

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

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-70002

United States Court of Appeals
Fifth Circuit

FILED

February 1, 2018

Lyle W. Cayce
Clerk

JOHN DAVID BATTAGLIA,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-1687

Before HIGGINBOTHAM, DENNIS, and GRAVES, Circuit Judges.

PER CURIAM:*

This case involves a question of competence to be executed. On January 2, 2018, John Battaglia filed a motion in the district court for funding of investigatory services and a motion for stay of execution. The district court denied the motions, stating that “any grant of funding for such an investigator would appear to be a misallocation of federal funds.” We affirm.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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I.

Having been convicted and sentenced to death for killing his two daughters,¹ John Battaglia now attacks his competency to be executed under Article 46.05 of the Texas Code of Criminal Procedure.

Battaglia first raised the competency issue in February 2016, when he filed a motion in state trial court for appointment of counsel to investigate, prepare, and file a competency claim.² The motion was summarily denied.³ Battaglia next filed a motion in federal court, requesting the appointment of counsel under 18 U.S.C. § 3599 and a stay of execution.⁴ The district court denied the motion.⁵

On March 30, 2016, we reversed the district court, appointed new counsel, and granted Battaglia a stay of execution “to make [his] right to counsel meaningful.”⁶ In our opinion, we stated “[i]t is the present counsel’s responsibility now appointed to take the case he has—and that may be developed during the time gained—to state court.”⁷

On June 21, 2016, Battaglia filed in federal district court a motion for leave to proceed *ex parte* and an *ex parte* motion to request investigative and expert funding.⁸ The funding motion requested \$19,500 to retain forensic psychologist Dr. Diane Mosnik and \$15,000 for investigative assistance from Nicole VanToorn, a mitigation specialist.⁹ On June 22, 2016, the district court

¹ *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, at *1 (Tex. Crim. App. Sept. 20, 2017).

² *Id.* at 4.

³ *Id.*

⁴ *Battaglia v. Stephens*, No. 3:16-cv-00687-B, 2016 WL 7852338 (N.D. Tex. Mar. 18, 2016).

⁵ *Id.*

⁶ *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016).

⁷ *Id.* at 476.

⁸ *Battaglia v. State*, No. 3:16-CV-1687-B, 2018 WL 550518, at *1 (N.D. Tex. Jan. 24, 2018).

⁹ *Id.* at *1.

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denied leave to proceed *ex parte* because of issues with service, but “included guidance on the procedures required to proceed *ex parte* and on what would be required to make the showing that funding for the sought services was reasonably necessary to the representation of Battaglia before the state court.”¹⁰ Battaglia made no further requests for funding from the federal district court at that time.

On July 21, 2016, Battaglia filed motions in state trial court seeking funding for the same mental health expert and mitigation specialist.¹¹ Battaglia represented that Dr. Mosnik was necessary to “assist [counsel] in developing evidence about Mr. Battaglia’s current mental health” and to “form an expert opinion about whether [Battaglia] is competent” to be executed. He claimed that VanToorn was needed to “(1) obtain and review voluminous records from TDCJ and Battaglia’s medical records . . . ; (2) collect 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.” Battaglia stated that “[i]f [the state] court decides it cannot fully fund the necessary experts, [he would] need to return to federal court for his funding before returning to file his [Article 46.05] motion.”

On July 29, 2016, the state trial court granted \$12,000 for the expert assistance of Dr. Mosnik and denied funding for mitigation specialist VanToorn. Despite his claim that he would need to return to federal court for funding before filing his motion, Battaglia did not do so.¹² In August 2016, the state court set Battaglia’s execution date for December 7, 2016.¹³

¹⁰ *Id.* *1.

¹¹ *Id.* at *2.

¹² Battaglia now contends that he did not return to federal court at least in part because he would not have had time to use that funding to develop his claims.

¹³ *Battaglia*, 2018 WL 550518, at *2.

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On October 19, 2016, Battaglia filed a motion under Article 46.05 challenging his competence to be executed. Four mental health experts examined Battaglia: the State’s expert Dr. Timothy Proctor; two court-appointed experts, Dr. Thomas Allen and Dr. James Womack; and the Defense’s expert, Dr. Diane Mosnik. After a two-day evidentiary hearing, the state court ruled that Battaglia had not shown he was incompetent to be executed.¹⁴

On December 2, 2016, the Texas Court of Criminal Appeals (“CCA”) granted a stay of execution to review the competency determination. On September 20, 2017, the CCA affirmed the state trial court’s order.¹⁵ On December 13, 2017, Battaglia filed a petition for a writ of certiorari with the Supreme Court, which is still pending.¹⁶ The state then set a new execution date of February 1, 2018.¹⁷

On January 2, 2018, Battaglia returned to federal court seeking funding for mitigation expert VanToorn’s services and a stay of execution. On January 24, 2018, the district court denied both motions.¹⁸ Battaglia appeals.

II.

While the procedural history of this case is lengthy, the question before us today is simple: whether the federal district court erred in denying Battaglia federal funding for a “mitigation specialist” to prepare a federal habeas challenge to a state competency determination. Under § 3599(f), a court “*may* authorize” defense attorneys to obtain “investigative, expert, or other services

¹⁴ *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, at *4 (Tex. Crim. App. Sept. 20, 2017).

¹⁵ *Id.* at *30.

¹⁶ *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, *petition for cert. filed* (U.S. Dec. 13, 2017) (No. 17-7165).

¹⁷ *Battaglia*, 2018 WL 550518, at *2.

¹⁸ *Id.* at *10.

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[that] are reasonably necessary for the representation of the defendant.”¹⁹ We review a denial of such funding for abuse of discretion.²⁰

We have held that “[a] denial of funding will be upheld when it would only support a meritless claim, when it would only supplement prior evidence, or when the constitutional claim is procedurally barred.”²¹ Battaglia contends that this is an exhaustive list, that “none of these factors exist here,” and thus the district court erred in denying him § 3599 funding.

A.

Battaglia contends that VanToorn’s services were reasonably necessary to “obtain and review voluminous . . . records, . . . collect information about Battaglia’s background, . . . [and] interview[] . . . Battaglia’s family members and others.” In his state funding request, Battaglia admits that counsel could undertake much of this work, 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.

That is not the point. Battaglia’s current request for funding comes on the eve of his execution, after the CCA has already affirmed the state trial court’s finding based on a full hearing that Battaglia is competent to be executed. As the district court correctly noted, Battaglia’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.²²

¹⁹ 18 U.S.C. § 3599(f) (emphasis added).

²⁰ *See Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

²¹ *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (internal citations omitted); *see also Smith*, 433 F.3d at 288.

²² *Battaglia*, 2018 WL 550518, at *5.

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At this stage, Battaglia seeks funding for investigatory services to pursue his claims in federal court. Yet because a state court has already adjudicated Battaglia's claim on the merits, "review under § 2254(d)(1) is limited to the record that was before the state court" during the competency hearing.²³ The district court correctly noted that this limitation on habeas review "indirectly limits the availability of funds for investigative assistance."²⁴ 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.

B.

To escape this reality, Battaglia argues that the limitations set by § 2254(d) are "a form of issue preclusion" and should not apply "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." Battaglia contends that this is just such a case, since the state court's denial of funding for a mitigation expert meant that he could not adequately develop his arguments and thus did not have a *meaningful* opportunity to be heard. While he concedes that a competency hearing "may be less formal than a trial," he asserts that it still requires process that allows a defendant to "present[]

²³ *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); cf. *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011) ("*Pinholster* prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254(d).").

²⁴ See *Battaglia*, 2018 WL 550518, at *4; see also *Devoe v. Davis*, No. 16-70026, 2018 WL 341755, at *9-10 (5th Cir. Jan. 9, 2018) (concluding that it was not an abuse of discretion to deny funding where § 2254(d) bars the consideration of any new evidence).

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critical evidence” and contends that the lack of funding prevented him from uncovering and presenting such evidence. Battaglia cites no authority holding that § 2254(d) is a form of issue preclusion that violates due process, and like the district court, we are not aware of any such case.

In *Valdez*, we held that “a full and fair hearing is not a prerequisite to the operation of 28 U.S.C. § 2254’s deferential scheme.”²⁵ That said, the Supreme Court has stated that “[o]nce a prisoner seeking a stay of execution has made ‘a substantial threshold showing of insanity,’ the protection afforded by procedural due process includes a ‘fair hearing’ in accord with fundamental fairness.”²⁶ If a state court fails to provide the “minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim,”²⁷ 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).

Battaglia has made no such showing here. States have “substantial leeway to determine what process best balances the various interests at stake’ once [they have] met the ‘basic requirements’ required by due process,” which include “an opportunity to submit ‘evidence and argument from the prisoner’s counsel, including expert evidence that may differ from the State’s own psychiatric examination.”²⁸ In *Green v. Thaler*, we upheld a competency proceeding where the defendant “received counsel, expert services, and the opportunity to present evidence and argument at a live hearing, including the

²⁵ *Valdez v. Cockrell*, 274 F.3d 941, 942, 950 (5th Cir. 2001) (“The term ‘adjudication on the merits[]’ . . . refers solely to whether the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons. It does not speak to the quality of the process.”) (internal citations omitted).

²⁶ *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (citing *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring)).

²⁷ *Id.*

²⁸ *Id.* at 949-50 (quoting *Ford*, 447 U.S. at 427) (Powell, J., concurring)).

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admission of medical records.”²⁹ The defendant contended that his due process rights were violated because the court did not permit him to present certain fact witnesses who could corroborate the expert’s diagnosis.³⁰ We rejected that argument and found that the defendant received sufficient process because he was “able to hire an expert who submitted a report and testified, and could respond directly to the State’s evidence.”³¹

Here, the state court conducted a two-day hearing into Battaglia’s competency to be executed. He was represented by counsel and the state provided \$12,000 of funding to hire a forensic psychologist, Dr. Mosnik, as a mental health expert. Battaglia 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.

III.

Battaglia’s motion for a stay of execution is in large part premised on his funding request. Battaglia also urges this court to stay his execution pending the Supreme Court’s decision in *Ayestas v. Davis*,³² which involves a challenge to a denial of § 3599 funding. The question presented 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

²⁹ 699 F.3d 404, 412 (5th Cir. 2012).

³⁰ *Id.* at 411-12.

³¹ *Id.* at 413.

³² 137 S. Ct. 1433, 1434 (2017).

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does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.

Ayestas is of no moment here. We need not evaluate the strength of Battaglia's underlying claim to decide whether he is entitled to the funding he belatedly seeks. Any additional evidence gained from an investigation by a mitigation specialist—whose assistance he seeks not because counsel cannot investigate but because a mitigation specialist would cost less—cannot be introduced for the first time in a federal court on collateral review.³³

IV.

We hold 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. We AFFIRM the district court's denial of Battaglia's motion for funding of a mitigation specialist and DENY his motion to stay his execution.



Certified as a true copy and issued
as the mandate on Feb 01, 2018

Attest:

Judy W. Conway
Clerk, U.S. Court of Appeals, Fifth Circuit

³³ See *Devoe*, 2018 WL 341755, at *10.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHN DAVID BATTAGLIA ,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	NO. 3:16-CV-1687-B
LORIE DAVIS, Director	§	
Texas Department of Criminal Justice,	§	(Death Penalty Case)
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER
DENYING FUNDING AND A STAY OF EXECUTION

On January 2, 2018, petitioner John David Battaglia (“Battaglia”) filed a motion for funding of investigatory services, (“Mot. Inv.”) doc. 9, and a motion for stay of execution, (“Mot. Stay”) doc. 10. The certificates of conference on both of these motions indicate that they are opposed. In response to this Court’s order, Battaglia filed a supplemental brief, (“Supp. Br.”) doc. 12, Respondent filed a response, (“Resp.”) doc. 13, and Battaglia has filed a reply, (“Reply”) doc. 14. Because Battaglia has not shown an entitlement to funding or a stay of his execution, relief is **DENIED**.

I.

Petitioner was convicted of capital murder and sentenced to death in Dallas County for the murder of his two young daughters while his former wife and mother of the children listened helplessly on the phone. *See Battaglia v. State*, No. AP-74,348, 2005 WL 1208949, at *1 (Tex. Crim. App. May 18, 2005). His conviction and sentence were affirmed on direct appeal. *Id.* Petitioner filed an application for a post-conviction writ of habeas corpus, which was denied by the Texas Court of Criminal Appeals (“CCA”). *See Ex parte Battaglia*, No. WR-71,939-01, 2009 WL 3042925 (Tex.

Crim. App. Sep. 23, 2009). Petitioner then filed a petition for writ of habeas corpus with supporting brief in this court, which was denied. *See Battaglia v. Stephens*, No. 3:09-CV-1904-B, 2013 WL 5570216 (N.D. Tex. Oct. 9, 2013), COA *denied*, *Battaglia v. Stephens*, 621 F. App'x 781 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 803 (2016).

The state court set Battaglia's execution for March 30, 2016. *See State v. Battaglia*, No. F01-52159-H (Crim. Dist. Ct. No. 1, Dallas Co., Tex., Dec. 16, 2015). Battaglia filed a motion to appoint new counsel in state court, which was denied. *See State v. Battaglia*, No. F01-52159-H (Crim. Dist. Ct. No. 1, Dallas Co., Tex., Mar. 2, 2016). Battaglia then filed in this Court a motion to appoint new counsel and motion to stay his execution, which were denied. *See Battaglia v. Stephens*, No. 3:16-cv-00687-B (N.D. Tex., Mar. 18, 2016). The United States Court of Appeals for the Fifth Circuit reversed and granted a stay of execution so that newly appointed counsel (Gregory Gardner) could investigate and file a challenge in the state court to Battaglia's competency to be executed. *See Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. Mar. 30 2016).

On June 10, 2016, Battaglia filed in this Court a motion to appoint co-counsel Michael Mowla. *See Battaglia v. Davis*, No. 3:16-CV-00687-B, doc. 15 (N.D. Tex.). This motion was granted on June 13. *See id.*, No. 3:16-CV-00687-B, doc. 16.

On June 21, Battaglia filed an *ex parte* motion in this Court for leave to proceed *ex parte* to request investigative and expert funding. *See id.*, No. 3:16-CV-00687-B, doc. 17, refiled in *Battaglia v. Davis*, No. 3:16-CV-1687-B, doc. 2 (N.D. Tex.). Although the certificate of service indicated that the motion was served on Respondent's counsel "using the electronic case filing system," doc. 2, 4, Battaglia's counsel filed the motion sealed and *ex parte*, so that it was not actually served on Respondent. Simultaneously with the filing of the motion for leave, Battaglia filed in this court his

ex parte motion for funding of \$19,500 to obtain expert assistance from Diane M. Mosnik, Ph.D., and \$15,000 for investigative assistance from Nicole Van Toorn, a mitigation specialist, doc. 2-2. On June 22, this Court issued a memorandum opinion and order on the motion denying leave to proceed *ex parte* because it had not actually been served on Respondent, but included guidance on the procedures required to proceed *ex parte* and on what would be required to make the showing that funding for the sought services was reasonably necessary to the representation of Battaglia before the state court. *See* Order, doc. 3. This order was originally made *ex parte*, but has been opened to both parties following the filing of the instant motions. Although this order assured Battaglia that “this Court would grant funding that is shown to be reasonably necessary to ‘file an Article 46.05 petition’ in the state court,” Battaglia made no further requests for funding in this Court until the instant motions were filed on January 2, 2018. Order, doc. 3, 3.

On July 21, 2016, Battaglia filed a motion in the state district court for leave to proceed *ex parte* on funding requests. *See* Mot. Inv., App.001-007. In this motion, Battaglia asserted that if the state court chose not to fully fund the litigation so that he may hire the necessary experts, Battaglia would seek a stay of the state court proceedings to return to federal court to secure the funding. *See* Mot. Inv., App.006-007. This motion was accompanied by an *ex parte* motion for funding to obtain the services of the same neuropsychologist and mitigation investigator he mentioned in his motion before this Court. *See* Mot. Inv., App.008-023. In the *ex parte* motion, Battaglia argued that, because of the mitigation investigator’s lower hourly rate, appointing the investigator would “be more cost effective to accomplish this necessary work than if counsel undertakes it.” *See* Mot. Inv., App.011. The motion also asserted that the additional expert and investigative assistance was needed even though trial counsel had previously obtained expert assistance and developed

information concerning Mr. Battaglia's mental health. See Mot. Inv., App.011-012.

