NO. _____
(Capital Case)

In the
Supreme Court of the United States

JOHN DAVID BATTAGLIA, Petitioner,

v.

LORIE DAVIS, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

JOHN DAVID BATTAGLIA IS SCHEDULED TO BE EXECUTED ON FEBRUARY 1, 2018 AT 6:00 P.M.

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Dated: February 1, 2018

QUESTION PRESENTED

1. Where a state court has deprived a capital habeas applicant of reasonably necessary investigative services to develop the state court record on a material issue related to a *Panetti/Ford* claim, may a federal court rely on 28 U.S.C. § 2254(d) to deny investigative services under 18 U.S.C. § 3599 to an applicant who seeks to develop and plead the claim in a federal habeas corpus petition?

PARTIES TO THE PROCEEDING

John David Battaglia, Petitioner

Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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2. Battaglia should be allowed to at least proceed to petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist. Otherwise, a complete denial of representation on the 2254(d)-issue will occur since the federal courts below effectively answered the Question Presented without input from the petitioner or his counsel. 30

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner John David Battaglia respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit:

OPINION BELOW

The opinion of the Fifth Circuit ("Opinion) is attached in the Appendix and is cited as *Battaglia v. Davis*, No. 18-70002 (5th Cir. Feb. 1, 2018) (App.001-009).

STATEMENT OF JURISDICTION

On February 1, 2018, the Fifth Circuit issued its Opinion, holding that the federal district court did not abuse its discretion in denying funding for a mitigation specialist "where any resultant evidence could do no meaningful work," affirmed the district court's denial of Battaglia's motion for funding of a mitigation specialist, and denied the motion to stay the execution. *Battaglia v. Davis*, No. 18-70002 (5th Cir. Feb. 1, 2018). (App.001-009). This Court has jurisdiction under 28 U.S.C. § 1254 (2017).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

FEDERAL STATUTES AFFECTED

18 U.S.C. § 3599 (2017) provides in relevant part:

> **(a)**
>
> > **(1)** Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--
> >
> > > **(A)** before judgment; or
> > >
> > > **(B)** after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
> >
> > shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
> >
> > **(2)** In any postconviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> .....
>
> **(e)** Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of

certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

28 U.S.C. § 2254(d) (2017) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Introduction

The Fifth Circuit has ruled that Battaglia is **not** entitled to meaningful representation in federal court on his *Panetti/Ford* claim. The Fifth Circuit did so by: (1) affirming the denial of Battaglia's motion for investigative funding; **and** (2) denying Battaglia's motion for stay of execution. Thus, the Fifth Circuit has

effectively ruled that Battaglia is not entitled to counsel under 18 U.S.C. § 3599 (2017) and the Eighth and Fourteenth Amendments to file a petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist.

Thus, Battaglia asks that this Court answer the Question Presented as that a federal court may **not** rely on 28 U.S.C. § 2254(d) to deny investigative services under 18 U.S.C. § 3599 to an applicant who seeks to develop and plead the claim in a federal habeas corpus petition where a state court has deprived a capital habeas applicant of reasonably necessary investigative services to develop the state court record on a material issue related to a *Panetti/Ford* claim. Further, Battaglia should be allowed to at least proceed to petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist. Otherwise, a complete denial of representation on the 2254(d)-issue will occur since the federal courts below effectively answered the Question Presented without input from the petitioner or his counsel.

Procedural History

On April 24, 2002, Battaglia was convicted of Capital Murder under Tex. Penal Code § 19.03 (2001). (RR-Trial-52.26).[1] On April 30, 2002, Battaglia was sentenced to

[1]The Clerk's Record is cited as "CR[volume number]," "CR-Sealed," "CR-Supp-Motion," or "CR-Supp-Ruling, followed by the page number. The Reporter's Record in the *Panetti*-proceeding is cited as "RR[volume number]," "RR-Supp[-2016-07-08 or -2016-08-30]," or "RR-Sealed," followed by the page or exhibit number. The record from the 2002 jury trial is cited as "RR-Trial[volume number" followed by the page number or "CR-Trial[-volume number]" followed by the page number. Petitioner's counsel will make any part of the record available to the Court upon demand.

death. (RR-Trial-56.74-77; CR-Trial-2.318-320). On May 18, 2005, the judgment and sentence were affirmed. *Battaglia v. State*, No. AP-74,348, 2005 Tex. Crim. App. Unpub. LEXIS 47 (Tex. Crim. App. May 18, 2005) (not designated for publication). On September 23, 2009, the TCCA adopted the trial court's findings that Battaglia's application for writ of habeas corpus under Tex. Code Crim. Proc. Art. 11.071 (2009) be denied. *Ex parte Battaglia*, No. WR-71,939-01, 2009 Tex. Crim. App. LEXIS 1822 (Tex. Crim. App. Sep. 23, 2009) (not designated for publication).

