jail mail, and the testing done by the other experts." Pet. App. 32. Additionally, Dr. Womack explained during his testimony that he typically does an interview first, and if there are red flags or concerns, then he may conduct an additional evaluation with testing to determine the veracity of the individual's report. (RR2: 18). In this case, he did not perform testing because he saw no evidence of delusional thinking during his first interview of Battaglia. (RR2: 18).

¹ 787 F.Supp.2d 458, 480–85 (W.D. Tex. 2011).

Additionally, the record does not support Battaglia's claim that Dr. Womack did not use the *Panetti* standard. In his first report, Dr. Womack stated Battaglia acknowledged that he was convicted for murdering his daughters but denied committing the offense. Pet. App. 127. Even so, he conceded that if another person murdered his daughters, that fact would justify that person's execution. Pet. App. 127-128. According to Dr. Womack, this answer reflected Battaglia's knowledge the state has the legal right to carry out the punishment for the conviction of Capital Murder. *Id.* Clearly, this reflects a rational understanding of why he is to be executed. Moreover, Dr. Womack testified at the hearing that he believes Battaglia has a rational understanding of the reason for his execution. (RR2: 44, 51).

Battaglia's assertion that the CCA should have used a *de novo* standard of review in analyzing his execution competency claim on direct appeal is patently incorrect. In *Green v. State*, the CCA determined that a trial court's competency determination is, if not wholly a factual determination, at least a mixed question of law and fact based on credibility and demeanor and therefore should be reviewed for an abuse of discretion. *Green*, 374 S.W.3d at 441. This conclusion was made in accordance with the opinions of the federal courts, other state courts, and Texas's guidelines as to standards of review. *Id.*

As noted above, the CCA conducted an exhaustive summary of the state and federal case law regarding competency to be executed. Pet. App. pp. 9-26. As a final step in its review of the trial court's competency determination, it compared Battaglia to the inmates found to be competent and those found incompetent and

noted the similarities between Battaglia and the former and dissimilarities between Battaglia and the latter. Pet. App. 40-41. The CCA then concluded:

Recognizing that it was within the trial court's discretion to evaluate the weight and credibility of the conflicting evidence, we hold that the record supports the trial court's determination that Battaglia is competent to be executed. Battaglia knows he is to be executed by the State, he knows he was convicted of killing his daughters, and he knows his execution is imminent. There is support in the record that Battaglia is malingering. Even though he denies being involved in the murders of his daughters, there is evidence in the record supporting the conclusion that he comprehends that there is a "causal link" between the capital offense and his imminent execution beyond merely identifying the State's articulated rationale for the execution.

Pet. App. 41-42.

As demonstrated herein, and contrary to Battaglia's allegations, the evidence in this case involved much more than simply the conclusions of three doctors versus the conclusion of one. Viewing all of the evidence and the testimony in context, the record supports the CCA's ruling that Battaglia is competent to be executed.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that John David Battaglia's petition for writ of certiorari be denied.

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