On July 29, 2016, the state district court granted \$12,000 for expert assistance of Dr. Mosnik, but denied the motion for funding the mitigation investigator. See Mot. Inv., App.024. Despite the assertion otherwise, see Reply, 8, no further motions for funding were filed in this Court until after the state court proceedings concluded and the current motion was filed on January 2, 2018.

The state court again set Battaglia's execution, this time for December 7, 2016. See *State v. Battaglia*, F01-52159-H (Crim. Dist. Ct. No. 1, Dallas Co., Tex., Aug. 12, 2016). Battaglia's counsel investigated his competency to be executed, utilizing the expert assistance obtained to evaluate Battaglia, and challenging his competence to be executed in state court under Article 46.05 of the Texas Code of Criminal Procedure. See Mot. Inv., App.166. The state court conducted an evidentiary hearing on the claims and ruled that Battaglia had not shown that he was incompetent to be executed. See *State v. Battaglia*, F01-52159-H (Crim. Dist. Ct. No. 1, Dallas Co., Tex., Nov. 18, 2016), Mot. Inv., App.164-177. The CCA affirmed the determination and denied relief. See *Battaglia v. State*, No. AP-77,069, ___ S.W.3d ___, 2017 WL 4168595 (Tex. Crim. App. Sept. 20, 2017).

Subsequently, the state district court again set his execution, this time for February 1, 2018. See *State v. Battaglia*, No. F01-52159-H (Crim. Dist. Ct. No. 1, Dallas Co., Tex., Oct. 30, 2017). Battaglia waited until January 2, 2018, less than a month before the scheduled execution, to file his current motion in this Court to fund investigative assistance, Mot. Inv., doc. 9. At the same time, Battaglia also filed a motion for a stay of his execution to allow his sought investigator additional time, Mot. Stay, doc. 10.

II.

In his motion for funding, Battaglia requests “that the Court authorize his counsel to retain investigative services for further investigation of his *Ford/Panetti* claim as required under 18 U.S.C. § 3599 (2017),” and “that the Court allow \$15,000 for *the mitigation investigation that should have been allowed by the state court.*” Motion, doc. 9, 7 (emphasis added). Battaglia states,

In the proceedings in the state court, Battaglia explained that investigative assistance was reasonably necessary to representation on his execution competency in order 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 information about Battaglia’s background, including environmental and genetic risk-factors by interviewing collateral sources; and (3) collect information about his present rational understanding of his death sentence by interviewing collateral sources, including Battaglia’s family members and others with whom Battaglia communicates.

Mot. Inv., 25. Battaglia argues that a mitigation specialist who could obtain and evaluate this information would have put the evidence from sources other than the experts into perspective. This is important, Battaglia argues, because the state court’s finding that Battaglia was malingering was not supported by the record as asserted by the state court, which apparently relied upon non-expert testimony in making this determination. Therefore, a mitigation specialist who could have obtained additional non-expert information could have produced additional evidence to show that Battaglia was not malingering. See Mot. Inv., 28-30.

III.

Federal law allows a state death row inmate to apply for funds for investigative assistance:

(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).

18 U.S.C. § 3599(f). This Court cannot alone authorize funding in excess of \$7,500, but, when the additional showing is made, may recommend to the chief judge of the circuit or his designee that the excess funding is “necessary to provide fair compensation for services of an unusual character or duration” when that additional showing is made under 18 U.S.C. § 3599(g)(2). “The denial of funding will be upheld when it would only support a meritless claim, when it would only supplement prior evidence, or when the constitutional claim is procedurally barred.” *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (quoting *Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009)) (footnote omitted); see also *Green v. Davis*, No. 3:15-CV-02197-M, 2016 WL 3824415, at *2-*4 (N.D. Tex. July 12, 2016) (denying funding to further develop exhausted claim); *Mamou v. Stephens*, No. CIV. H-14-403, 2014 WL 4274088, at *2 (S.D. Tex. Aug. 28, 2014) (denying investigative funding because “*Pinholster* prohibits a federal court from using evidence that is introduced for the first time” in federal court (quoting *Blue v. Thaler*, 665 F.3d 647, 661 (5th Cir. 2011))).

The availability of funding is limited by the scope of this Court’s review under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Under the AEDPA, if the state court denies the claim on the merits, a federal court may not grant relief unless it first determines that the state court unreasonably adjudicated the claim, as defined in 28 U.S.C. § 2254(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.

Id. In the context of § 2254(d) analysis, “adjudicated on the merits” is a term of art referring to a state court’s disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief, but restricts this Court’s power to grant relief to state prisoners by barring the relitigation of claims in federal court that were not unreasonably denied by the state courts. The AEDPA limits, rather than expands, the availability of habeas relief. See *Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Harrington v. Richter*, 562 U.S. 86, 98 (2011). “This is a ‘difficult to meet,’ and ‘highly deferential standard for evaluating state-court rulings, which demands that state-court rulings be given the benefit of the doubt.’” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court, unless the record before the state court satisfies § 2254(d). “[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.” *Pinholster*, 563 U.S. at 185. The evidence required under § 2254(d)(2) must show that the state-court adjudication “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.”

Because the AEDPA limits evidence that may be considered in making this threshold showing, it indirectly limits the availability of funds for investigative assistance. See *Ward v. Stephens*, No. 3:10-CV-2101-N, 2014 WL 887440, at *11 n.10 (N.D. Tex. Mar. 6, 2014) (finding that it properly denied funding to investigate an exhausted claim because the petitioner “must therefore overcome the limitations in § 2254(d) on the record that was before the state court”); *Mamou*, No. CIV. H-14-403, 2014 WL 4274088, at *4 (finding requested funding for additional factual development not reasonably necessary because “*Pinholster* prevents federal courts from considering facts outside the state-court record.”); *Brown v. Thaler*, No. CV H-09-74, 2011 WL 13115485, at *1 (S.D. Tex. May 23, 2011) (finding that petitioner did not show expert assistance reasonably necessary to grant funding, especially since the record under federal habeas review is limited to the record before the state court.); *Devoe v. Davis*, No. 16-70026, ___ Fed. App’x ___, 2018 WL 341755, *9 (5th Cir. Jan. 9, 2018).

In *Devoe v. Davis*, the inmate sought funding under § 3599 for an investigator to review the state’s expert testimony and provide an affidavit regarding where the State’s expert, A.P. Merillat, “got things wrong.” 2018 WL 341755, *9. In denying the motion, the district court explained that because a state court considered the merits of Devoe’s arguments, federal habeas review is limited to the state court’s record and that any “additional factual development is irrelevant in the adjudication of exhausted claims.” *Id.* The United States Court of Appeals for the Fifth Circuit agreed with the district court, holding that because the state court also reached the merits of the claim sought to be investigated, federal review was similarly limited and would exclude the sought expert testimony.

[A] federal court’s “review under § 2254(d)(1) is limited to the record that was

before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); see *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011) (explaining that “*Pinholster* prohibits a federal court from using evidence that is introduced for the first time” in a federal court in the context of an *Atkins* claim). Thus, even if a federal court granted Devoe’s motion for expert funding, a federal court could not consider any additional facts concerning [the State expert’s] testimony discovered by such [a newly funded] expert. Any awarded funding would be a misallocation of federal resources.

Devoe, 2018 WL 341755, at *10.

IV.

A. Federal Funding to Assist in Presentation to State Court

Despite the admonitions of the United States Court of Appeals for the Fifth Circuit and this Court, and Battaglia’s own representations to the state court, Battaglia made no attempt to obtain federal funding under § 3599 for any sought investigative assistance that was denied by the state court when it could have assisted the experts in making their evaluations and providing evidence to the state court. In granting a stay to allow newly appointed counsel to investigate and present a competency challenge to the state court, the Court of Appeals instructed counsel, “[i]t is the present counsel’s responsibility now appointed to take the case he has—and that may be developed during the time gained—to state court. Fear of not prevailing is no excuse to ignore the state court’s primary right of first decision.” *Battaglia v. Stephens*, 824 F.3d 470, 476 (5th Cir. 2016). This instruction was based on the determination that Battaglia could return and present his challenge to the state court.

Though Battaglia’s *Ford* claim appears to be unexhausted, he may return to state court and file an Article 46.05 petition. As Battaglia notes, there is no procedural barrier or time limit that would prevent him from taking this step. And the plain language of § 3599(e) expressly provides that Battaglia would be entitled to the assistance of federal counsel—supported by federal funding—during this proceeding.

Id. at 474-75. Based on that observation, this Court assured Battaglia that it “would grant funding that is shown to be reasonably necessary to ‘file an Article 46.05 petition’ in the state court,” and provided guidance on what would be required to make that showing in this case. Order, doc. 3, 2-3.

Battaglia’s own motion in the state court referenced these assurances of the availability of federal funding, and expressed his intent to return to federal court for funding if the state court “decides it cannot fully fund the necessary experts, ...” Mot. Inv., App.006. Despite the federal court assurances and his own representations before the state court, Battaglia did not return to this Court to seek funding for the sought investigative assistance that was denied by the state court on July 29, 2016, until 2018, long after the state court concluded its hearing and the Court of Criminal Appeals ultimately denied relief. Battaglia’s current request to fund investigative assistance comes too late to have any impact on the expert evaluations that were made and the testimony that was presented to the state court on November 14-15, 2016. Therefore, it is not being sought “to ‘file an Article 46.05 petition’ in the state court.” Order, 3 (quoting *Battaglia*, 824 F.3d at 474).

B. Funding Additional Evidence for Federal Habeas Review

Instead, the requested funding appears to be sought for the purpose of contesting the state court’s adjudication of his claim. Therefore, this Court must determine whether the sought funding is shown to be “reasonably necessary” under § 3599 for such purpose. Battaglia seeks investigative assistance under 18 U.S.C. § 3599, and a stay of his execution, in connection with the preparation of a habeas petition to challenge the state court determination that he was shown to be incompetent to be executed. He requests funding “for the mitigation investigation that should have been allowed by the state court.” Mot. Inv., 7.

Battaglia made his request in the state court for a mitigation specialist “to perform a number

of services in support and anticipation of” the evaluations by Battaglia’s requested expert. Mot. Inv., App.010. Specifically, in state court, Battaglia requested the mitigation specialist

to obtain and review voluminous records from TCDJ and Mr. Battaglia’s medical records. These records have not been collected or reviewed by any previous counsel. Counsel will also task [the mitigation specialist] with collecting information about Mr. Battaglia’s background (including environmental and genetic risk factors) and present understanding of his death sentence by interviewing collateral sources, including Mr. Battaglia’s family members and others with whom Mr. Battaglia communicates.

Mot. Inv., App.010-011. Battaglia argued that the requested investigation was necessary because a comprehensive mitigation investigation was not reflected in the files of prior counsel, who conducted a mental health investigation but did not develop “a mitigation or mental health profile that addresses Mr. Battaglia’s current competency for execution.” Mot. Inv., App.011. While conceding that prior counsel obtained expert mental health assistance, Battaglia argued that “this was a backwards-looking investigation, and it was not based on a comprehensive record collection or investigation of Mr. Battaglia’s psychosocial history.” Mot. Inv., App.011. The state court granted \$12,000 of the funding Battaglia requested for his neuropsychological expert, but no funding for the mitigation specialist. See Mot. Inv., App.024.

Before the state court, Battaglia also indicated that sought investigative services could be performed by counsel, but at a higher hourly rate. See Mot. Inv., App.011. Counsel also stated that the proposed mitigation investigator “has the experience and training to conduct interviews involving sensitive mental health and background issues that counsel lacks.” See *id.* Although Battaglia argues that any refusal to grant the requested funding would result in the lack of essential evidence and that “these meritorious factual issues will ‘never be heard,’” Mot. Inv., 25, counsel has not revealed in these motions how much of the sought investigation—such as collecting and reviewing

voluminous records, compiling records for the expert, interviewing Battaglia, his family members or others, and organizing a genogram to show Battaglia's family history of mental illness—was actually performed by counsel and co-counsel appointed in this case. Nor does Battaglia indicate whether counsel has already requested or received compensation for such work in any CJA vouchers submitted for payment by this Court. Therefore, Battaglia has not shown what essential investigation was not conducted in time to make a difference to the state court determination, and what remains lacking.

To be reasonably necessary, and not a “misallocation of federal resources,” the sought investigative services must be designed to produce something that could be considered by this Court in the adjudication of a habeas claim that may come before it. *See Devoe*, 2018 WL 341755, at *10. Because the sought investigative assistance comes too late to produce evidence that may be presented to the state court in making the adjudication in question, the limitations of § 2254(d) prevent this Court from considering any evidence obtained from the sought investigative assistance.

The Limitation of § 2254(d)

In his supplemental briefing, Battaglia addresses the question of how this Court could consider any evidence that may be developed by the sought investigator in light of the limitations of 28 U.S.C. § 2254(d). He argues that the relitigation bar of § 2254(d) “is a form of issue preclusion, a doctrine that provides that once a court decides an issue of fact or law necessary to its judgment, the decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” Supp. Br., doc. 12, 8 (citing *Montana v. United States*, 440 U.S. 147, 153 (1979) and *RecoverEdge L.P. v. Pentecost, et al.*, 44 F.3d 1284, 1291 (5th Cir. 1995)). He argues that this doctrine does not apply to preclude the federal court from relitigating state-court

adjudications “where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.” Supp. Br., 8 (quoting *Allen v. McCurry*, 449 U.S. 90, 100 (1980)). He also argues that it would violate due process for this Court to apply the doctrine of issue preclusion to this claim because he did not have a meaningful opportunity to be heard due to the lack of the quality, extensiveness, or fairness of procedures in the prior proceeding. See Supp. Br., 9. Because he did not receive funding at the state-court level for the sought investigator, Battaglia argues that he was not given a “fair shot” at presenting his *Panetti/Ford* claim in the state court and, therefore, did not have a full and fair opportunity to litigate that claim. Supp. Br., 8. Accordingly, he argues that the relitigation bar should not apply. See Supp. Br., 7-11. Battaglia also makes a constitutional argument that without a “full and fair” hearing requirement, deference under § 2254(d) would violate due process. See Supp. Br., 9-10.

Respondent counters that Battaglia received all that he was entitled to under *Ford/Panetti*, and that § 2254(d) is not the same as “issue preclusion.” Respondent points out that Battaglia made a competency challenge in state court with the assistance of an appointed expert, was granted a live evidentiary hearing during which three other experts and one lay witness testified, and the state court considered abundant evidence in adjudicating the competency challenge. See Resp., 37. Respondent also argues that the limitation of § 2254(d) “is not the same as ‘issue preclusion,’ in that the ‘full and fair hearing’ requirement was explicitly removed from the statute by the AEDPA.” Resp., 37-38 (citing *Valdez v. Cockrell*, 274 F.3d 941, 949-50 (5th Cir. 2001)). Respondent continues that the term “adjudication on the merits,” giving rise to AEDPA deference, “refers solely to whether the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons. *It does not speak to the quality of the process.*”

Resp., 38 (quoting *Valdez*, 274 F.3d 950) (emphasis added and citations omitted by Respondent). Therefore, Respondent concludes that the AEDPA and Fifth Circuit precedent foreclose Battaglia's argument.

On this point, Respondent has the better argument. The doctrine of "issue preclusion" is a "precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata." See *Montana*, 440 U.S. at 153. Any argument that it was applied to habeas proceedings under *Townsend v. Sain*, 372 U.S. 293, 312 (1963), and incorporated into the prior version of 28 U.S.C. § 2254(d) would be superseded by the amendments under the AEDPA that "jettisoned all references to a 'full and fair hearing' from the presumption of correctness accorded state court findings." *Valdez*, 274 F.3d at 949.

Regarding Battaglia's constitutional argument that due process includes a "full and fair" hearing requirement, petitioner cites no authority holding that § 2254(d) is a form of issue preclusion that violates due process, and this Court is not aware of any. The Court declines to adopt such a novel theory that would appear to contradict *Valdez*. See also *Hummel v. Davis*, No. 4:16-CV-00133-O, 2018 WL 276331, at *15 (N.D. Tex. Jan. 3, 2018) (rejecting "novel argument" that 2254(d) is a form of issue preclusion that would violate federal due process).

Even so, due process requirements are central to federal court review of such competency determinations. *Ford* and *Panetti* impose procedural due process requirements upon states when an inmate makes a substantial threshold showing of incompetence to be executed which, if violated, could give rise to additional evidentiary development in federal court.