On August 19, 2013, the federal magistrate judge recommended that Battaglia's petition for writ of habeas corpus filed under 28 U.S.C. § 2254 be denied. *Battaglia v. Stephens*, No. 3:09-CV-1904-B, 2013 U.S. Dist. LEXIS 146808 (N.D. Tex. Aug. 19, 2013). On October 9, 2013, the district judge adopted the magistrate judge's findings and entered an order denying the petition. *Battaglia v. Stephens*, No. 3:09-CV-1904-B, 2013 U.S. Dist. LEXIS 146473 (N.D. Tex., Oct. 9, 2013). On July 15, 2015, the Fifth Circuit denied Battaglia's certificate of appealability. *Battaglia v. Stephens*, 621 Fed.Appx. 781 (5th Cir. 2015). On January 11, 2016, this Court denied Battaglia's petition for writ of certiorari. *Battaglia v. Stephens*, No. 15-6548, 2016 U.S. LEXIS 236 (U.S. Jan. 11, 2016).

On December 16, 2015, the trial court set the execution date for March 30, 2016. (CR1.10-11). On February 22, 2016, undersigned counsel filed a Motion for Appointment of Counsel to Prepare an Article 46.05 Motion (*Panetti*-motion) and a motion to admit Mr. Gardner *pro hac vice*. (CR-Supp-Motion.1-24). On February 29, 2016, the trial court denied both motions. (CR4.1229-1232).

On March 10, 2016, under 18 U.S.C. § 3599 (2016), Battaglia filed an emergency motion to appoint counsel and a motion for stay of execution in the federal district court so that he may investigate the factual bases for and prepare a habeas application under *Panetti*. *Battaglia v. Stephens*, No. 3:16-CV-0687-B, 2016 U.S. Dist. LEXIS 35703 (N.D. Tex. Mar. 18, 2016). On March 18, 2016, the district court denied the motion. *Id.* at *30.

On March 30, 2016 (the execution-date), the Fifth Circuit stayed the execution and reversed the district court's order and appointed Mr. Gardner as counsel (undersigned counsel Mowla was appointed later by the district court). *Battaglia v. Stephens*, 824 F.3d 470, 474-476 (5th Cir. 2016).

On August 12, 2016, although counsel was preparing for the *Panetti*-hearing, the trial court set a new execution date for December 7, 2016. (CR4.1354-1359).

On October 19, 2016, Battaglia filed a motion under Article 46.05(f) and *Panetti*, and the hearing was held on November 13-14, 2016. (RR1 & RR2). On November 18, 2016, the trial court denied Battaglia's motion. (CR-Supp-Ruling 1-14).

On November 21, 2016, Battaglia filed in the TCCA a motion to stay execution, which was granted on December 2, 2016. *Battaglia v. State*, No. AP-77,069 (Tex. Crim. App. Dec. 2, 2016) (per curiam). On September 20, 2017, the TCCA entered its Opinion. *Battaglia*, 2017 Tex. Crim. App. LEXIS 908. (App.001). Battaglia is set to be executed on February 1, 2018. (App.035-046).

On December 13, 2017, Battaglia filed the Petition for Writ of Certiorari. The Petition presents one Question:

> In *Panetti v. Quarterman*, 551 U.S. 930, 959, 962 (2007), this Court held that a prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. If the prisoner does not have a rational understanding of the reason he is being executed because of severe mental illness, the prisoner's perception of reality may be so distorted that he is incompetent to be executed. In the present case, three of four experts who use the *Panetti*-standard concluded that the prisoner suffers from a delusion that renders him incompetent-to-be-executed because: (1) although he is aware of the State's rationale for his execution, he does not have a rational understanding of it, and (2) there is no evidence of malingering. The one expert who concluded that the prisoner is competent-to-be-executed did not use the *Panetti*-standard and performed no testing or assessment of malingering.
>
> Did the lower court misapply this Court's decision in *Panetti*?

This Petition was filed on December 13, 2017 is pending before this Court.

On January 18, 2018, Respondent State of Texas filed its Brief in Opposition.

On January 23, 2018, Battaglia filed the Reply to the Brief in Opposition and a motion to stay execution, which is pending before this Court.

On January 2, 2018, in the federal district court Battaglia filed a motion for investigative services and an opposed motion for stay of execution. (ROA.584-615).

On January 24, 2018, the district court denied both motions. *Battaglia v. Davis*, No. 3:16-CV-1687-B (N.D. Tex. Jan. 24, 2018) (mem. op.) (App.010-030).

Battaglia's counsel did not receive notification of the district court's decision until January 25, 2018. (App.031-032).

On the same day, Battaglia's counsel immediately filed a notice of appeal to the Fifth Circuit. (App.033-034).

Battaglia's counsel filed the Appellant's Brief the next day, January 26, 2018, and the State filed its response on January 29, 2018.

Today, on February 1, 2018, the Fifth Circuit issued its opinion, holding that the federal district court did not abuse its discretion in denying funding for a mitigation specialist "where any resultant evidence could do no meaningful work," affirmed the district court's denial of Battaglia's motion for funding of a mitigation specialist, and denied the motion to stay the execution. *Battaglia v. Davis*, No. 18-70002 (5th Cir. Feb. 1, 2018) (App.001-009).

Background Facts

1. On July 21, 2016, prior to the *Panetti/Ford* hearing that was held in the state trial court on November 14-15, 2006, Battaglia filed a pre-hearing funds-request for expert and investigative assistance, which was denied by the state trial court.

On July 21, 2016, prior to the *Panetti/Ford* hearing that was held on November 14-15, 2016, undersigned counsel filed a motion for pre-hearing funds-request for expert and investigative assistance. (ROA.45-67).[2] Battaglia pleaded that the state trial court authorize his counsel to retain the assistance of: (1) expert services from Dr. Diane Mosnik, a forensic psychologist; and (2) investigative services from Nicole VanToorn, a mitigation specialist. (ROA.53-56).

Undersigned counsel needed Ms. VanToorn's assistance to: (1) obtain and review voluminous records from TDCJ and Battaglia's medical records, which to counsel's knowledge had not been collected or reviewed by previous counsel; (2) collect

[2] References to "ROA." are to the record on appeal before the Fifth Circuit. Counsel will provide any part of this record to the Court upon demand.

information about Battaglia's background, including environmental and genetic risk-factors; and (3) present understanding of his death sentence by interviewing collateral sources, including Battaglia's family members and others with whom Battaglia communicates. (ROA.54-56). VanToorn's services were: (1) reasonably necessary because she has the experience and training to conduct interviews involving sensitive mental health and background issues that counsel lack; and (2) critical to the preparation and litigation of the *Ford/Panetti*-claim since none of the prior counsel for Battaglia developed his psychosocial history. (ROA.54-56).

And, undersigned counsel informed the state trial court that prior state and federal habeas counsel did **not** conduct an independent investigation into Battaglia's background, mental health, or execution competency. (ROA.54-56). Although prior federal counsel received funding services to investigate various issues concerning Battaglia's factual allegations, prior counsel did **not** seek or receive services to investigate Battaglia's background to develop a psychosocial history, which was critical in a *Ford/Panetti* case. (ROA.54-56). Thus, no funds were sought or granted to investigate Battaglia's mental health or background for the issue of execution-incompetency. (ROA.54-56). Undersigned counsel estimated that for collecting records, interviewing collateral sources, consulting with undersigned counsel and Dr. Mosnik, and traveling, VanToorn would work about 150 hours. (ROA.54-56).

On July 29, 2016, the state trial court authorized counsel to retain Diane Mosnik's services as a mental health expert, inclusive of travel, but denied the motion for investigative services in its entirety. (ROA.68). Thus, counsel was unable to

investigate Battaglia's background or to develop a social and mental health history of Battaglia in state trial court. (ROA.23).

2. At the July 8, 2016 hearing, after denying Battaglia's motion for investigative services, the state trial court repeatedly pushed to move the case forward as fast as possible so that it may set an execution date.

On **July 8, 2016**, a hearing was held before the state trial court. (ROA.1229.1253). The government opposed any such funding request, which was acknowledged by the government:

> "Beyond that, on the issue of funding, I understand the Defense wants to get the funding from federal court. It's my understanding, I've been in contact with the Assistant Attorney General, and the AGs are objecting to the issue of funding." (ROA.1234)

The state trial court erroneously claimed that Battaglia had already been examined such that "at least" an "initial motion under 46.05" could be filed, which was **not** the case, as the basis for which this Court granted the March 30, 2016 stay of execution was **not** because an expert had evaluated Battaglia for execution-incompetency:

> "But from my understanding of the record in this case, the Defendant has been over the years examined by more than one mental health expert. And I'm sure there's a lot of records down in TDC also about his mental status that could be brought forward to at least make an initial motion under 46.05 and that has not been done, and I think that's what needs to happen first." (ROA.1237).

The government continued to argue that the case should move forward quickly, claiming that undersigned counsel has had some prison records since February (2016)

even though undersigned counsel was not appointed until **June 14, 2016** [*Battaglia v. Davis*, No. 3:16-cv-00687-B (N.D. Tex., ECF-16, June 14, 2016)]:

> "It's that the motion is -- there is actually a motion under 46.25 to actually initiate these proceedings. What we're asking, Judge, is to not delay this case any further. They had these records since February. So we're basically saying they have to get funding, they want to delay their defense to get funding. And we're telling you, Hey, let's just go ahead and proceed under 46.05 under the State's motion." (ROA.1239).

The state trial court agreed, telling the government that it should file a motion to request an execution date such that it allows "some period of time" to allow an expert to evaluate Battaglia (nothing was mentioned about allowing Battaglia time to return to federal court):

> I think what needs to happen is that the State needs to file a motion requesting an execution date, some period of time in the future that allows sufficient time for the Defendant to file a motion for experts to be appointed and their records received, and have a hearing and make a determination as to whether or not he's competent. But in the absence I'm going to set a timeline for a motion, an initial motion to be filed, that's not been done. And whether that's a delay tactic or not, I don't know, but I think one has to be done. And I think counsel has an obligation to do that if there's an option of that. And in the absence of that motion, then the -- you know -- the execution date will go forward." (ROA.1240)

The state trial court insisted that an execution-date, making assertions arguments that "they" (counsel) have had the records 4.5-5 months even though undersigned counsel was not appointed until June 14, 2016, three weeks before the hearing:

> "And so I think we need to pick an execution date, and we need to have a timeline for them to file their initial motion. And then the Court can appoint experts -- you know -- two, three, four weeks should be enough time for them to file motions since they've had this material for five

> months now, four and a half, five months. I think that's what needs to happen unless I hear something otherwise. I'm all ears. I mean, you-all tell me. (ROA.1242).