Once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. This protection means a prisoner

must be accorded an “opportunity to be heard,” though “a constitutionally acceptable procedure may be far less formal than a trial.” As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity “appear[ed] to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.” “Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State’s examinations.”

Justice Powell did not set forth “the precise limits that due process imposes in this area.” He observed that a State “should have substantial leeway to determine what process best balances the various interests at stake” once it has met the “basic requirements” required by due process. These basic requirements include an opportunity to submit “evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.”

Panetti v. Quarterman, 551 U.S. 930, 949-50 (2007) (citations omitted) ((quoting *Ford*, 477 U.S., at 424, 426, 427)(Powell, J., concurring)). Once an inmate proves that a state has failed to provide the procedures as required by *Ford* and *Panetti*, he has shown an unreasonable application of clearly established Supreme Court law under § 2254(d)(1), which would then allow a federal court to review the inmate’s incompetency claim without deference to the state court’s decision and receive additional evidence developed by further investigative or expert assistance. This preliminary showing, however, must be made on the record that was before that state court. See *Pinholster*, 563 U.S. at 185.

Battaglia insists, however, that he has not filed, and cannot file, a habeas petition to make this showing until the present motions are granted and the investigation is completed. See Mot. Inv., 24-26; Mot. Stay, doc. 10, 21-31. He argues that to require him to make a showing at this juncture that he may have a viable claim for relief would be to place the cart before the horse. See Mot. Inv., 24. Battaglia’s reasoning, however, would nullify the requirements of § 2254(d).

In his supplemental briefing, Battaglia argues that he has already made the showing required by § 2254(d) in his motion for stay and motion for funding. *See* Supp. Br., 7, 10-11. But neither of those motions mentioned the requirements of § 2254(d). Battaglia's funding motion argues that the state court's determination of facts was deficient in relying primarily on the opinions of an expert that conducted an inadequate evaluation and the opinion of a lay witness that was not qualified. *See* Mot. Inv., 21-23, 27-30. This does not show any deprivation of the procedures required by *Ford* and *Panetti*, or that the state court's determination was based on an unreasonable determination of the facts in light of the record before the state court. Instead, it argues that the requested additional funding may find evidence to show an entitlement to relief because of Battaglia's disagreement with the testimony and opinions relied upon by the state court.

Battaglia's motion for stay also argues that the reasoning of *Harbison v. Bell*, 556 U.S. 180 (2009), and the funding statute, § 3599(e), apply to authorize federal court funding of investigative assistance in state court competency proceedings. *See* Mot. Stay, 21-22. But this Court has already determined that it would have granted whatever funding was shown to be reasonably necessary to assist in that competency proceeding. Order, 3 (citing *Battaglia*, 824 F.3d at 474). No such funding was requested in this Court at any time after the state court denied the requested investigative funding and before the current motions were filed, which is too late to assist in the state court determination.

Battaglia also argues that under the law-of-the-case doctrine, the issue of funding has already been determined in his favor. *See* Mot. Stay, 23-24. But as set forth in Section A above, the opinion of the Court of Appeals addressed the funding needed to assist in making the competency challenge *before the state court*. That opinion did not resolve, or even address, the question of whether

evidence developed in federal court to review the state court's competency decision could be considered under § 2254(d), or whether federal funding would be appropriate to develop new evidence that was not considered by the state court and could not be considered by this Court. Therefore, the law of the case does not foreclose the issue.

Battaglia also argues in his supplemental briefing that this Court may consider evidence that may be developed by the sought investigator despite the limitations of 28 U.S.C. § 2254(d) because *Pinholster* does not limit all federal habeas corpus review to the state court record. See Supp. Br., 11-16. Comparing his motion to a motion for investigative assistance to explore a claim of ineffective assistance of trial counsel for failing to investigate mitigating evidence, Battaglia asserts that the state court's denial of his motion for funding prevented the sought investigative assistance, and that additional investigation could produce evidence that could materially alter the claim and render it unexhausted. Therefore, Battaglia argues that any potential habeas petition may not ultimately present an exhausted claim subject to the limitation of § 2254(d), and this Court could not make that determination until after the investigation is complete and the ultimate claim is presented for consideration in a habeas petition. See Supp. Br., 11-13.

A reasonable necessity is not shown, however, when the claim sought to be investigated is not cognizable or is procedurally barred from federal habeas review. See *Ward*, 777 F.3d at 266. In *Ward*, the Court of Appeals favorably quoted the district court's language that disallowed "factual development in federal court in search for unexhausted claims," noting that such a procedure would "encourage sandbagging in state court to obtain *de novo* review of a petitioner's 'real' claim in federal court." *Ward*, 777 F.3d at 257 n.3. The same reasoning would apply in this case. Funding should not generally be granted for inmates to transform exhausted claims that may be reviewed by the

federal court into unexhausted claims that are procedurally barred from federal habeas review.

More importantly, Fifth Circuit precedent prevents this Court from granting funding and a stay to develop a new claim of incompetence to be executed that would differ from the claim that was presented to the state court making the competency determination to be reviewed. In *Green v. Thaler*, 699 F.3d 404 (5th Cir. 2012), the Court of Appeals instructed that a district court should not entertain a request for expert resources for such a new claim.

We think there is an important distinction between the claim of incompetency that was presented to the state trial court in 2010 and a claim that the petitioner's mental condition today, on the eve of his execution, has deteriorated substantially, such that he is currently incompetent to be executed. The latter claim does not undermine the state courts' conclusion that he was competent to be executed in 2010, as would potentially be the case with what we consider to be an "unexhausted claim." It is simply a new claim. It is one that has not been presented to the state court system, even though state law provides a mechanism for presenting such a claim. Tex. Code Crim. Proc. art. 46.05. We are unwilling to treat this new claim as an unexhausted claim within the meaning of [*Rhines v. Weber*, 544 U.S. 269 (2005)], which would permit the district court to stay his execution pending the state court disposition of this new claim. ***We are even more unwilling to allow the district court to entertain his request for "expert resources."*** Instead, we are convinced that Green's federal court proceedings should come to an end with the disposition of the federal habeas claim relating to the 2010 competency hearing, and any request for a stay of execution on competency grounds should be directed by Green to the state courts, perhaps ancillary to the proceedings contemplated by Article 46.05(e).

Id. at 420 (emphasis added). This binding precedent prevents this Court from granting funding and a stay to develop a new unexhausted claim of incompetence to be executed.

Battaglia also argues that § 3599 should not be interpreted to prohibit funding to further investigate claims adjudicated on the merits under § 2254(d) because that would make § 3599 a "legal fiction" that does not give meaning to the funding statute as a practical matter. Supp. Br., 13-14. This argument fails to recognize that funding was available from this Court at a time when it could have assisted in Battaglia's presentation to the state court and become part of the record that

could be considered under § 2254(d). Further, if Battaglia files a habeas petition that shows *from the state court record* that he was denied the due process requirements of *Ford* and *Panetti*, or otherwise shows that the state court adjudication was based on an unreasonable determination of fact in light of *the evidence presented in the state court proceeding*, then additional funding and evidentiary development may be available. New funding and evidentiary development, however, could have no bearing on that preliminary determination under § 2254(d).

In sum, this Court cannot see how any evidence that may be obtained by the sought investigator could be considered in determining under § 2254(d)(1) whether the state court's record reflects compliance with the procedures required by *Ford* and *Panetti* in adjudicating Battaglia's competency challenge or under § 2254(d)(2) whether the state court's denial of that challenge was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, any grant of funding for such an investigator would appear to be a misallocation of federal funds.

V.

Battaglia also requests a stay of execution to (1) allow a meaningful investigation by the requested mitigation investigator and (2) to allow the Supreme Court time to consider the pending petition that Battaglia has filed there. *See* Mot. Stay, 7. Jurisdiction to grant the requested stay is asserted under *McFarland v. Scott*, 512 U.S. 849, 858 (1994), and the Court of Appeals opinion in *Battaglia*, 824 F.3d at 475. *See* Mot. Stay, 23-27.

This Court agrees that it has jurisdiction to stay Battaglia's execution to allow him to conduct the investigation needed to prepare and file a habeas petition in this Court. "Once a capital defendant invokes his § 3599 right, a federal court also has jurisdiction under 28 U.S.C. § 2251 to

enter a stay of execution to make the defendant's § 3599 right effective." *Battaglia*, 824 F.3d at 475 (internal quotations and citations omitted). Since the requested funding is denied, however, there is no investigation that requires a stay. Therefore, Battaglia's request for a stay that is dependant on the grant of that request for funding is also denied.

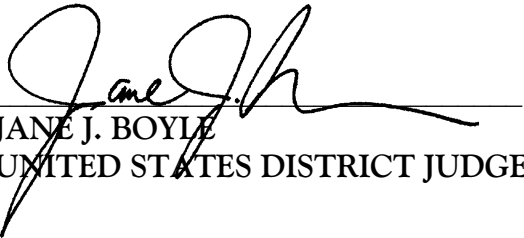
Regarding this Court's jurisdiction to grant a stay to allow the Supreme Court to consider a petition that is before it, Battaglia has not established this Court's jurisdiction to grant such a stay. "When a petitioner seeks a stay of execution pending the disposition of a writ of certiorari in the United States Supreme Court, he should seek that stay in the Supreme Court itself." *Williams v. Cain*, 143 F.3d 949, 950 (5th Cir. 1998) (finding that "[t]he district court lacks the ability to give [the stay of execution] under 28 U.S.C. § 2251"); *Howard v. Dretke*, 157 F. App'x 667, 673 (5th Cir. 2005). Since the prior opinion of the Court of Appeals did not address this basis for jurisdiction, the law of the case does not support jurisdiction in this Court for such relief. Therefore, this basis for jurisdiction fails.

* * *

Battaglia has not shown that the sought investigative assistance is reasonably necessary under 18 U.S.C. § 3599(f), much less that the requested funding in excess of \$7,500 is "necessary to provide fair compensation for services of an unusual character or duration" under § 3599(g) (2). Accordingly, the investigative funding as requested must be denied. Since Battaglia's motion for a stay of execution relies upon the granting of the motion for funding, it must also be denied. Battaglia has shown no other basis for jurisdiction to grant a stay of his execution.

Petitioner John David Battaglia's motion to fund investigator, doc. 9, and for a stay of execution, doc. 10, are **DENIED**.

IT IS SO ORDERED this 24th day of January, 2018.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Activity in Case 3:16-cv-01687-B Battaglia v. Davis-Director TDCJ-CID

Memorandum Opinion and Order

ecf_txnd@txnd.uscourts.gov

Thu 1/25/2018 8:57 AM

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U.S. District Court

Northern District of Texas

Notice of Electronic Filing

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Case Name: Battaglia v. Davis-Director TDCJ-CID

Case Number: [3:16-cv-01687-B](#)

Filer:

Document Number: [15](#)

Docket Text:

MEMORANDUM OPINION AND ORDER denying [9] Motion for Discovery, [10] Application for Stay of Execution, filed by John David Battaglia. (Ordered by Judge Jane J. Boyle on 1/24/2018) (aaa)

3:16-cv-01687-B Notice has been electronically mailed to:

W Erich Dryden erich.dryden@oag.texas.gov, ashley.hodgson@oag.texas.gov, cindy.hodges@oag.texas.gov, laura.haney@oag.texas.gov

Michael Mowla michael@mowlalaw.com, michaelmowla@yahoo.com

Gregory Wayne Gardner gardnerlegal@gmail.com

3:16-cv-01687-B The CM/ECF system has NOT delivered notice electronically to the names listed below. The clerk's office will serve notice of court Orders and Judgments by mail as required by the federal rules. An attorney/pro se litigant is cautioned to carefully follow the federal rules (see FedRCivP 5) with regard to service of any document the attorney/pro se litigant has filed with the court. The clerk's office will not serve paper documents on behalf of an attorney/pro se litigant.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

John David Battaglia,

Petitioner,

v.

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

Respondent

No. 3-16-CV-01687-B

Death Penalty Case

Execution Date – Feb. 1, 2018

**BATTAGLIA’S NOTICE OF APPEAL OF THE
MEMORANDUM OPINION AND ORDER
DENYING FUNDING AND A STAY OF EXECUTION (ECF-15)
ENTERED ON JANUARY 25, 2018**

Petitioner John David Battaglia files this notice of appeal to the United States Court of Appeals for the Fifth Circuit of the MEMORANDUM OPINION AND ORDER DENYING FUNDING AND A STAY OF EXECUTION (ECF-15) entered on January 25, 2018.

Respectfully submitted,

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Attorney for Petitioner

/s/ Michael Mowla
Michael Mowla

Certificate of Service

I certify that on January 25, 2018, this document was served through the ECF system on the Texas Attorney General's Office.

/s/ Michael Mowla
Michael Mowla

THE STATE OF TEXAS §
 §
COUNTY OF DALLAS §

WARRANT OF EXECUTION

TO THE HONORABLE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, HUNTSVILLE, TEXAS -- GREETINGS:

WHEREAS, there was presented into Court an indictment charging John David Battaglia with the offense of capital murder; and

WHEREAS, in the Criminal District Court of Dallas County, Texas, John David Battaglia was duly and legally convicted by a jury of the crime of capital murder upon said indictment and sentenced to death; and the Court having pronounced sentence in the presence of the defendant and his attorneys, as fully appears in the Judgment and Sentence of said Court entered upon the Minutes of the said Court, as follows, to-wit;

JUDGMENT AND SENTENCE ATTACHED

WARRANT OF EXECUTION

Battaglia.wex

NO. F-0152159-WH

THE STATE OF TEXAS

VS.

JOHN DAVID BATTAGLIA

**THIS CASE IS
ON APPEAL**

IN THE CRIMINAL DISTRICT

COURT

OF

DALLAS COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

APRIL TERM, A.D., 2002

JUDGE PRESIDING: JANICE L. WARDER

DATE OF JUDGMENT: 04/30/02

ATTORNEY
FOR STATE: H BLACKMON

ATTORNEY
FOR DEFENDANT: PAUL JOHNSON

OFFENSE
CONVICTED OF: CAPITAL MURDER MULTIPLE

DEGREE: A CAPITAL FELONY

DATE OFFENSE COMMITTED: 05/02/01

CHARGING
INSTRUMENT: INDICTMENT

PLEA: NOT GUILTY

JURY VERDICT: GUILTY

FOREMAN: DAVID HATFIELD

PLEA TO ENHANCEMENT
PARAGRAPH(S): N/A

FINDINGS ON
ENHANCEMENT: N/A

FINDINGS ON THE JURY FINDS THAT DEFENDANT HEREIN USED OR EXHIBITED
DEADLY WEAPON, A DEADLY WEAPON DURING THE COMMISSION OF SAID
BIAS OR PREJUDICE, OFFENSE TO-WIT: A FIREARM.
AND/OR
FAMILY VIOLENCE:

PUNISHMENT
ASSESSED BY: JURY SEE SPECIAL ISSUES ATTACHED HERETO AND INCORPORATED BY
REFERENCE

DATE SENTENCE
IMPOSED: 04/30/02

COSTS: YES

PUNISHMENT AND
PLACE OF

CONFINEMENT: DEATH IN THE INSTITUTIONAL DIVISION DATE TO
OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE COMMENCE: To be determined
AND A FINE OF \$0.00

TIME CREDITED: 05-03-01 TO 04-30-02

RESTITUTION/REPARATION: NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

KP

VOL. 600 PAGE 59

BEEN ADJUDGED GUILTY OF THE ABOVE NAMED OFFENSE, AS SHOWN ABOVE, AND WHOSE PUNISHMENT HAS BEEN ASSESSED BY THE COURT OR THE JURY, AS SHOWN ABOVE, THAT SAID DEFENDANT BE PUNISHED IN ACCORDANCE WITH THE PUNISHMENT SET FORTH ABOVE, AND THAT DEFENDANT SHALL BE DELIVERED BY THE SHERIFF TO THE DIRECTOR OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, OR OTHER PERSON LEGALLY AUTHORIZED TO RECEIVE SUCH CONVICTS FOR THE PUNISHMENT ASSESSED HEREIN, AND SAID DEFENDANT SHALL BE CONFINED FOR THE ABOVE-NAMED TERM IN ACCORDANCE WITH THE PROVISIONS OF LAW GOVERNING SUCH PUNISHMENTS. IT IS FURTHER ORDERED THAT THE DEFENDANT PAY THE FINE, COURT COSTS, COSTS AND EXPENSES OF LEGAL SERVICES PROVIDED BY THE COURT APPOINTED ATTORNEY IN THIS CAUSE, IF ANY, AND RESTITUTION OR REPARATION, AS SET FORTH HEREIN, FOR WHICH LET EXECUTION ISSUE.