Undersigned counsel reminded the state trial court about returning to federal court to file motions, and the state trial court tells undersigned counsel:

> **Undersigned counsel:** Well, Your Honor, the reason why -- you know -- when you say delay tactic, Your Honor, we file timely motions for filing for an expert in the federal court.
>
> **State trial court:** You're going to get an expert. There's really no point –" (ROA.1242).

The state trial court then again reminded undersigned counsel about the timeline and that it expects **"strict compliance" to the timeline** because the state trial court believes **"this case deserves that to happen":**

> "And then I think the Court needs to issue a timeline for things to be done by. I'll expect relatively -- I will expect strict compliance to the timeline, because I think this case deserves that to happen. You know, I'm sure, Mr. Mowla, it's going to be at the top of your list of things to get done." (ROA.1246).

Although the government knew that undersigned counsel had **not** had an expert appointed or a chance to return to the federal district court to attempt to obtain investigative funding, one of the state attorneys wanted the competency hearing to take place "within 30 days" of when the motion is filed:

> "Do you think that having a competency hearing within 30 days of when the motion is filed is a reasonable time length? (ROA.1248).

The state trial court then again reminded the government to request another execution date even though this Court had granted a stay of the March 30, 2016 execution date so that Battaglia can press his rights under 18 U.S.C. § 3599:

> "I still -- I mean, I'm not quite sure, because I don't think 46.05 is exactly clear on -- but it still seems appropriate for the State to request another execution date. I mean, it was just that last date was stayed. (ROA.1250)

3. Three of the four experts who evaluated Battaglia (Drs. Proctor, Allen, and Mosnik) found that Battaglia suffers from Delusional Disorder of the Persecutory Type, found no evidence of malingering, and found that Battaglia is incompetent to be executed

For a proper diagnosis of Delusional Disorder, the DSM-5 requires: (A) the presence of one or more delusions with a duration of one month or longer; (B) criterion A for schizophrenia has never been met (and hallucinations, if present, are not prominent and are related to the delusional theme, such as the sensation of being infested with insects associated with delusions of infestation; (C) apart from the impact of the delusions or its ramifications, functioning is not markedly impaired, and behavior is not obviously bizarre or odd; (D) if manic or major depressive episodes have occurred, these have been brief relative to the duration of the delusional periods; and (E) the disturbance is not attributable to the physiological effects of a substance or another medical condition and is not better explained by another mental disorder, such as body dysmorphic disorder or obsessive-compulsive disorder. (ROA.204-207.272-273); *see* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 90-94 (5th ed. 2013).

Delusional Disorder of the Persecutory Type occurs where the individual has strongly-held beliefs that he is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals. *Id.* Delusions are fixed beliefs that are **not** amenable to change considering conflicting evidence and are determined based, in part, on the degree of

conviction held by the individual despite clear and reasonable contradictory evidence regarding the veracity of the beliefs. (ROA.168).

Drs. Proctor, Allen, and Mosnik concluded that Battaglia suffers from Delusional Disorder of the Persecutory Type, a severe mental illness, and found **no** evidence that Battaglia was malingering. (ROA.151-185). Based on the testing, evaluation, and review of the materials, Drs. Proctor, Allen, and Mosnik concluded that Battaglia is incompetent to be executed. (ROA. 151-185.271.280.338.404.416).

4. Womack used the pre-Panetti-standard for execution-competency, conducted no testing, provided no assessment of malingering, and made conclusory findings that Battaglia is 'too intelligent' to suffer from Delusion Disorder

Prior to his first "evaluation" of Battaglia, Womack conducted **no** testing, reviewed a one-page court order, and reviewed only videos provided by the State. (ROA.186). Womack admitted that it was "pretty rare" for him to be involved with a defendant charged with Capital Murder. (ROA.467). After the first "evaluation," Womack conducted a second "evaluation" because he noticed a "…disparity between Mr. Battaglia's emotional presentation during assessment with three other examiner's (sic) and that of the current one," he contacted the state trial court and received permission to "…conduct further assessment of Mr. Battaglia…" (ROA.197). Prior to this "further (second) assessment (evaluation)," Womack reviewed the competency-to-be-executed reports of Drs. Proctor, Allen, and Mosnik, and one psychiatric evaluation conducted in 2002. (ROA.197).

During the first "evaluation," Womack failed to perform an assessment of malingering in his examination ("malinger" and "malingering" do **not** appear in the first report). (ROA.186-196). Womack concluded that based on state law only (and not *Panetti*), Article 46.05(h), Battaglia is competent to be executed, writing (ROA.142-152):

> "(Battaglia)…[p]rovided clear examples he understands the fact the state intends to execute him and it seeks to do so imminently. He acknowledged he had been convicted of murdering of his two daughters but denied having done so. He demonstrated his knowledge the state intends to carry out the execution imminently when he said the execution date is December 7, 2016. At no time did he express any confusion as to these two points. When asked if another party had, in fact, murdered his daughters, would this fact justify that party executed, he stated, 'Technically yes.' This answer reflects his knowledge the state has the legal right to carry out the punishment for the conviction of Capital Murder."

Womack claimed he saw **no** evidence of "delusional" or "psychotic" thinking during the first interview; concerned that after reading that the other experts identified Delusional Disorder and he had **not** addressed it. (ROA.462), Womack returned on November 13, 2016 (the day before the *Panetti/Ford*-hearing) and conducted another "evaluation." (ROA.197-203). Womack told Battaglia that he must perform the second "evaluation" because "…there was a disparity in the reported presentation in the mental status sections of the other three reports and that which (Womack) had experienced with him the first time, and (Womack) wanted to talk to him more to get a clearer picture and to ask him follow-up questions that had not been asked in the (first) evaluation." (ROA.472-473).

Womack conducted **no** testing, depended on **no** testing, and made a "finding" of a "provisional" question of malingering, which is **not** a diagnosis of malingering, but indicates that he could **not** make the diagnosis of malingering (ROA.200.474.505):

> **Question:** So your diagnosis is at the bottom of page 4. Your final conclusion -- and I'm getting ahead of myself. But your final conclusion is provisional malingering; is that correct?
>
> **Womack:** Well, I have the rule out for stimulant use disorder in a controlled environment. That means further evaluation would be needed to determine with confidence that, in fact, he did have a stimulant use disorder in the free world. In a controlled environment, it just means there's no evidence.
>
> .....
>
> **Question:** So you're not confident enough to make a diagnosis at this point?
>
> **Womack:** I'm saying that the malingering is something that is highly suspected. That's why you put in "Provisional."
>
> **Question:** Okay.
>
> **Womack:** But if you had more information, you would have even more confidence.
>
> **Question:** So the DSM5 allows for a provisional that's not at the level of a diagnosis, but it's a maybe, but need more information?
>
> **Womack:** Correct.

Womack agreed that Drs. Proctor, Allen, and Mosnik concluded that Battaglia is incompetent to be executed due to a lack of rational understanding of the reasons for the execution due to persecutory delusions (ROA.198-199.203):

> While this writer agrees with the assertion that many delusional individuals are resistant to admitting they have a mental health problem, if one wanted to simulate a presentation of a delusional

> disorder one could deny mental illness while asserting highly suspicious claims. It has been suggested Mr. Battaglia likely could not fabricate such an elaborate system of various antagonists and maintain it over the years; however, he is a highly intelligent person who has had the time and motivation to begin creating a complex, paranoid story line that he could have practiced over the years. He also has made exculpatory comments independent of seeming delusional ideas; therefore, this writer is of the opinion he is likely not to have a delusional disorder.

In Womack's view, because Battaglia is "highly intelligent" and has made "exculpatory comments independent of seeming delusional ideas," Battaglia is "likely not to have a delusional disorder." (ROA.203). Womack admitted that delusional persons he had dealt with in the past "tend to be rather high in intelligence." (ROA.470).

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

REASONS FOR GRANTING THE WRIT

I. A federal court may not rely on 28 U.S.C. § 2254(d) to deny investigative services under 18 U.S.C. § 3599 to an applicant who seeks to develop and plead the claim in a federal habeas corpus petition where a state court has deprived a capital habeas applicant of reasonably necessary investigative services to develop the state court record on a material issue related to a *Panetti/Ford* claim. Further, Battaglia should be allowed to at least proceed to petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist. Otherwise, a complete denial of representation on the 2254(d)-issue will occur since the federal courts below effectively answered the Question Presented without input from the petitioner or his counsel.

1. The Opinion relies on 28 U.S.C. § 2254(d) to deny investigative services under 18 U.S.C. § 3599 to Battaglia even though the state court deprived him of reasonably necessary investigative services to develop the state court record on the *Panetti/Ford* claim.

On page 5 of the Opinion, the Fifth Circuit concludes that "Battaglia admits that counsel could undertake much of this work (mitigation investigation), but states that counsel would be less 'cost effective' and lack 'experience and training to conduct [sensitive] interviews.' Much of this information sought about Battaglia's past would likely have had little sway on the determination of his present competence to be executed." First, counsel did **not** argue in the district court and Fifth Circuit that he could "undertake much of" the mitigation investigation. Counsel is not a mitigation investigator and has never personally conducted a mitigation investigation.

Second, a social history would have been highly probative on the issue of malingering. Under 18 U.S.C. § 3599(f) (2017), Battaglia is entitled to "investigative, expert, and other services" that are "reasonably necessary for the representation" in capital cases. Section 3599(f) authorizes services when a movant can establish a "substantial need" for the services, the language of § 3599(f) is clear, and when the statutory language is plain, a court must enforce it according to its terms. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). The district court did not clearly explain the substantial-needs test, and instead effectively placed the "cart-before-the-horse" and concluded that Battaglia is **not** entitled to investigative services because he failed to present sufficient evidence showing that he may have a viable claim for relief. As

Battaglia explained below, this is like **not** giving a person the opportunity to gain experience, and yet criticizing that person for lacking experience.