DEFENDANT IS HEREBY ORDERED REMANDED TO JAIL UNTIL SAID SHERIFF CAN OBEY THE DIRECTIONS OF THE JUDGMENT.

FOLLOWING THE DISPOSITION OF THIS CAUSE THE DEFENDANT'S FINGERPRINT WAS, IN OPEN COURT, PLACED UPON A CERTIFICATE OF FINGERPRINT. SAID CERTIFICATE IS ATTACHED HERETO AND IS INCORPORATED BY REFERENCE AS A PART OF THIS JUDGMENT.

WHEN REQUIRED, A PRESENTENCE INVESTIGATION WAS CONDUCTED IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF LAW.

DEFENDANT EXCEPTS AND GIVES NOTICE OF APPEAL TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS.

** NO VICTIM IMPACT STATEMENT HAS BEEN RECEIVED BY THE COURT **

COSTS AND EXPENSES OF COURT APPOINTED ATTORNEY IN THE AMOUNT OF \$492.25 TO BE PAID.

*Immediately upon release, defendant must report in person to the Felony Collections Dept., 2nd fl., Rm. C2-3, Crowley Court Bldg., Dallas, TX, for payment arrangement of court ordered costs, fines and/or attorney fees.

THIS CASE IS
ON APPEAL

CLERK OF DISTRICT COURT
FIFTH DISTRICT OF TEXAS
DALLAS, TEXAS
JAN 10 2018
10:00 AM
JAN 10 2018
10:00 AM
JAN 10 2018
10:00 AM

Janice Under

JUDGE PRESIDING

RECORDED
INDEXED
JAN 10 2018
10:00 AM

JUDGMENT
CERTIFICATE OF THUMBPRINT

CAUSE NO. F01-51259H

THE STATE OF TEXAS

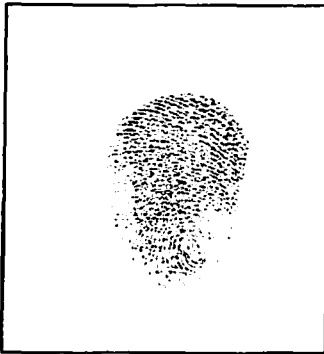
IN THE CRIMINAL

VS.

BATTAGLIA, JOHN D

DISTRICT COURT _____

DALLAS COUNTY, TEXAS



Right
Thumb*



Defendant's Rt hand

THIS IS TO CERTIFY THAT THE FINGERPRINTS ABOVE ARE THE ABOVE-NAMED DEFENDANT'S FINGERPRINTS TAKEN AT THE TIME OF DISPOSITION OF THE ABOVE STYLED AND NUMBERED CAUSE.

DONE IN COURT THIS 24th DAY OF April, 2002.

JP Collard #202
BAILIFF/DEPUTY SHERIFF

*Indicate here if print other than defendant's right thumbprint is placed in box:

☐ left thumbprint

☐ left/right index finger

☐ other, _____

AND WHEREAS, on the 13th day of June, 2005, in trial court No. F01-52159-H, Court of Criminal Appeals No. AP-74,348 the Texas Court of Criminal Appeals issued a mandate affirming the Judgment in *John David Battaglia vs. The State of Texas* as follows, to-wit:

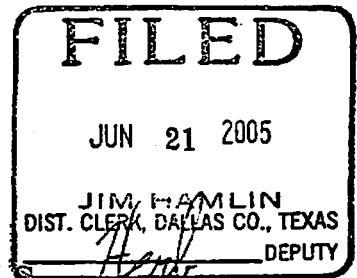
MANDATE ATTACHED

WARRANT OF EXECUTION

Battaglia.wex



688/131



TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

M A N D A T E

THE STATE OF TEXAS,

TO THE CRIMINAL DISTRICT COURT OF DALLAS COUNTY — GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 18th day of MAY, A.D. 2005, the cause upon appeal to revise or reverse your Judgment between:

JOHN DAVID BATTAGLIA

VS.

THE STATE OF TEXAS

CCRA NO. AP-74,348

TRIAL COURT NO. F-0152159-WH

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

WHEREFORE, We command you to observe the Order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE SHARON KELLER,

Presiding Judge of our said COURT OF CRIMINAL APPEALS,

with the Seal thereof annexed, at the City of Austin,

this 13th day of JUNE, A.D. 2005.

TROY C. BENNETT, JR., Clerk

Chief Deputy Clerk

Abel Acosta

APP.041

AND WHEREAS, the Criminal District Court of Dallas County, Texas on the 30th day of October, 2017, did enter an Order Setting Execution Date as set forth in the Minutes of said Court, as follows, to-wit:

ORDER SETTING EXECUTION DATE

ATTACHED

WARRANT OF EXECUTION

Battaglia.wex

CAUSE NO. F01-52159-H

THE STATE OF TEXAS	§	IN THE CRIMINAL
	§	
VS.	§	DISTRICT COURT
	§	
JOHN DAVID BATTAGLIA	§	DALLAS COUNTY, TEXAS

ORDER SETTING EXECUTION DATE

Whereas the Defendant, John David Battaglia, was previously sentenced to death by the Court in the presence of his attorneys; and

It being the duty of this Court to set an execution date in the above numbered and styled cause; the Court now enters the following **ORDER**:

IT IS HEREBY ORDERED that the Defendant, John David Battaglia, who has been adjudged to be guilty of capital murder as charged in the indictment and whose punishment has been assessed by the verdict of the jury and judgment of the Court at Death, shall be kept in custody by the Director of the Texas Department of Criminal Justice, Institutional Division, until the **1st day of February, 2018**, upon which day, at the Texas Department of Criminal Justice, Institutional Division, at some time after the hour of six o'clock p.m., in a room arranged for the purpose of execution, the said Director, acting by and through the executioner designated by said Director, as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the said John David Battaglia

ORDER SETTING EXECUTION DATE

Battaglia/ose

Original

until the said John David Battaglia is dead. Such procedure shall be determined and supervised by the said Director of the Texas Department of Criminal Justice, Institutional Division.

The Clerk of this Court shall issue and deliver to the Sheriff of Dallas County, Texas, a Death Warrant in accordance with this Order, directed to the Director of the Texas Department of Criminal Justice, Institutional Division, at Huntsville, Texas, commanding him, the said Director, to put into execution the Judgment of Death against the said John David Battaglia.

The Sheriff of Dallas County, Texas is hereby ordered, upon receipt of said Death Warrant, to deliver said Warrant to the Director of the Department of Criminal Justice, Institutional Division, Huntsville, Texas.

The Clerk of this Court is ordered to forward a copy of this Order to Defendant's counsel, Michael Mowla, counsel for the State, Jaclyn O'Connor Lambert, and to the Office of Capital and Forensic Writs in Austin, Texas.

SIGNED this 30th day of October, 2017.



**ROBERT BURNS, JUDGE
THE CRIMINAL DISTRICT COURT
DALLAS COUNTY, TEXAS**

ORDER SETTING EXECUTION DATE

Battaglia/ose

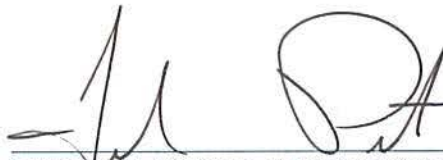
Original

You are hereby commanded to carry into execution the order of execution herein in accordance with this Warrant for the execution of the sentence of death, and in accordance with the Judgment and Sentence of this said Court, shown herein, which I certify to be true and correct copies of the original Judgment and Sentence, Mandate, and Order Setting Execution Date now on file on my office and entered on the Minutes of said Court.

HEREIN FAIL NOT, but due return make of this Warrant showing how you have executed the same.

Given under my hand and seal of the Criminal District Court of Dallas County, Texas, on this

6th day of November, 2017.



FELICIA PITRE, DISTRICT CLERK
DALLAS COUNTY, TEXAS



WARRANT OF EXECUTION

Battaglia.wex

SHERIFF'S RETURN

The above and foregoing Warrant came to hand on the ____ day of November A.D. 2017, and immediately upon receipt, said Warrant was taken to the Texas Department of Criminal Justice, Institutional Division, at Huntsville, Texas, and delivered into the hands of the Director of the Texas Department of Criminal Justice, Institutional Division, and from the said Director a receipt was taken for the said Warrant as follows:

"Received from the Sheriff of Dallas County, Texas, a Warrant for the execution of the Death Sentence to be executed upon John David Battaglia in Cause No. F01-52159-H, in the Criminal District Court of Dallas County, Texas."

Date Signed: _____

Director
Texas Department of Criminal Justice
Institutional Division
Huntsville, Texas

which said receipt I now return to the office of the Clerk of the Criminal District Court of Dallas County, Texas, this _____ day of November, A.D. 2017.

SHERIFF
DALLAS COUNTY, TEXAS

SHERIFF'S RETURN - Solo Page

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**SUPPLEMENTAL REPORTER'S RECORD
VOLUMES 01 OF 01
CAUSE NO. F01-52159-H**

THE STATE OF TEXAS	)	IN THE CRIMINAL
	)	
	)	DISTRICT COURT #1
	)	
VS.	)	OF
	)	
	)	DALLAS COUNTY,
TEXAS	)	
	)	
JOHN DAVID BATTAGLIA	)	<u>DEATH PENALTY CASE</u>

PRETRIAL HEARING

On the 8th day of July, 2016, the
above-styled and numbered cause came on for hearing, and
the following proceedings were heard before the Honorable
Judge Robert Burns, Judge presiding, held in Dallas,
Dallas County, Texas:

Proceedings reported by computerized stenotype
machine; Reporter's Record produced by computer-assisted
transcription.

CRYSTAL R. JONES, TEXAS CSR #8040

Official Court Reporter

The Criminal District Court

214.653.5903

A P P E A R A N C E S**REPRESENTING THE STATE OF TEXAS:**

HONORABLE CHRISTINE WOMBLE
Assistant District Attorney
SBOT #: 24035991
133 North Riverfront Boulevard,
LB 19
Dallas, Texas 75207-4399
(214) 653-3600

-AND-

HONORABLE JACLYN O'CONNOR LAMBERT
SBOT #: 24049262
133 North Riverfront Boulevard,
LB 19
Dallas, Texas 75207-4399
(214) 653-3600

REPRESENTING THE DEFENDANT:

HONORABLE MICHAEL MOWLA
Attorney at Law
SBOT #: 24048680
P. O. Box 868
Cedar Hill, Texas 75106
(972) 795-2401

REPORTER'S RECORD
VOLUMES 01 OF 01
CAUSE NO. F01-52159-H

C H R O N O L O G I C A L I N D E X

JULY 8, 2016

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1 **P-R-O-C-E-E-D-I-N-G-S:**

2 (July 8, 2016; 9:18 a.m.)

3 (Open court, defendant present, no jury)

4 THE COURT: F01-52159, State of Texas against
5 John Battaglia, who is not present in court. Mr. Mowla
6 is present for the Defense.

7 Could the State identify yourselves for the
8 Court, please.

9 MS. WOMBLE: Yes, Your Honor.

10 Christine Womble for the State and Christine
11 O'Connor for the State.

12 THE COURT: Okay. I guess, first, I'll grant
13 Mr. Gardner's pro hac vice motion.

14 And can you get me an order?

15 MR. MOWLA: Yes, Your Honor. May I approach?

16 THE COURT: Yes.

17 MR. MOWLA: There's two copies granting each
18 motion.

19 THE COURT: Okay. You know I've been looking
20 through the Court's file and OnBase is not working very
21 well, and I've been looking through the
22 Defendant's -- has there been -- have you filed any 46.05
23 motion yet? Or has anyone filed on Mr. Battaglia's
24 behalf, other than the request for counsel, has there
25 been any kind of a claim yet in 46.05 in state court?

1 MS. WOMBLE: There is not right now, Your Honor.
2 What we're doing right now is we've requested from the
3 federal court funding so we can obtain the experts
4 necessary for 46.05/4 hearing.

5 THE COURT: Okay. Well, before we get there,
6 though, does not the Defendant have to raise some claim
7 with or without experts that he's not competent to be
8 executed?

9 MR. MOWLA: Well see, Your Honor, in the Fifth
10 Circuit when they stayed the execution he didn't make an
11 allegation, obviously, to actually prove up the 46.05
12 issue. We have to have an expert to do that; that's what
13 we're in the process of; that's why Mr. Battaglia objects
14 to the State's motion, because, you know, not only does
15 the statute in our opinion state that it's our motion to
16 bring, not the State's or courts, the burden is on us.

17 So we're trying to get an expert funded by the
18 federal court to do the expert's job, and then we'll
19 file -- hopefully file a motion. At that point, the
20 State can file a response and request their experts and
21 do whatever else the State deems necessary.

22 THE COURT: Okay. All right.

23 Well, let me hear from the State. What needs to
24 happen next?

25 MS. WOMBLE: First of all, Your Honor, with regards to

1 the request for the appointment of counsel, it's just the
2 State's attempt to try and make the record abundantly
3 clear about who is representing Mr. Battaglia. The Fifth
4 Circuit was clearly concerned about him having been
5 abandoned by Mr. Gross. And to my knowledge, and I've
6 asked the AAG, there has not been a personal order from
7 Mr. Gardner. I know there has been one from Mr. Mowla.
8 The State is just trying to get some clarity.

9 THE COURT: I thought they both were appointed
10 by Jean Royal (phonetic). Were they not?

11 MS. WOMBLE: But that order says the Court
12 appointed Margaret Schmuckner who was replaced by Michael
13 Gross and Gregory Gardner. And then it says we're
14 appointing Mr. Mowla. It doesn't specifically say
15 Mr. Gardner is now his federal counsel.

16 THE COURT: Well, anyway. Okay.

17 MS. WOMBLE: Beyond that, on the issue of
18 funding, I understand the Defense wants to get the
19 funding from federal court. It's my understanding, I've
20 been in contact with the Assistant Attorney General, and
21 the AGs are objecting to the issue of funding.

22 THE COURT: Okay.

23 MS. WOMBLE: And the reality is that this motion
24 is a motion that's going to be tried here in the state
25 court.

1 THE COURT: I agree.

2 MS. WOMBLE: And so this would be something that
3 the State would ask the Court, this court, to do in the
4 interest of justice and judicial economy.

5 THE COURT: And the Court will make funds
6 available for court appointment of experts for the
7 Defendant.

8 MS. WOMBLE: And with regard to the State's
9 ability to file this motion, we would disagree with the
10 interpretation of 46.05. Um, 46.05, the jurisdiction
11 provision, (b), provides that the trial court
12 obtains jurisdiction of the motions filed by or for a
13 defendant over this article. I'm not aware of a case,
14 nor has the Defense pointed to a case that specifically
15 says the State cannot file this motion.

16 THE COURT: Okay.

17 MR. MOWLA: Your Honor, may I respond? The
18 State's saying it's representing -- you know -- it's
19 filed a motion for the Defendant -- well, I'm not sure I
20 understand.

21 THE COURT: And that's -- I don't think that's a
22 point we need to argue. I think what we need to talk
23 about is timelines for things to happen. Because, you
24 know, how many -- it's been three or four months
25 since -- when was the execution date for this?

1 Q MS. WOMBLE: March.

2 THE COURT: So it's been, you know, some period
3 of time and nothing, that I'm aware of, nothing has been
4 filed to raise the 46.05 claim other than the request for
5 counsel in this court that I'm aware of. Now, I could be
6 wrong, because, like I said, my OnBase is -- it's
7 difficult to get through the Court's file, but I don't
8 see that anything has been filed other than the request
9 of counsel and that's been granted.

10 So what's the next thing that's going to happen
11 in order for me to figure out a timeline?

12 MR. MOWLA: Well, Your Honor, you're correct,
13 nothing has been filed as far as a 46.05/4 claim in this
14 court. And Ms. Womble is correct, the Attorney General
15 is opposing a request for funding. But that motion is
16 still pending before the federal court. If the federal
17 court grants it, then we're going to have funding
18 provided by the federal court.