When courts do **not** allow funding for services as the courts below did, but then conclude that a petitioner failed to present evidence that the funding may have produced, the courts create a precondition for funding that violates the plain language of § 3599(f). Section 3599(f) was enacted to enhance representation for a capital defendant and ensure that potentially meritorious claims are investigated and litigated. A claim **cannot** be litigated before it is investigated. A "procedure" that does **not** allow funding for auxiliary services based on a conclusion that the claim has no merit before the litigant has had a chance to investigate the claim violates § 3599(f) and due process

During the state-court proceedings, Battaglia pleaded that the investigative services were reasonably necessary to representation on his execution competency in order to: (1) obtain and review voluminous records from TDCJ and his medical records, which had not been collected or reviewed by previous counsel certainly for the purpose of execution-incompetency; (2) collect information about Battaglia's background, including environmental and genetic risk-factors by interviewing collateral sources; and (3) collect information about Battaglia's **present** rational understanding of his sentence by interviewing collateral sources, including Battaglia's family members and others with whom he communicates. (App.071-093).

Battaglia tried to obtain funding for these investigative services from both the state trial court and federal district court and was denied. Rather than correct this

abuse of discretion, the Fifth Circuit decided that Battaglia should not be allowed to investigate and present relevant factual allegations that investigative services would uncover. Thus, meritorious factual issues will "never be heard," and Congress "did not intend for the express requirement" of investigative services "to be defeated in this manner." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). *See also Martel v. Clair*, 565 U.S. 648, 662-663 (2012) (§ 3599 grants federal capital defendants and capital habeas petitioners "enhanced rights of representation.").

The purpose of § 3599 is to "improve the quality of representation afforded to capital [habeas] petitioners and defendants alike." *Martel*, 565 U.S. at 659. 18 U.S.C. § 3599(f) (2017) accomplishes this by requiring lawyers in capital cases to have more legal experience than 18 U.S.C. § 3006A (2017) demands in the non-capital context. *Id.* Further, 18 U.S.C. § 3599(f) (2017) provides more money for investigative and expert services than are available under Section 3006A, which "'reflec[ts] a determination that quality legal representation is necessary' to foster 'fundamental fairness in the imposition of the death penalty.'" *Id.*, *quoting McFarland*, 512 U.S. at 855, 859.

In *McFarland*, this Court held that failure to appoint counsel to an indigent, capitally sentenced prisoner in advance of the filing of a habeas corpus application created a substantial risk that the prisoner's habeas claims would never be heard on the merits, and therefore violated the right to quality legal representation afforded by 18 U.S.C. § 3599. 512 U.S. at 856. The Court also concluded that preapplication representation was essential because: (1) the complexity of habeas corpus

jurisprudence; and (2) the need to investigate and identify the factual bases of possible claims. *Id*. at 855-56. Finally, the Court held that a stay of execution was required because, absent one, the representation could not be made meaningful. *Id*. at 858. Thus, *McFarland* holds that the failure to afford a qualifying prisoner meaningful and quality legal representation (which would include investigative services) violates the representation right that 18 U.S.C. § 3599(f) (2017) affords Battaglia because it creates a substantial risk that his habeas claims will be forfeited or go unreviewed by the federal court.

Thus, § 3599(f) does **not** require Battaglia to prove his claims before investigating them. Battaglia **cannot** make a substantial- or reasonable-showing without funding to investigate, develop, and present evidence of a substantial- or reasonable-showing.

Third, Battaglia asks this Court to grant motion for stay of execution and reverse the Order at least until *Ayestas v. Davis*, No. 16-6795 (U.S.) is decided. Battaglia's claim is identical to the claim in *Ayestas* concerning the deprivation of Battaglia's right to "meaningful and quality" legal representation that 18 U.S.C. § 3599 affords him. *See McFarland*, 512 U.S. at 856. The legal issue to be decided in *Ayestas* is:

> Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.

The arguments of Ayestas and Battaglia are that the Fifth Circuit's substantial-need test is incompatible with § 3599(f)'s plain meaning, structure, and purpose because it "requires a higher showing than 'reasonable' need, contrary to § 3599(f)'s plain meaning." § 3599(f) adopts a single standard, which reasonable necessity, for the award of services in a capital representation that is flexible enough to apply across all the phases of a capital representation without obligating courts to fund frivolous services. Regardless of what standard this Court employs, this Court should grant the motion for stay of execution and reverse the Order at least until Ayestas is decided. As argued in the district court and the Fifth Circuit, without the mitigation investigator's assistance, Battaglia cannot prove that he was prejudiced because both the state trial court and TCCA pointed to the "record" as justification to conclude that he is competent-to-be-executed.

The investigative-services are thus required so that the record is better-developed. Battaglia explained in detail in the district court that despite three of four experts (who reviewed a large part of the record) finding that Battaglia is incompetent to be executed under the *Panetti*-standard and is **not** malingering, and the other expert (who did **not** make a finding of malingering) failed to use the *Panetti*-standard, state courts (and effectively the federal district court) referred to a "record" to conclude that Battaglia is possibly malingering, which is **incorrect**. Investigative services would have help develop the facts and issues that Battaglia's counsel identified to the trial court. Absent the requested investigative-services, Battaglia

will be denied adequate representation and any meaningful opportunity for federal collateral review.