19 Now, you just said, I mean, this is probably the
20 first time I'm hearing this from the Court before I've
21 had some opportunity to address it that the Court will
22 provide funding. We still think, though, that under the
23 statute, the decision to obtain the experts has to be the
24 Defendant's presumed, because it's the Defendant's burden
25 to prove it for you -- or to prove something for you.

1 So I guess what I'm asking, Your Honor -- or
2 should I ask -- is if the Court provides funding, what is
3 the procedure the Court plans to proceed on, who the
4 experts are going to be for this?

5 THE COURT: Well --

6 MR. MOWLA: To my understanding the rule is
7 before the situation the Defendant obtains funding for an
8 expert, the Defendant retains the expert, the expert does
9 what an expert does, then the subsequent 46.05 motion is
10 filed by the Defendant, and then the State can respond
11 and request their are own expert.

12 THE COURT: Well, look. Look, I don't know that
13 you have the right to have an expert appointed and to not
14 initially file the 46.05 motion. I'm sure the
15 Defendant -- you know -- to file the initial motion --
16 now, there might be -- I think you have a right to have
17 an expert appointed after the initial motion is filed.
18 But from my understanding of the record in this case, the
19 Defendant has been over the years examined by more than
20 one mental health expert. And I'm sure there's a lot of
21 records down in TDC also about his mental status that
22 could be brought forward to at least make an initial
23 motion under 46.05 and that has not been done, and I
24 think that's what needs to happen first.

25 And then at that point the Court -- I will make

1 funds available for an expert, but nothing's happened
2 other than a request in this Court, nothing's happened
3 except for appointment of counsel, and we need to have
4 some kind of initial motion and that needs to be done
5 very quickly.

6 MS. WOMBLE: Judge, if I may interject.

7 THE COURT: Go ahead.

8 MS. WOMBLE: Just to let the Court be aware, on
9 February 16th of this year, I sent the TDCJ
10 classification file that I received to Mr. Gross. I
11 forwarded those records to Mr. Mowla and Mr. Gardner on
12 February 22nd, and that's prior to the date that the
13 initial motion for appointment of counsel was filed. On
14 that same day, February 22nd, I also sent Mr. Gardner and
15 Mr. Mowla an expert of an interview that Mr. Battaglia
16 gave to Dallas Morning News, and I believe it was 2014, I
17 sent that to him as well. On February 26th, I e-mailed
18 Mr. Battaglia's medical and mental health file to
19 Mr. Gardner and Mr. Mowla on that day. And Mr. Mowla and
20 I are planning to complete the open file review next
21 week.

22 THE COURT: Okay. Is that all correct?

23 MR. MOWLA: That is correct, Your Honor.

24 THE COURT: Okay. Well, we need to work out
25 some kind of a timeline here for you to file a motion

1 and for the Court to appoint an expert to you. And then
2 I'll need a court expert, I think, if I'm reading the
3 code correctly. And then, of course, the Defendant has
4 to waive any claim of privilege by filing the motion.

5 You know, the State, of course -- the Court
6 intends to appoint a neutral expert. The State also has
7 the right to have, I believe, have him examined as well,
8 correct?

9 MS. WOMBLE: I believe, so.

10 MS. O'CONNOR-LAMBERT: Judge, do you understand
11 what the State's position is actually?

12 THE COURT: Go ahead.

13 MS. O'CONNOR-LAMBERT: I'm not sure you do.
14 It's that the motion is -- there is actually a motion
15 under 46.25 to actually initiate these proceedings. What
16 we're asking, Judge, is to not delay this case any
17 further. They had these records since February. So
18 we're basically saying they have to get funding, they
19 want to delay their defense to get funding. And we're
20 telling you, Hey, let's just go ahead and proceed under
21 46.05 under the State's motion. We'd like two neutral
22 experts appointed under 46.05, which is what the statute
23 provides for, and then he can also get funding for his
24 own expert in anticipation of a competency hearing, and
25 then that way we're not waiting around for them to give

1 him money or not give him money. If he wants to litigate
2 competency if his client is truly incompetent, then let's
3 just go ahead and have him examined.

4 MR. MOWLA: Well, Your Honor -- and, if I may,
5 we're --

6 THE COURT: Just a second. Let me re-read 46.05
7 real quick.

8 (Brief pause in proceedings)

9 THE COURT: Well, clearly, 46.05 (c), the motion
10 must be verified by the elements in person on the
11 Defendant's behalf. I don't think the State is filing a
12 46.05 motion on the Defendant's behalf. I think what
13 needs to happen is that the State needs to file a motion
14 requesting an execution date, some period of time in the
15 future that allows sufficient time for the Defendant to
16 file a motion for experts to be appointed and their
17 records received, and have a hearing and make a
18 determination as to whether or not he's competent.

19 But in the absence I'm going to set a timeline
20 for a motion, an initial motion to be filed, that's not
21 been done. And whether that's a delay tactic or not, I
22 don't know, but I think one has to be done. And I think
23 counsel has an obligation to do that if there's an option
24 of that. And in the absence of that motion, then
25 the -- you know -- the execution date will go forward.

1 MS. WOMBLE: I understand that, Your Honor. And
2 that's the issue that the State has in this case, and
3 that's why we would urge that the State's motion be
4 interpreted as a 46.05 motion. And I understand your
5 concern about section (c), that would be a pleading
6 deficiency. And Caldwell says that you can interpret the
7 substance of the motion -- if you set another execution
8 date we're going to be right back at square one -- and
9 it's just an additional delay.

10 THE COURT: Well, yes, you know, like I said, I
11 think Defense counsel has a duty to file a motion if
12 there's facts to raise that issue. And so setting an
13 execution date, and then dates before then for the motion
14 to be filed -- provided to Mr. Mowla an extensive amount
15 of information that if there was a culpable claim, he
16 could have made that. I would like to hear some
17 proposed, from both sides, proposed dates that all of
18 this can take place and then an execution date. You
19 know, four, five, six months away that allows
20 for -- we've got to do -- assuming he files a proper
21 46.05 motion, then we've got to appoint experts. They've
22 got to have an opportunity to interview the Defendant,
23 and we have to have a hearing. And then there will be
24 some hearing, I'm sure, probably in the Federal District
25 Court, and then certainly in the Fifth Court Of Appeals.

1 All of that needs to take place before an execution, I
2 think, can be completed.

3 And so I think we need to pick an execution
4 date, and we need to have a timeline for them to file
5 their initial motion. And then the Court can appoint
6 experts -- you know -- two, three, four weeks should be
7 enough time for them to file motions since they've had
8 this material for five months now, four and a half, five
9 months. I think that's what needs to happen unless I
10 hear something otherwise. I'm all ears. I mean, you-all
11 tell me.

12 MR. MOWLA: Well, Your Honor, the reason
13 why -- you know -- when you say delay tactic, Your Honor,
14 we file timely motions for filing for an expert in the
15 federal court.

16 THE COURT: You're going to get an expert.
17 There's really no point --

18 MR. MOWLA: Right. Right. That's why I want to
19 address the State's assertion that there's some sort of
20 delay tactic. So --

21 THE COURT: Well, I'm only taking that at face
22 value, and it's certainly not meant towards you're
23 integrity. And I don't really want to go back and forth
24 and tick for tack about who said what. I want to find
25 some date and I want to move forward.

1 MR. MOWLA: If the Court indeed is going to
2 provide funding for an expert, then I think that at least
3 resolves one issue, a major issue. We can file a 46.05
4 motion, and then with that request funding for an expert.
5 And then if that expert can proceed -- you know -- I
6 don't see any delay in the expert proceeding -- then we
7 can come back with the evidence requested from the State,
8 and then we can do whatever the State wants to do.

9 But to suddenly have -- to interpret a State's
10 motion as a motion being filed on behalf of the Defendant
11 or it was like a friend of court motion, I don't think
12 statute supports that at all.

13 MS. WOMBLE: It's a motion for the Defendant
14 trying to initiate these proceedings. Essentially the
15 State is saying, Court, don't make them -- just appoint
16 the experts and go ahead and have them examined. I mean,
17 so what the Court is basically saying right now and what
18 the Defendant is basically saying is, give us time so we
19 can investigate, and then file a motion. And what the
20 State is saying, let's bypass that, and let's go forward
21 and have them examined.

22 THE COURT: Well --

23 MS. WOMBLE: Because that's what the Fifth
24 Circuit wanted.

25 THE COURT: Well, until the motion on his behalf

1 is filed, I don't think you can force him to waive -- the
2 Defendant to waive his privilege. I don't think you can
3 force him to submit to an examination until they file a
4 motion. I don't think you can force him.

5 MR. MOWLA: And we'll file the motion, Your
6 Honor. We'll get the funding from the Court as the Court
7 has indicated the Court will provide, and then we'll move
8 forward. And then the State can file whatever response
9 of pleadings and motions at that point. And then, you
10 know, if we agree to it, we agree to it; and, if not,
11 we'll hear it out.

12 MS. WOMBLE: Does it not matter that this is
13 what the Defense was asking for initially back in
14 February? I mean, wouldn't that count as some sort of
15 waiver of those rights?

16 THE COURT: That's not how I read the statute.

17 MR. MOWLA: Just the way the statute is
18 triggered, just to keep the record clear, I think the
19 Judge is correct on that.

20 So, Judge, I can provide a timeline to file the
21 initial 46.05 motion, with that a request for expert
22 funding. And then the expert will do whatever they need
23 to do, and then we can --

24 THE COURT: Well, I think that -- from my
25 reading of the hearing so to speak from the federal

1 court's order, the federal court is sort of telling me
2 that in the Court's opinion the threshold has been met
3 under 46.05. And so I'm going to ask you to file a 46.05
4 motion within two weeks, and in all likelihood, that's
5 going to be granted. Because I think -- the way I read
6 the federal court's order is that it expects that the
7 hearing will be conducted.

8 And so file one in this first case, and then
9 we'll get to the appointment of experts and set hearings
10 for the determination of whether or not the Defendant is
11 going to be executed.

12 MR. MOWLA: Okay. And, Your Honor, with the
13 initial motion, which will be due on July 22nd, can I go
14 ahead and just request the expert, either separately or
15 within the motion, then present an order for an expert?
16 Or did you want to --

17 THE COURT: Yes, that's fine.

18 MR. MOWLA: Okay.

19 MS. WOMBLE: Judge, I'm not sure if the Court
20 wants or needs any of this, but the State is prepared to
21 provide a list of doctors and psychologists who have had
22 contact in the case.

23 THE COURT: I'll review anything that you
24 submit. I request -- because I keep having OnBase
25 problems, would you-all make sure to give he a courtesy

1 paper copy --

2 MS. WOMBLE: Absolutely, Judge.

3 THE COURT: -- so I can read it.

4 And then I think the Court needs to issue a
5 timeline for things to be done by. I'll expect
6 relatively -- I will expect strict compliance to the
7 timeline, because I think this case deserves that to
8 happen. You know, I'm sure, Mr. Mowla, it's going to be
9 at the top of your list of things to get done.

10 MR. MOWLA: Yes, Your Honor.

11 THE COURT: And we'll figure out expert
12 situations, and the Court is going to appoint experts as
13 well, and then we'll have a hearing on the Defendant's
14 competency.

15 MR. MOWLA: Okay, Your Honor. And, Your Honor,
16 I prepared an order, a proposed order for today's
17 hearing, basically just denying the State's motion for
18 point -- counsel is moot, and then denying the State's
19 motion based on the fact that we haven't filed the actual
20 foreclaim yet, and the trial court within jurisdiction
21 over motions filed prior for defendant over this article.

22 Do you want to review this, or do you want to
23 just --

24 THE COURT: I think I made myself pretty clear a
25 minute ago. I'm going to grant the 46.05 motion as soon

1 as it's filed, and then at that point we're going to
2 appoint experts. So two weeks from today have the motion
3 and it will be granted.

4 MR. MOWLA: And, Your Honor, since OnBase isn't
5 working, I have here our opposition and a new motion pro
6 hac vice and the State's request for appointments. Did
7 you want copies of these for your files?

8 THE COURT: No. I did pull that up, and it's
9 granted.

10 MS. WOMBLE: And, Judge, the last thing that I
11 would ask is just in the event that there's any issue,
12 would the Court be okay in setting an investigative date?

13 THE COURT: Oh, sure. Absolutely. My
14 coordinator is out today, but we would certainly get the
15 setting on that as soon as she returns, you bet.

16 MS. WOMBLE: And the Court is aware, anything I
17 can get, I'll provide to the Defense.

18 THE COURT: Okay. Well, okay. So I'll look at a
19 timeline. Do you-all have any ideas about how long it's
20 going to take -- well, one thing in my mind I was trying
21 to decide was, I guess, at some time we're going to have
22 to bench the Defendant back for the hearing. I mean, I
23 won't be -- do you-all have a feeling for how long it's
24 going to take to -- I mean, do you want the experts to go
25 down there and you have them there, or should we bring

1 him here first? Do you-all have a feeling about that?

2 MS. WOMBLE: I think that bringing him here is
3 probably the most appropriate thing to do, and also
4 depending on that expert that Your Honor appoints, it's
5 certainly going to be easier for them to do that.

6 THE COURT: Okay.

7 MS. O'CONNOR-LAMBERT: Judge, do you want to set
8 this for two weeks from now?

9 THE COURT: Let's go ahead and do that at this
10 point. I think it's taking two or three weeks to bench
11 somebody back from TDC, so we can go from there.

12 MS. WOMBLE: Sure. I can follow-up on Monday to
13 make sure.

14 THE COURT: Okay. Or we can do it Monday.

15 MS. O'CONNOR-LAMBERT: Do you think that having
16 a competency hearing within 30 days of when the motion is
17 filed is a reasonable time length?

18 THE COURT: Well, you can have a hearing in 30
19 days plus two weeks -- is that what you're saying?

20 MS. WOMBLE: Your Honor, I don't think that's
21 reasonable. I mean, again, we don't even have a single
22 expert appointed yet. I mean, the expert -- well, he
23 might be on vacation for a week. He needs time to review
24 the record and go meet with the Defendant.

25 THE COURT: At this point it doesn't seem

1 reasonable.

2 MS. O'CONNOR-LAMBERT: Because it's my
3 understanding it's present competency. It's doesn't have
4 anything to do with --

5 THE COURT: Yes, that's right. That he
6 currently understands why he's facing the punishment he
7 faces.

8 MR. MOWLA: I understand. But I think the
9 experts still need to look at the immediate past record
10 of the Defendant. So, I mean, there's going to be --

11 THE COURT: Well, I think one has been provided
12 to you by the State, those records.

13 MS. WOMBLE: Right. And I think the experts
14 also need to review them as well. That's why I don't
15 think that 30 days to have the actual hearing --

16 THE COURT: Well, we'll see.

17 MR. GUINAN: So just be back here two weeks from
18 today at nine o'clock?

19 MS. WOMBLE: Sure.

20 THE COURT: And I expect your motion to be filed
21 before that date.

22 MR. MOWLA: Yes, sir.

23 THE COURT: Okay. Anything else that we need to
24 take up?

25 MR. MOWLA: No, Your Honor.

1 MS. WOMBLE: No.

2 THE COURT: All right. Thank you.

3 (Off the record)

4 THE COURT: Oh, still on the record.

5 I still -- I mean, I'm not quite sure, because I
6 don't think 46.05 is exactly clear on -- but it still
7 seems appropriate for the State to request another
8 execution date. I mean, it was just that last date was
9 stayed.

10 MS. WOMBLE: And the State can certainly do
11 that. We haven't done that thus far just so all of this
12 can get settled. One of the Fifth Circuit concerns is
13 that the Defense wanted to review the file and likely he
14 will have time to do all that. But that's certainly
15 something we're going to be looking into doing.

16 THE COURT: All right. Thank you.

17 (Proceedings concluded)

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1 THE STATE OF TEXAS * IN THE CRIMINAL
 2 VS. * DISTRICT COURT OF
 3 JOHN BATTAGLIA * DALLAS COUNTY, TEXAS

4 I, Crystal R. Jones, Official Court Reporter in
 5 and for the Criminal District Court No. 1 of Dallas
 6 County, State of Texas, do hereby certify that the above
 7 and foregoing contains a true and correct transcription
 8 of all portions of evidence and other proceedings
 9 requested by counsel for the parties to be included in
 10 this volume of the Reporter's Record, in the above-styled
 11 and numbered cause, all of which occurred in open court
 12 or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
 14 the proceedings truly and correctly reflects the
 15 exhibits, if any, offered by the respective parties.