Next, the Fifth Circuit opines that "Much of this information (the information that the mitigation investigator would have uncovered) sought about Battaglia's past would likely have had little sway on the determination of his present competence to be executed." Opinion, p. 5. And, "[B]attaglia's current funding request "comes too late to have any impact on the expert evaluations that were made and the testimony that was presented" in the state competency proceedings." However, the funding-request was **not** made to impact expert evaluations. The state court already denied investigative funding for that purpose, so the state of the state-court record is on the state court alone. Battaglia is requesting investigative funding to develop and plead a *Panetti/Ford* claim in federal court.

Then on page 6, the Fifth Circuit concludes, "[T]he district court correctly noted that this limitation on habeas review 'indirectly limits the availability of funds for investigative assistance.' Even if Battaglia received the requested funding and the mitigation specialist 'collect[ed] information about Battaglia's…present rational understanding of his death sentence,' such information would be barred from consideration by the federal courts. It is not an abuse of discretion to deny a motion for funding that would produce only unreviewable evidence."

This is an incorrect conclusion. First, the conclusion that "…[s]uch information would be barred from consideration by the federal courts" applies only as to whether

the Section 2254(d)(1) exception exists, **not** as to whether Battaglia is incompetent to be executed. These are distinct inquiries.

Second, the preclusion bar does not limit specific representation a prisoner may receive, especially as they pertain to the discovery and pleading of federal habeas claims. The relitigation bar of 28 U.S.C. § 2254(d) (2017) is **not** meant to be as onerous and unyielding as the Fifth believes it to be. Under 18 U.S.C. § 3599(f) (2017), Battaglia is entitled to "investigative, expert, and other services" that are "reasonably necessary for the representation" in capital cases. Again, § 3599(f) authorizes services when a movant can establish a "substantial need" for the services, the language of § 3599(f) is clear, and when the statutory language is plain, a court must enforce it according to its terms. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Per the Fifth Circuit's own precedent, auxiliary services should be denied only if: (1) it supports a meritless claim, meaning that the claim on its face would never success (*i.e.*, such as where an inmate whose measured WAIS-IV IQ score is well above 70 and he requests funding for an *Atkins* claim), (2) it merely supplements prior evidence, or (3) the constitutional claim is procedurally barred at the time the motion is made. *Ward v. Stevens*, 777 F.3d 250, 266 (5th Cir. 2015). None of these disqualifying factors exist here.

Third, whether (as the Fifth Circuit opines) "[It] is not an abuse of discretion to deny a motion for funding that would produce only unreviewable evidence" **cannot** be determined until an analysis under Section 2254(d)(1) is performed. No court has

performed one. And, Battaglia has **not** been afforded any meaningful representation with respect to this issue.

Next, on page 7 of the Opinion, the Fifth Circuit concludes that Battaglia "…has made no…showing" that "[I]f a state court fails to provide the 'minimum procedures a State must provide to a prisoner raising a Ford-based competency claim,' that failure would constitute an unreasonable application of clearly established Supreme Court precedent and the state court's competency finding would not be entitled to deference under § 2254(d)(1)." Again, the "cart-before-the-horse": Battaglia has not been given any meaningful opportunity to make such a showing. **Nor** has any court below been able to meaningfully review the question yet because Battaglia was refused his due process rights and rights under Section 3599. The state trial court, the TCCA, the district court, and the Fifth Circuit ignored the findings of Drs. Proctor, Allen, and Mosnik, and based their decision on Womack's "finding" under the Texas statute (rather than the *Panetti*-standard) and a "finding" of a "provisional" question of malingering, which is **not** a diagnosis of malingering, but indicates that he could **not** make the diagnosis of malingering (ROA.200.474.505). The trial court cited records from TDCJ, interviews Battaglia gave to the media, recordings of jail-calls Battaglia made, and the transcript of the 2002 trial. The TCCA concluded that "[R]ecognizing 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*, 2017 Tex. Crim. App. LEXIS 908, at* 91-92. And, the TCCA concluded

"[T]here is support in the record that Battaglia is malingering." *Id*. (emphasis supplied). However, based on that same record, Drs. Proctor, Allen, and Mosnik found that Battaglia was **not** malingering, and that he is incompetent-to-be-executed.

Thus, the "record" that the state trial court and TCCA describe that "support(s)" a finding of malingering purportedly came from sources other than the experts. Battaglia's counsel has been unable to locate evidence of malingering in the record, but the information that counsel needed a mitigation specialist to obtain and evaluate would have helped put the information from sources other than the experts in perspective. This includes voluminous records from TDCJ and Battaglia's medical records, Battaglia's background, including environmental and genetic risk-factors, and a presentation of an understanding of his death sentence by interviewing collateral sources, including Battaglia's family members and others with whom Battaglia communicates. The mitigation specialist would have interviewed those associated with Battaglia prior to 2001, during 2001 and 2002 (the year of the trial), and since 2002. She would have interviewed Battaglia's family, coworkers, investigate issues that may have arisen during his military service, the circumstances surrounding his mother's death, and his interpersonal relationships. The specialist would investigate instances of chaos, instability, violence, and dysfunction in Battaglia's life from childhood until now, which would be helpful to determine how he became afflicted with this severe mental illness and whether his experiences caused him to lack necessary coping skills. The specialist would have investigated whether certain behavior by Battaglia should have triggered the

recommendation for mental-health treatment, including whether Battaglia suffered an injury that impaired his rational thought-process.