16 I further certify that the total cost for the
 17 preparation of this volume of the Reporter's Record is
 18 included in the total cost of the transcript shown in the
 19 last volume.

20 /s/ Crystal R. Jones
 21 Crystal R. Jones, CSR
 22 Texas CSR No. 8040
 23 Expiration: 12/31/2016
 24 Official Court Reporter
 25 THE CRIMINAL DISTRICT COURT
 Frank Crowley Courts Building
 133 North Riverfront
 Dallas, Texas 75207
 (214) 653-5903

D I S C L O S U R E

**NOTE: Supreme Court Rule Adopted and
Promulgated in Conformity with Chapter 52 of
the Government Code, V.T.C.A**

**Please be advised that pursuant to Supreme
Court Rule IV, B.5., with regards to disclosure, I, to
the best of my knowledge, have no existing or past
financial, business, professional, family or social
relationships with any of the parties or their attorneys
which might reasonably create an appearance of
partiality, except as follows: NONE.**

/s/Crystal R Jones

CRYSTAL R. JONES, CSR #8040

Expiration: 12/31/16

Criminal District Court #1

Frank Crowley Criminal Courts

133 N. Riverfront Blvd, LB38

Dallas, Texas 75207

CAUSE NO. F01-52159-H

STATE OF TEXAS

v.

JOHN DAVID BATTAGLIA

In the Criminal District Court

No. 1

Dallas County

**DEFENDANT'S MOTION FOR LEAVE TO FILE UNDER SEAL, AND TO LITIGATE
EX PARTE, A MOTION FOR PRE-APPLICATION FUNDS FOR EXPERT AND
INVESTIGATIVE ASSISTANCE**

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CLERK OF DISTRICT COURT
DALLAS COUNTY, TEXAS
[Signature]

The Defendant, John Battaglia, through counsel, respectfully moves this Honorable Court for leave to file under seal, and litigate *ex parte*, a motion for pre-application funds for expert and investigative assistance. In support, Mr. Battaglia submits the following:

Relevant Procedural History

On April 30, 2002, a Dallas County jury sentenced Mr. Battaglia to death. Before his trial, three experts diagnosed Mr. Battaglia as having Bipolar Disorder. After his trial, Mr. Battaglia wrote letters and pleadings to many people and courts. He maintained that loosely defined and ever-changing conspiracies somehow worked to wrongly convict him of capital murder and bury the truth of his innocence to ensure his execution.

After Mr. Battaglia's appeals and habeas litigation had been exhausted, every person who even briefly contacted him knew that a claim about his competency to be executed was ripe. Unfortunately, Mr. Battaglia's federal habeas counsel believed that his 18 U.S.C. § 3599 appointment did not extend to these proceedings. Undersigned counsel was recruited to represent Mr. Battaglia in his subsequent litigation. This Court, at the State's urging, denied counsel's motion for appointment to litigate his *Ford* claim. Because the Court of Criminal Appeals has no jurisdiction to review that judgment, Mr. Battaglia sought certiorari in the United States Supreme Court.

Mr. Battaglia also moved the United States District Court for the Northern District of Texas to appoint Gregory W. Gardner. That court, again at the State's urging, denied Mr. Battaglia's efforts to have counsel before being executed. The United States Court of Appeals for the Fifth Circuit, however, reversed this judgment. It appointed Mr. Gardner as substitute counsel for Mr. Battaglia under 18 U.S.C. § 3599 and stayed Mr. Battaglia's then-pending execution for counsel to have a meaningful opportunity to litigate his *Ford* claims. It reasoned

that Mr. Battaglia had presented a colorable *Ford* claim and, therefore, was statutorily guaranteed appointed counsel. It also directed Mr. Battaglia to return to this Court to litigate the *Ford* claim with federal funding.

As the Fifth Circuit directed, Mr. Battaglia requested funding from the Northern District of Texas for expert services to investigate, develop, and prepare his *Ford* claim. That court denied Mr. Battaglia's motion. It also appointed Michael Mowla as co-counsel for Mr. Battaglia.

Mr. Battaglia has not filed any other pleadings in this Court. But on June 16, 2016, the State filed a motion asking this Court to appoint counsel and experts for Mr. Battaglia's *Ford* application – even though Mr. Battaglia had not filed anything. Mr. Battaglia filed an opposition to that motion on June 29, 2016, arguing, in part, that this Court does not have jurisdiction to act before he filed his application for *Ford* relief. He maintains that position. In response, the Court ordered a hearing on the State's motion. At that hearing on July 8, 2016, the Court informed counsel that it wanted Mr. Battaglia to quickly file a basic *Ford* application, and there was a suggestion that a substantive hearing could be had in 30 days following the appointment of the experts. Mr. Battaglia told the Court that he could not properly investigate and prepare a *Ford* application with such a short timeframe. In response, the Court assured Mr. Battaglia that it would provide funds for his application.

This motion accepts that invitation.

Discussion

I. Mr. Battaglia's request for funding must be sealed and *ex parte* because it reveals confidential work product about upcoming litigation.

The Court is required to provide an indigent capital defendant with sufficient funding to ensure a fair adversarial process. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). In the capital context, it is well established that a

defendant's requests for expert expenses and other investigatory funds are litigated *ex parte*. *Ake*, 470 U.S. at 82-83; *Ex Parte Napper*, 322 S.W.3d 866, 882 (Tex. Crim. App. 2012); *Williams v. State*, 958 S.W.2d 186, 192.94 (Tex. Crim. App. 1997). *Ex parte* litigation ensures that the proceedings satisfy the Due Process Clause and Equal Protection Clause. *See Williams*, 958 S.W.2d at 192-93 ("While the Supreme Court's suggestion that the threshold showing should be made *ex parte* is dicta, it is consistent with the due process principles on which *Ake* rests."); *id.* at 193 n.8 ("When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised.") (quoting *U.S. v. Meriwether*, 486 F.2d 498, 505-06 (5th Cir. 1973)); *Napper*, 322 S.W.3d at 247 ("A defendant with the resources to hire his own expert could hire someone on a consulting-only basis without the State ever discovering that he has done so. Under *Williams* and *Skinner*, an indigent defendant has the same capability.") (citations omitted).

Numerous courts, including the Texas Court of Criminal Appeals, have reasoned that the purpose of proceeding *ex parte* with funding requests is to protect defense theories and privileged work product from unconstitutional pre-trial discovery by the State. *Williams*, 958 S.W.2d at 193-94; *id.* at 194 n.8 (citing numerous examples from other jurisdictions).

Motions challenging a capital prisoner's mental competency to be executed are treated as initial habeas applications because Article 46.05 issues are not ripe for judicial review during initial habeas litigation. *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). Under Texas Code of Criminal Procedure article 11.071(3)(b), capital habeas applicants are entitled to file an *ex parte*, confidential request for the prepayment of funds necessary to secure expert and investigative services "to investigate and present potential habeas corpus claims." *Ibid.* The District Court must grant the funding request if it is reasonable. Art. 11.071(3)(c).

Mr. Battaglia will submit a separate motion specifying the services and funds that are needed to litigate his upcoming *Ford* claims. That motion will be *ex parte* and under seal.

II. Mr. Battaglia's request for funding is properly before this Court before he files his *Ford* motion because he cannot file a sufficient motion that would survive summary dismissal without funding to properly investigate and prepare the basis for the claim.

The Texas Court of Criminal Appeals and the United States Supreme Court have recognized that capital habeas litigants must have funding to secure expert and investigatory services before preparing and filing habeas challenges. *See McFarland v. Scott*, 512 U.S. 849, 856-57 (1994); *Ex Parte Briggs*, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005). Under Article 11.071, habeas applications “must state specific, particularized facts which, if proven true, would entitle [the applicant] to habeas relief.” *Ex Parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 1997) (citations omitted). If applicants fail to satisfy that pleading standard, their habeas claims will be dismissed without further hearings or factual development. Art. 11.071(8); *Ex Parte Medina*, 361 S.W.3d 633, 637-38 (Tex. Crim. App. 2011). When state habeas claims are summarily dismissed for failure to sufficiently plead a claim, the applicant cannot secure habeas relief in federal courts because that claim will be procedurally barred. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). In other words, the applicant will lose the opportunity ever to litigate the habeas claim unless he can show that he is actually innocent. Without funds to meaningfully investigate and prepare habeas claims before filing an application, habeas applicants will not know the appropriate claims to file and the factual bases to support those claims. And even if the applicant knows the claims that are appropriate to file, he cannot sufficiently plead them without investigation to document factual premises and expert assistance to prove claims that are outside the ken of laypersons.

Mr. Battaglia seeks the funding to which he is statutorily entitled before filing his *Ford* challenge. Mr. Battaglia made a colorable showing that he is incompetent to be executed. *Battaglia v. Stephens*, No. 16-70009, 2016 U.S. App. LEXIS 5811, *8 (5th Cir. Mar. 30, 2016). After that showing, he is entitled to funds to investigate and prepare his *Ford* claims before filing it. *Ibid* (“[T]he plain language of § 3599(e) expressly provides that [Mr.] Battaglia would be entitled to the assistance of federal counsel – supported by federal funding – during [his state *Ford* litigation].”). Without expert and investigatory assistance, he cannot plead a sufficient case. It simply cannot be done without a mental health expert. Because Mr. Battaglia is an indigent death-row prisoner, he cannot pay for those experts. And he cannot be placed in a disadvantaged position because he is indigent.

In his sealed, *ex parte* funding motion, Mr. Battaglia will detail the specifics of his requests.

III. If this Court believes that the Fifth Circuit ordered the federal district court to fund Mr. Battaglia’s *Ford* litigation, and this Court chooses not to fully fund the litigation so Mr. Battaglia may hire the necessary experts, then Mr. Battaglia asks this Court to stay these proceedings until he secures that funding.

The Fifth Circuit held that Mr. Battaglia is entitled to federally funded counsel to investigate, prepare, and file his *Ford* claims. *Battaglia*, slip opinion at 8. Based on that ruling, Mr. Battaglia initially sought funding under 18 U.S.C. § 3599(f) in the United States District Court for the Northern District of Texas. He intended to secure funding there before returning to this Court to file his *Ford* challenge. As mentioned above, this Court offered to fund Mr. Battaglia’s litigation, so Mr. Battaglia diverged from his plan to accept that offer. If this Court decides it cannot fully fund the necessary experts, Mr. Battaglia will need to return to federal court for his funding before returning to file his motion. As discussed above, he cannot file his motion until after he receives the funding and has the meaningful assistance of expert and

investigative services. Accordingly, Mr. Battaglia would ask this Court to stay these proceedings until he receives that funding, hires experts, and consults with them about his filing.

Conclusion and Prayer for Relief

For the reasons discussed above, the Defendant, John Battaglia, respectfully asks this Honorable Court to allow him to file his funding requests under seal and litigate them *ex parte*.

Respectfully submitted,

/s/ Gregory W. Gardner
Gregory W. Gardner

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Texas Bar No. 24048680

Certificate of Service

I certify that on July 21, 2016, this motion was served on Christine Womble of the Dallas County District Attorney's Office by email.

/s/ Gregory W. Gardner
Gregory W. Gardner

CAUSE NO. F01-52159-H

STATE OF TEXAS

v.

JOHN DAVID BATTAGLIA

In the Criminal District Court

No. 1

Dallas County

**DEFENDANT'S MOTION FOR PRE-APPLICATION FUNDS
FOR EXPERT AND INVESTIGATIVE ASSISTANCE**

FILED UNDER SEAL AND EX PARTE

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App.078

16 JUL 21 3:56
App.008
18-70002.52

TO THE HONORABLE JUDGE OF THE COURT:

The Defendant, John Battaglia, through counsel, files this motion for appointment of and prepayment for expert and investigative services for his upcoming Texas Code of Criminal Procedure Article 46.05 habeas proceedings. He requests these services under Texas Code of Criminal Procedure Article 11.071(b)(3). In support, Mr. Battaglia states the following:

1. Mr. Battaglia incorporates by reference his simultaneously filed motion for leave to file under seal, and to litigate *ex parte*, a motion for pre-application funds for expert and investigative assistance.

2. The Fifth Circuit held that Mr. Battaglia made a colorable showing of incompetence to be executed. *Battaglia v. Stephens*, -- F.3d --, 2016 U.S. App. LEXIS 5811 (5th Cir. Mar. 30, 2016).

Neuropsychological services

Counsel for Mr. Battaglia requests authorization to retain neuropsychological services from Diane M. Mosnik, Ph.D., a clinical psychologist and neuropsychologist licensed in Texas and Wisconsin. Dr. Mosnik's curriculum vitae is attached as Exhibit A. Counsel intends to use Dr. Mosnik to assist him in developing evidence about Mr. Battaglia's current mental health and form an expert opinion about whether he is competent under the appropriate Eighth Amendment standard. To form her opinion, counsel will ask Dr. Mosnik to review relevant records, Mr. Battaglia's psychosocial history, and witness interviews and to conduct an evaluation that takes around ten hours to comprehensively exam Mr. Battaglia's current mental status. Counsel will also need to consult at length with Dr. Mosnik to prepare an Article 46.05 motion for Mr.

***Ex Parte &
Under Seal***

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Battaglia. Dr. Mosnik will not seek any travel expenses other than the necessary flight expenses for a round-trip visit to the Polunsky Unit, which should not exceed \$2,000. She estimates that the clinical evaluation and record review will take Dr. Mosnik approximately 50 hours. She charges \$350 per hour for most of her services. Accordingly, counsel estimates that Dr. Mosnik's fees and expenses will not exceed \$19,500.

Counsel has sought to retain Dr. Mosnik, in particular, because: (1) she is a neuropsychologist who is qualified to administer neuropsychological instruments that should aid counsel's understanding of Mr. Battaglia's mental functioning more than mere psychological evaluation; (2) she has prior experience in execution-competency cases in Texas, including under the specific state statute pursuant to which Mr. Battaglia will be proceeding; and (3) she has agreed to limit her travel expenses to airfare. Counsel does not consider expenses related to Dr. Mosnik's need to travel unreasonable relative to other options which counsel have considered but deemed less helpful. The prison in which evaluations must occur is situated in Livingston, Texas. Thus, any mental health expert not residing in Livingston, Texas, will incur travel expenses related to conducting an evaluation of Mr. Battaglia. As Dr. Mosnik has agreed to limit her expenses to airfare, it is not expected that her travel expenses will be substantially more than a mental expert residing in Texas would incur.

Mitigation services

Counsel for Mr. Battaglia also requests authorization to retain mitigation services from Nicole VanToorn, a mitigation specialist. Counsel will ask Ms. VanToorn to perform a number of services in support and anticipation of Dr. Mosnik's evaluations. Counsel intends to ask Ms. VanToorn to obtain and review voluminous records from TCDJ and Mr. Battaglia's medical

***Ex Parte &
Under Seal***

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records. These records have not been collected or reviewed by any previous counsel. Counsel will also task Ms. VanToorn with collecting information about Mr. Battaglia's background (including environmental and genetic risk factors) and present understanding of his death sentence by interviewing collateral sources, including Mr. Battaglia's family members and others with whom Mr. Battaglia communicates.

As Ms. VanToorn charges \$100 per hour for her services, counsel concluded that utilizing her services will be more cost effective to accomplish this necessary work than if counsel undertakes it. Moreover, she has the experience and training to conduct interviews involving sensitive mental health and background issues that counsel lacks. Between collecting records, interviewing collateral sources, consulting with counsel and Dr. Mosnik, and traveling, it is estimated that Ms. VanToorn will spend approximately 150 hours of her time on Mr. Battaglia's behalf. Accordingly, counsel estimates that Ms. VanToorn's fees and expenses will not exceed \$15,000.

Based on his review to date, undersigned counsel has concluded that these services are essential to the investigation and preparation of Mr. Battaglia's *Ford* claim. Undersigned counsel collected all files and materials from Mr. Battaglia's prior counsel. None of those counsel developed a mitigation or mental health profile that addresses Mr. Battaglia's current competency for execution. Although trial counsel retained expert assistance and developed information concerning Mr. Battaglia's mental health, specifically his bipolar disorder, this was a backwards-looking investigation, and it was not based on a comprehensive record collection or investigation of Mr. Battaglia's psychosocial history of Mr. Battaglia. Nevertheless, while trial counsel's work will inform Mr. Battaglia's current investigation, it does not obviate the

*Ex Parte &
Under Seal*

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investigation undersigned counsel seeks to conduct. That investigation will be focused on Mr. Battaglia's *current* mental health, how he presently understands his death sentence, and whether that understanding is rational. Neither state nor federal habeas counsel conducted any independent investigation into Mr. Battaglia's background, mental health, or execution competency.¹ Federal counsel sought and received funding for a private investigator to investigate Mr. Battaglia's factual allegations, but she did not seek or receive funding for any mitigation or neuropsychological investigations and evaluations. The funds were not expended to investigate Mr. Battaglia's mental health or background.

Conclusion and Prayer for Relief

The Defendant, John Battaglia, respectfully asks this Honorable Court grant this motion and prepay the funds for the reasonably necessary pre-application expert and investigate assistance as follows:

- Dr. Diane Mosnik for \$19,500.00, and
- Nicole VanToorn for \$15,000.00.

Respectfully submitted,

/s/ Gregory W. Gardner

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641 S Street, N.W. Third Floor
Washington, D.C. 20001

18 U.S.C. § 3599 Counsel For Mr. Battaglia

¹ An execution competency challenge would not have ripe, so such an investigation would not have been reasonably necessary at the time.

***Ex Parte &
Under Seal***

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DIANE M. MOSNIK, PH.D.

Clinical Neuropsychologist, Pediatric & Adult
& Forensic Psychologist

Licensed in the states of Wisconsin (# 2620-57) & Texas (31547)

TEL: 832-483-9732 4dmosnik@gmail.com / drdianemosnik4@hushmail.com

I, Diane M. Mosnik, Ph.D., declare under penalties of perjury that the foregoing information and allegations of this Declaration are true and correct:

Per the Texas state legal standard, a defendant is found incompetent to be executed if the defendant does not understand that he or she is to be executed and that the execution is imminent; and the reason he or she is being executed. Prior decisions by the Courts have pointed out that serious mental disorders can so impact an individual's mental state and cognitive functioning as to distort their understanding of their legal situation. In *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007), the Supreme Court ruled that in order to be found competent, a defendant must have some "rational understanding" of the reason for his execution. "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." The Court explained, "The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question...if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." The Court pointed out that with the symptoms of serious mental illness, there can be a difference between mere awareness and actual understanding. In particular, the Supreme Court concluded that "gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose."

The American Psychological Association's opinion regarding competency to be executed assessments states that individuals suffering from serious mental illnesses can, by the nature of their symptoms, be unable to appreciate truths obvious to others, such as the nature of the death penalty or causal connection between the criminal acts and punishment, and that mental health professionals can reliably assist the courts in identifying prisoners with mental illness who suffer such symptoms that preclude them from understanding the actual reasons for their execution.

The research literature in serious mental disorders, such as schizophrenia and bipolar disorder, have consistently demonstrated cognitive impairments and serious psychiatric symptoms that interfere with and impair an individual's awareness, comprehension, and ability to understand the world around them accurately. Cognitive impairments have been identified in schizophrenia and in bipolar disorder and share some similarities. The cognitive impairments have been shown to exist outside of mood episodes in bipolar disorder (see: Green, M., *J. Clin Psychiatry* 2006; 67(10):e12). In addition, researchers demonstrated the presence of cognitive dysfunction in the areas of verbal memory and executive functioning in groups of individuals suffering from bipolar disorder during episodes of depression, manic or hypomanic episodes, and in euthymic bipolar patients, and indicated that poor neuropsychological test performance was also associated with poor functional outcome (see: Martinez-Aran, A., et al., *Am J Psychiatry* 2004; 161:262-270). Results indicated that verbal learning and memory were impaired in bipolar disorders, independently of clinical state (even in remitted patients), with deficits in encoding and retrieval of verbal information, pointing to the involvement of the frontal regions and medial temporal lobe regions of the brain. Bipolar patients also had significantly lower scores on measures of frontal executive functioning, a region of the brain known to be involved in decision-making, problem-solving, awareness, and competency.

CLIENT NAME: Mr. Battaglia
Requesting Individual: Atty. Gregory Gardner
DOR: 07/20/2016

2

There is also evidence in the scientific literature that a number of clinical factors appear to influence the presence and severity of cognitive impairment in individuals with bipolar disorder, such as the number of mood episodes they have experienced, the frequency and nature of the manic episodes they have experienced, the duration of the illness, and illness severity, for example.

Given this evidence, as a forensic neuropsychologist I believe that it is imperative to thoroughly assess an individual in regards to their mental health and cognitive functioning in order to obtain an accurate clinical diagnosis, should one exist, and to determine the symptoms and severity of that mental illness and the impact of such symptoms on the individual's ability to function and think coherently, as this relates directly to the assessment of one's competence, which involves understanding, comprehension, and rational thinking. As such, as an examiner, I conduct a direct assessment of a client's mental state, psychological functioning, and cognitive functioning via the administration of a battery of standardized test instruments in order to provide the court with objective data about the client's clinical psychiatric diagnosis and level of functioning to determine competency. The direct assessment of the client's psychiatric diagnosis and cognitive functioning typically requires approximately eight to twelve hours of direct client contact, as well as a thorough review of prior medical and mental health records. The use of an investigator to help delineate the client's social history and mental health history will assist the process in helping to clarify the client's psychiatric diagnosis, as well as providing information on other relevant clinical factors known to be associated with level of functioning, as noted above. As an examiner, I have an established hourly rate that is consistent with usual and customary fees for such services. As a rule, I do not bill for any personal expenses or expenses related to travel in relation to conducting the assessment, apart from reimbursement for flight expense, should that be required.

DECLARATION

Under 28 U.S.C. § 1746 and Texas Civil Practice and Remedies Code § 132.001 *et seq.*, I declare under penalties of perjury under the laws of the United States and the State of Texas that my name is Diane M. Mosnik, Ph.D. I am over the age of 18 years, and am competent to make this declaration. My work address is 6110 N. Port Washington Road, Glendale, WI 53217. This document is not a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. I have not been forced to sign this declaration. I declare that under the penalties of perjury that all assertions provided in this document are correct and true.

Executed on July 21, 2016 in Milwaukee County, Texas.



Diane M. Mosnik, Ph.D.

Signed and dated July 21, 2016, at 9:45 a.m.

DIANE M. MOSNIK, Ph.D.
Curriculum Vitae

Full Name: Diane Marie Mosnik, Ph.D.
Citizenship: United States of America

Home Address: 2357 East Bennett Avenue
Milwaukee, WI 53207

Cellular: (832) 483-9732

Personal / Professional Email:

4dmosnik@gmail.com
drdianemosnik4@hushmail.com

Clinical Practice Location:
Diane M. Mosnik, Ph.D., Inc.
with Medical Psychology Associates
6110 North Port Washington Road
Glendale, Wisconsin 53217

Direct Telephone: (832) 483-9732
Office: (414) 962-1000 ext. 475

LICENSURE

Full licensure was obtained in the State of Wisconsin, effective as of July 20, 2006. License # is 2620-057.
Currently active and renewed from 10/2015 – 09/2017.

Full licensure was obtained in the State of Texas, effective as of June 15, 2001. License # is 31547. License
currently active from 04/01/2016 -- 03/31/2017.

PROFESSIONAL APPOINTMENTS

November, 2014 – present **Private Practice- Diane M. Mosnik, PhD, Inc.**
Also partnered with Medical Psychology Associates

January 9, 2012 – October 2014 **ProHealth Care Waukesha Memorial Hospital, Neuroscience Department**
Section of Neuropsychology, Clinical Neuropsychologist

May 18, 2009 – January 6, 2012 **Wheaton Franciscan Healthcare St. Mary's Hospital/All Saints Campus**
Clinical Neuropsychologist

April 24, 2006 – May 1, 2009 **Aurora Healthcare St. Luke's Medical Center**
Clinical Neuropsychologist

FORENSIC WORK

2001 – present

Conduct Neuropsychological and / or Psychological Assessments of
Capacity: Determination of need for guardianship, medical and financial
decision making, competency to stand trial, competency to be
executed, understanding of Miranda rights, and not guilty by reason of
insanity.

Conduct Neuropsychological and / or Psychological Assessments in
Personal Injury Cases (i.e., Traumatic Brain Injury), Independent Medical
Evaluations, Workman's Compensation Insurance Evaluations, and
independent Social Security Disability Insurance Evaluations.

Conduct Neuropsychological and / or Psychological evaluations and
assessments for the establishment of clinical diagnoses for forensic
purposes in Adult, Pediatric and Adolescent Neurologic and Psychiatric
disorders.

Assessments have included determination of adult and pediatric cognitive disability / functioning associated with Neurologic disorders including, but not necessarily limited to, Traumatic Brain Injury, Multiple Sclerosis, Dementia, Epilepsy, as well as Psychiatric disorders including Autism, Asperger's Disorder, Schizophrenia, Bipolar Disorder, Post Traumatic Stress Disorder, Depression, Anxiety, Obsessive Compulsive Disorder, Attention Deficit and Hyperactivity Disorder.

2001 – present

Served as Expert Witness for Federal and State Court Criminal Proceedings in the States of Texas and Wisconsin, associated with capital murder / homicide cases, assault cases, and sexual misconduct cases. I have also been called upon to testify / present information in regards to mitigating circumstances in sentencing hearings.

To Date

I have been hired by the defense team on forensic cases 100% of the time in criminal cases, primarily due to the fact that defense attorneys would typically be the attorneys who would want or need to raise a particular question that I would have the clinical expertise to address, such as questions relating to competency, questions relating to the impact of specific neurological or psychiatric conditions or diagnoses on the criminal act in question, or how specific neurological or psychiatric conditions or diagnoses would affect an individual's cognitive functioning and state of mind in relation to providing mitigating circumstances. I have also been hired in civil cases by both the defendant and the plaintiff. I have been formally deposed five times. I have testified in state and federal court proceedings in the State of Texas and various counties in the State of Wisconsin.

PRIOR ACADEMIC APPOINTMENTS

September, 2000 – April, 2006 **Baylor College of Medicine, Department of Neurology**
Assistant Professor, Licensed, Clinical Neuropsychologist

August, 2004 – July, 2005 **Michael E. DeBakey Veterans Affairs Medical Center**
Department of Neurology
1-year Term Position, Clinical Neuropsychologist

September 1, 2000 – June, 2003 **Baylor College of Medicine, Department of Psychiatry**
Assistant Professor, Licensed, Clinical Neuropsychologist
Secondary Appointment to the Department of Psychiatry

EDUCATION

August, 1998 – August, 2000 **Indiana University School of Medicine, Depts. of Neurology & Psychiatry**
Indianapolis, Indiana, USA, 46202
Two-Year Postdoctoral Fellowship in Clinical Neuropsychology
Research Focus: Neuroimaging and Alzheimer's Disease Research Center

July 1, 1997 – June 30, 1998 **The University of Chicago Hospitals, Department of Psychiatry**
Chicago, IL, USA, 60637
APA Accredited Internship in Clinical Psychology
Specialization in Clinical Neuropsychology

05/1994-05/2000 **Finch University of Health Sciences/The Chicago Medical School**
now known as **The Rosalind Franklin University of Medicine & Science**

North Chicago, IL, USA, 60064

Doctor of Philosophy in Clinical Neuropsychology (Ph.D.), APA Accredited
 Thesis: *Effects of Cigarette Smoking and Withdrawal on Cognitive Performance and Psychopathology in Patients with Schizophrenia Compared to Normal Controls.*

08/1988-05/1994

Finch University of Health Sciences/The Chicago Medical School**North Chicago, IL, USA, 60064****Master of Science in Clinical Neuropsychology**

Thesis: *Phenylalanine loading effects on tardive dyskinesia severity in schizophrenics.*

1984 - 1988

North Dakota State University**College of Science and Mathematics****Fargo, North Dakota, USA, 58105**

Bachelor of Arts

Interdisciplinary Major: Biopsychology, Minor: Zoology

Emphases: Behavioral Neurosciences

RECENT PROFESSIONAL PRESENTATIONS

- 11/19/2015 Sheboygan County Annual Caregiver Conference sponsored by the Alzheimer's Association, including the keynote address entitled, "Reversible & Irreversible Types of Dementia & Their Diagnosis," and two workshops entitled, "Health & Medical Factors Contributing to the Risk & Severity of Dementia," and "Approaches to Communication in Different Types of Dementia."
- 11/06/2015 Dodge/Jefferson County Regional Dementia Conference, presentation, "Information on Supplements & Alternative Treatments for Dementia & Dementia Behaviors (from a non-prescriber)".
- 10/29/2015 Fond du Lac County Annual Caregiver Conference, workshop entitled, "Health & Medical Factors Contributing to the Risk & Severity of Dementia."
- 04/28/2015 Dodge County Dementia Concerns Coalition Spring Caregiver Conference, two workshop presentations including, "The Frontotemporal Dementias," and "Lewy Body Dementia."
- 04/16/2015 St. Francis Home staff presentation, "Behavioral Management & Caregiving: Approaches to Communication in Different types of Dementia."
- 10/30/2014 Fond du Lac County Annual Caregiver Conference, two workshops on the diagnosis of dementia, including, Lewy Body Dementia and The Frontotemporal Dementias.
- 10/30/2014 Fond du Lac Annual Caregiver Conference, two workshops on the diagnosis of dementia, including, Lewy Body Dementia and The Frontotemporal Dementias.
- 10/01/2013 Walworth County's Third Annual Caregiver Conference, "The Importance of Caring for the Caregiver."
- 08/22/2013 ADRC Walworth County Dementia Caregiver Conference, "Frontotemporal and Lewy Body Dementia: How they differ from Alzheimer's Dementia."
- 05/14/2013 ProHealth Care All Medical Staff Conference, "The Autism Spectrum in Children and Adolescents: Neuropsychological Assessment and Diagnosis." Presented with Rebecca Torres, Ph.D.

- 11/15/2012 ADRC Sheboygan County Dementia Caregiver Conference, "Frontotemporal and Lewy Body Dementia: How they differ from Alzheimer's Dementia."
- 11/02/2012 ADRC Racine County Annual Caregiver Conference, "The Importance of Proper Diagnosis & Proper Care for the Patient & the Caregiver in Dementia," Keynote Address.
- 05/21/2012 Presentation for the Alzheimer's Association Dodge & Jefferson County Spring Meeting, "Dementia: A Focus on Frontotemporal & Lewy Body Dementias."
- 03/15/2012 Presentation entitled, "Aggression: Causes & Prevention of Behaviors in Dementia," for the 3rd Annual Spring Conference "Alcohol, Amyloid, and Aggression: Discovering the A's of Alzheimer's Disease," in Manitowoc County, sponsored by Harbor House Memory Care and the Alzheimer's Association
- 02/21/2012 Presentation entitled, "Aggression: Causes & Prevention of Behaviors in Dementia," for the 3rd Annual Spring Conference "Alcohol, Amyloid, and Aggression: Discovering the A's of Alzheimer's Disease," in Kenosha County, sponsored by Harbor House Memory Care and the SE Alzheimer's Association
- 11/15/2011 Dementia and Associated Behaviors. Advanced Dementia Care Conference, Waukesha County Technical College in collaboration with the Alzheimer's Association, SE WI Chapter, at WCTC, 1.5 hours
- 08/25/2011 Frontotemporal Lobar Degeneration. Presented by Diane M. Mosnik, Ph.D. sponsored by The Milwaukee Center for Independence & the Alzheimer's Association
- 07/08/2011 Approaches to Behavioral Challenges Exhibited by Different Types of Dementia: Focus on Frontotemporal Dementia, Vascular, and AD. Presented by Diane M. Mosnik, Ph.D. as part of the Alzheimer's Association Dodge & Jefferson County Meeting
- 05/03/2011 Managing Frontotemporal Dementia. Presented by Malgorzata Franczak, MD & Diane M. Mosnik, Ph.D. for the Wisconsin Network Conference on AD & Related Dementias sponsored by the Alzheimer's Association
- 02/22/2011 Depression: It's Role in Dementia. Presented at the Harbor House Conference on "Diagnosis, Drugs, & Depression: Little Discussed Dementia Issues." Sponsored by the Harbor House Memory Care Group, Best Western Harborside Inn & Kenosha Conference Center, 1 hour
- 02/15/2011 Behavioral Symptoms of Dementia: Focus on Frontotemporal Dementia. Sponsored by the Racine-Kenosha Professional's Dementia Care Network, Alzheimer's Association, Southeast Wisconsin Region, UW-Parkside, 1.5 hours
- 11/16/2010 Behavioral Symptoms of Dementia: Focus on Lewy Body Dementia. Sponsored by the Racine-Kenosha Professional's Dementia Care Network, Alzheimer's Association, Southeast Wisconsin Region, UW-Parkside, 1.5 hours
- 10/14/2010 Dementia and Associated Behaviors. Advanced Dementia Care Conference, Waukesha County Technical College in collaboration with the Alzheimer's Association, SE WI Chapter, at WCTC, 1.5 hours
- 06/04/2010 Behavioral Management in Dementia: Go Back to the Beginning to Shape the Future 20th Annual Aging Well Conference, Alzheimer's Association, UW-Parkside, 1.5 hours