Battaglia's presentations are not rational, and three of the four experts who are competent on issues of execution-competency opined that Battaglia is incompetent to be executed because he does not have a rational understanding of why the State wants to execute him. A person like Battaglia, who was a successful CPA and intelligent, does not suddenly decide to kill his young daughters just to do so and without any apparent rational motive. Battaglia suffers from a severe mental illness, and he had the right under Section 3599 to investigative services on the issue of competency-to-be-executed.

Finally, the mitigation specialist would investigate and interview persons Battaglia had contact with while on death row for the past 15 years. This may have contradicted or explained the testimony of Shirley Griffin, a former correctional officer and the current supervisor of the law library at the death row unit, who testified that during her interactions with Battaglia over the years "it did not appear to her that Battaglia suffers from a mental illness." Griffin is a layperson who took one introductory course in psychology and has **no** training in the diagnoses of mental illness or any disorder. (ROA.359-369). Griffin's "diagnoses" of Battaglia **not** being mentally ill was supported by her "opinion" that Battaglia was **not** "lethargic," was clean, and kept good hygiene." (ROA.368-369). Griffin admitted that "not all" persons who have mental illness are "messy and lethargic and have bad hygiene." (ROA.369).

However, Griffin admitted that she has **no** idea whether Battaglia has a mental illness (ROA.369).

Yet, the trial court emphasized Griffin's "opinion" on Battaglia's alleged lack of mental illness, and the TCCA considered this as part of the "record" that may show possible malingering since Battaglia requested copies of certain cases from the law library while Griffin was the librarian (*see* trial court's ruling, ROA.218: "Griffin also testified that during her interactions with Battaglia over the years it did not appear to her that Battaglia suffers from a mental illness"; and *Battaglia*, *id*. at 56-57). Others who interacted with Battaglia would have testified that Battaglia did **not** suddenly concoct his delusional beliefs about the various conspiracies because he received an execution-date, and in fact, presented severe delusions prior to 2001, which have intensified since.

Finally, a mitigation specialist is critical because: (1) none of the prior counsel developed a mitigation or mental-health profile that addressed Battaglia's competency for execution; (2) none of the prior counsel investigated Battaglia's psychosocial history; (3) none of the prior counsel conducted an independent investigation into Battaglia's background, mental health, or execution-incompetency; and (4) although prior federal counsel funding for a private investigator to investigate Battaglia's factual allegations, she did **not** seek or receive funding for mitigation or neuropsychological investigations and evaluations for execution-incompetency.

Finally, on page 8 of the Opinion, the Fifth Circuit concludes, "[B]attaglia was also evaluated by two court-appointed experts in addition to the State's expert. We

see no evidence that the state court violated the procedural requirements set out by *Panetti*. Thus, any habeas petition challenging the state court's competency finding would have to be cabined to the record that was before the state court, obviating the need for additional investigatory services. The reason why the Fifth Circuit saw "no evidence that the state court violated the procedural requirements set out by *Panetti* is because Battaglia was denied a meaningful opportunity to make the showing. Battaglia was also denied the right to make arguments that either the Section 2254(d)(1) or (d)(2) exception to the relitigation bar exist. Thus, the Fifth Circuit applied the relitigation bar in the **complete absence** of any meaningful opportunity to be heard by Battaglia.

Another issue to note is that the Fifth Circuit's reliance on *Green v. Thaler*, 699 F.3d 404 (5th Cir. 2012) is misplaced. There is no indication that Green's counsel asked for a mitigation investigator. He asked only for an expert. Thus, *Green* is inapplicable. Battaglia did ask for a mitigation investigator and was denied by the state court. Further, counsel's job is to decide what to present. The mitigation investigator's job by training and credentialing is to "obtain, understand and analyze all documentary and anecdotal info relevant to the client's life history." *See* ABA Guidelines 5.1B, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/2008-guideline-5-1.html, last accessed on February 1, 2008. And, it is her job to "have the ability to advise counsel on appropriate mental health and other expert assistance." ABA Guideline 5.1C. This

information would be given to the experts to "illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning" on the competency issues Jared identified. ABA Guidelines 5.1D.

2. Battaglia should be allowed to at least proceed to petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist. Otherwise, a complete denial of representation on the 2254(d)-issue will occur since the federal courts below effectively answered the Question Presented without input from the petitioner or his counsel.

Should this Court conclude that investigative services are not needed, Battaglia should be allowed to at least proceed to petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist. Otherwise, a complete denial of representation on the 2254(d)-issue will occur since the federal courts below effectively answered the Question Presented without input from the petitioner or his counsel. Section 3599(e) is clear: Battaglia is entitled to counsel representing him "…throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. § 3599(e) (2017). The federal habeas proceeding

that begins with the filing of the habeas petition and the litigation of it is included in Section 3599(e). Battaglia thus asks for this right.

CONCLUSION AND PRAYER

For the reasons stated in this petition, the Fifth Circuit decided important federal constitutional questions in ways that conflict with relevant decisions of this Court. Therefore, Petitioner Battaglia respectfully asks this Court to issue a writ of certiorari to the Fifth Circuit on the issue presented in this petition and grant the motion for stay of execution.

Respectfully submitted,

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