- 02/16/2010 Behavioral Assessments in Dementia: Go Back to the Beginning to Shape the Future, sponsored by the Racine-Kenosha Professional's Dementia Care Network, Alzheimer's Association, Southeast Wisconsin Region, UW-Parkside, 1.5 hours
- 02/11/2010 Patient Autonomy when Decision Making is Questionable, panel presented Matt Moran, Attorney WFH-All Saints, Diane M. Mosnik, Ph.D., Neuropsychologist, Ed Harasim, VP WFH-Ethics & Mission Services, Thomas Vravick, M.D., & Sheryl Hansen, NP for the Grand Rounds: Ethics Care Conference
- 11/17/2009 Dementia: Differential Diagnosis, Treatments, & Research Updates, sponsored by the Racine-Kenosha Professional's Dementia Care Network, Alzheimer's Association, Southeast Wisconsin Region, UW-Parkside, 1.5 hours
- 09/15/2009 Differentiating Dementia: Diagnosis & Treatment, sponsored by the Racine-Kenosha Professional's Dementia Care Network, Alzheimer's Association, Southeast Wisconsin Region, UW-Parkside, 1.5 hours

PRIOR RESEARCH GRANTS / FUNDING

- 2005 Project Titled: *The effect of Aripiprazole on cognitive function in first-episode psychosis*. Primary Investigator with co-investigator, Sara C. Ruppelt, Pharm.D.
Granting Agency: Investigator-Initiated Research Grant from Bristol-Myers Squibb & Co. Amount Awarded: \$ 41,887.60 Date of Award: 05/2005
- 2004 Pilot Project Titled: *Assessment of cognitive function and social cognition in patients with schizophrenia using functional magnetic resonance imaging*.
Co- Investigator with Sara C. Ruppelt, Pharm.D.
Human Neuroimaging Laboratory at Baylor College of Medicine
- 2004 Project Titled: *Assessment of cognitive function and social cognition in patients with ALS using functional magnetic resonance imaging: Differences among patients with normal cognition, subcortical frontal lobe dysfunction, and Frontotemporal dementia*.
Co- Investigator with Paul Schulz, M.D., Reed Montague, Ph.D.
Human Neuroimaging Laboratory at Baylor College of Medicine
- 1998 Project Titled: *A comparison of olanzapine versus typical antipsychotics among schizophrenic smokers: Effects and interactions of smoking behavior, cognitive performance, psychopathology and extrapyramidal side effects*.
Primary Investigator with supervising sponsor,
Granting Agency: Investigator-Initiated Research Grant from Eli Lilly & Co.
Amount Awarded: \$50,700, Contract
Date of Award: 09/1998 – 09/2000

PROFESSIONAL AFFILIATIONS

American Psychological Association, Associate Member
APA Division 12 and Division 40 and 41
International Neuropsychological Society, Associate Member
Midwest Neuropsychology Group, Regular Member
National Academy of Neuropsychology
Houston Neuropsychological Society (past)
Texas Psychological Society (past)

ETHICS MEMBERSHIPS

Wheaton Franciscan Healthcare Regional Ethics Committee member May 2009-January 2012

PUBLICATIONS

ORIGINAL PAPERS

- Schmolck, H.I., Mosnik, D.M., & Schulz, P.E. (2007) *Discrimination of threatening and non-threatening faces in ALS*. Accepted by Neurology.
- Salamone, A.R., Witgert, M., Macias, A., Massman, P., Bradshaw, M., Mosnik, D.M., & Schulz, P.E. (2007) *Behavioral changes in ALS and their relationship to cognitive impairment*. Neurology.
- Ringholz, G.M., Appel, S.H., Bradshaw, M., Cooke, N.A., Mosnik, D.M., & Schulz, P.E. (2005) *Prevalence and patterns of cognitive impairment in sporadic ALS*. Neurology, 65, 586-590.
- Ringholz, G.M., Roebuck, T., Mosnik, D.M., Bradshaw, M., Appel, S.H., & Schulz, P.E. (2005) *Incidence and subtypes of cognitive dysfunction in sporadic ALS*. Neurology, August.
- Kareken, D. A., Mosnik, D.M., Doty, R.L., Dziedzic, M., & Hutchins, G.D. (2003) *Functional Anatomy of Human Odor Sensation, Discrimination, and Identification in Health and Aging*. Neuropsychology, July; 17(3): 482-495.
- Kareken, D.A., Doty, R.L., Moberg, P.J., Mosnik, D.M., Chen, S.H., Farlow, M.R., & Hutchins, G.D. (2001) *Olfactory-evoked Regional Cerebral Blood Flow in Alzheimer's Disease*. Neuropsychology, 15(1): 18-29.
- Gupta, S., Mosnik, D.M., Black, D.W., Berry, S., & Masand, P.S. (1999) *Tardive dyskinesia: Review of treatments past, present, and future*. Annals of Clinical Psychiatry, 11(4): 257-266.
- Mosnik, D.M., Spring, B., Rogers, K., & Baruah, S. (1997) *Tardive dyskinesia exacerbated after ingestion of phenylalanine by schizophrenic patients*. Neuropsychopharmacology, 16(2): 136-146.
- Swayze, V.W., Johnson, V.P., Hanson, J.W., Piven, J., Sato, Y., Giedd, J.N., Mosnik, D.M., & Andreasen, N.C. (1997) *Magnetic resonance imaging of brain anomalies in Fetal Alcohol Syndrome*. Pediatrics, 99(2): 232-240.

ABSTRACTS

- Witgert, M.E., Massman, P.J., Mosnik, D.M., Bradshaw, M.R., & Schulz, P.E. (2006). *Behavioral change in Amyotrophic Lateral Sclerosis*. Poster presented at the Annual International Neuropsychological Society meeting, Boston, MA, 2006.
- Mosnik, D.M., Sterling, L.E., Wheaton, M., Schmolck, H., & Schulz, P.E. (2005). *The dissociation of dysarthria from cognitive dysfunction in ALS*. Poster presented at the Annual International Neuropsychological Society meeting, Boston, MA, 2006.
- Sterling, L.E., Mosnik, D.M., & Schulz, P.E. (2005). *Executive function disorders and ALS: Implications for management of dysarthria and dysphagia*. Accepted Symposium at the annual ASHA convention in San Diego, CA, 2005.
- Schmolck, H., Mosnik, D., Wheaton, M.W., Appel, S.H., Ringholz, G.M., & Schulz, P.E. (2005) *Is the amygdala affected in amyotrophic lateral sclerosis?* Annual Meeting of the FTD-ALS Conference, London, Canada, May, 2005.
- Schulz, P.E., Mosnik, D.M., Appel, S.H., & Ringholz, G.M. (2005) *Characterizing the cognitive deficits in Familial ALS*. American Academy of Neurology Annual Meeting, April, 2005.

- Coerver, K., Mosnik, D.M., McMurray, P., Schulz, P., & Ringholz, G.M. (2004). *Identification of a unique right Frontotemporal dementia that predominantly affects females in a large American kindred*. Annual Meeting of the American Academy of Neurology
- Ringholz, G.M., Mosnik, D.M., Roebuck, T.M., McMurray, P.J., and Appel, S.H. (2002). *Rethinking the cognitive deficits associated with Amyotrophic Lateral Sclerosis: Incidence and subtypes*. Annual Meeting of the American Neurological Association, New York, New York, October 13-16, 2002.
- Kareken, David A., Mosnik, Diane M., Doty, Richard L., Dzemidzic, Mario, & Hutchins, Gary D. (2001) *Functional Anatomy of Olfaction in Normal Aging*. Human Brain Mapping Conference
- Mosnik, Diane M., & Spring, Bonnie. (2000) *Effects of smoking withdrawal and reinstatement on attentional performance of smokers with schizophrenia*. Presented at the annual meeting of the American College of Neuropsychopharmacology, San Juan, Puerto Rico, Dec. 10-14, 2000.
- Beristain, X., Kareken, D.A., Mosnik, D.M., & Unverzagt, F.W. (2000) *The Weigl-R: A brief measure of conceptual reasoning in dementia*. Presented at the International Neuropsychological Society annual meeting, February, 2001.
- Kareken, D.A., Mosnik, D.M., & Doty, R. (2000) *Imaging cortical olfactory processes in healthy normosmic subjects: Sensation versus odor discrimination and identification*. Presented at the International Neuropsychological Society annual meeting, February, 2001.
- Kareken, D.A., Mosnik, D.M., Dzemidzic, M., Lurito, J.T., Radnovich, A., Staser, J.A., Wang, Y., Lowe, M.J., & Mathews, V.P. (2000) *Visual naming in fMRI: A stimulation paradigm that permits monitoring of response accuracy*. Presented at Neurosciences, 2000.
- Mosnik, D.M., Williams, L.S., Kroenke, K., & Callahan, C. (1999) *Somatic and psychological symptoms in post-stroke depression and geriatric depression*. Presented at the American Academy of Neurology 2000 meeting, San Diego, California.
- Mosnik, D.M., Williams, L.S., Welch, R. (2000) *The neuroanatomy of post-stroke depression and quality of life*. Published in the January 2000 issue of *Stroke: A Journal of the American Heart Association*. Presented at the 2000 Meeting of the American Heart Association, 25th Annual International Stroke Conference, New Orleans, LO.
- Kareken, D.A., Doty, R., Mosnik, D.M., Farlow, M., & Hutchins, G. (2000) Laterality of olfaction in healthy aging and Alzheimer disease. Journal of the International Neuropsychological Society, 6(2): 194. Presented at the 2000 Meeting of the International Neuropsychological Society, Dencer, CO.
- Mosnik, D.M., Spring, B., Shekhar, A., Rao, T., & Kareken, D.A. (2000) *Effects of cigarette smoking and abstinence on cognitive performance in patients with schizophrenia relative to healthy smokers*. Journal of the International Neuropsychological Society, 6(2): 219-220. Presented at the 2000 Meeting of the International Neuropsychological Society, Dencer, CO.
- Mosnik, D.M., Tranel, A.P., O'Leary, D.S., & Andreasen, N.C. (1996) *Planum Temporale Asymmetry in Groups Defined by Dichotic Ear Advantage: A Study of Female Schizophrenic Patients and Normal Controls*. Journal of the International Neuropsychological Society, 2(1): 56.
- Mosnik, D.M., Tranel, A.P., O'Leary, D.S., & Andreasen, N.C. (1995) *Planum Temporale Asymmetry in Groups Defined by Dichotic Ear Advantage: A Study of Schizophrenic Patients and Normal Controls*. Journal of the International Neuropsychological Society, 1(2): 184.
25TH Annual Conference of the International Neuropsychological Society, Orlando, FL

- Mosnik, D.M., Spring, B., Rogers, K., Baruah, S., & Waziri, R. (1995) *Phenylalanine loading effects on tardive dyskinesia severity in schizophrenics*. Schizophrenia Research, 15(1,2): 208.
- Mosnik, D.M., O'Leary, D.S., Tranel, A.P., & Andreasen, N.C. (1995) *Left hemisphere language dominance in schizophrenic patients and normal controls: A study of anatomical and functional asymmetries*. Schizophrenia Research, 15(1,2): 30.
- Mosnik, D.M., Tranel, A.P., O'Leary, D.S., & Andreasen, N.C. (1995) *Methodological issues in the measurement of the planum temporale*. Schizophrenia Research, 15(1,2): 93.
- O'Leary, D.S., Kesler, M., Mosnik, D.M., Tranel, A.P., Hurtig, R., Hichwa, R., & Andreasen, N.C. (1995) *Regional cerebral blood flow (rCBF) within heschl's gyrus and the planum temporale in schizophrenic patients and controls during language tasks: An MRI and PET study*. Schizophrenia Research, 15(1,2): 94.
- Mosnik, D.M., Spring, B., Rogers, K., Baruah, S., & Waziri, R. (1994) *Tardive dyskinesia exacerbated following ingestion of phenylalanine by schizophrenic patients*. American College of Neuropsychopharmacology, 33: 121.
- Andreasen, N.C., Flashman, L.A., O'Leary, D.S., Mosnik, D.M., Swayze, V.W., Watkins, G.L., Boles Ponto, L.L., & Hichwa, R.D. (1993) *Gender differences in brain volume and cerebral blood flow (CBF) : A positron emission tomography (PET) and magnetic resonance imaging (MRI) study of normal controls*. Society for Neuroscience Abstracts, 19: 1493.
- Mosnik, D., Tranel, A., Black, J., Flashman, L., O'Leary, D., & Andreasen, N.C. (1994) *Dichotic listening in schizophrenia and its relationship to clinical symptomatology*. Archives of Clinical Neuropsychology, 9(2): 166.
- Tranel, A., Flashman, L., Mosnik, D., Black, J., O'Leary, D., & Andreasen, N.C. (1994) *Right visual field disadvantage seen in schizophrenics in a covert visual attention task*. Archives of Clinical Neuropsychology, 9(2): 193.
- Black, J., Nopoulos, P., Flashman, L., Mosnik, D., Tranel, A., O'Leary, D., & Andreasen, N.C. (1994) *The relationship between visual attention and clinical symptomatology in schizophrenia*. Archives of Clinical Neuropsychology, 9(2): 111.

TEACHING AND ACADEMIC EXPERIENCES: BAYLOR DEPARTMENT OF PSYCHIATRY

2009 – 2012	Consultation and Supervision of Psychology Graduate School Practicum Students and Interns at Wheaton Franciscan Healthcare All Saints Hospital
2010 – 2011	Consultation and Supervision of Neuropsychology Postdoctoral Fellow at Wheaton Franciscan Healthcare All Saints Hospital
2006 - 2009	Consultation and Supervision of Psychology Graduate School Practicum Students and Interns from Marquette and Cardinal Stritch through Aurora
2000 - 2006	Clinical Case Conference
	Peer Consultation and Supervision of Trainees
2002 - 2006	Supervision of Postdoctoral Fellow in Clinical Psychology
2000 - 2003	Assistant Professor, Psychiatry Resident Seminar Instructor
	“Psychological Testing” 5 sessions
2001 - 2003	Assistant Professor, Psychiatry Resident Seminar Instructor
	“Interpersonal Therapy (IPT)” 5 sessions
2000 - 2003	Non-didactic Resident Training: Supervision & teaching of Ben Taub psychiatry residents working in the Intensive Outpatient Program (IOP) (1 hour/week)
2002 - 2004	Non-didactic Clinical Fellow Training at Ben Taub, Psychiatry
	general clinical psychology fellow, annual August - August
2000 - 2003	Lectures: 4 annual local lectures for Baylor Psychology Interns:

	1) Neuropsychological Assessment I: Overview
	2) Neuropsychological Assessment II: Cognitive Assessment
	3) Overlap of Psychiatric and Neurologic Symptoms & Diagnostic Issues
	4) Theories & Methods of Supervision / Consultation
2002 & 2003	Fall Lecture Series on Psychiatric Diagnoses to Texas Women's University
	Master's Program in Occupational Therapy
	(OT 5524 Occupational Adaptation: Adolescence to Adulthood)
1995-1997	Ad hoc Reviewer: American Journal of Psychiatry
1997	Ad hoc Reviewer: Journal of Psychopharmacology

PROFESSIONAL REFERENCES PROVIDED UPON REQUEST

CAUSE NO. F01-52159-H

16 JUL 29 AM 9:28

THE STATE OF TEXAS § IN THE CRIMINAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
V. § DISTRICT COURT OF DALLAS COUNTY, TEXAS
JOHN DAVID BATTAGLIA § DALLAS COUNTY, TEXAS

ORDER ON EX PARTE MOTIONS

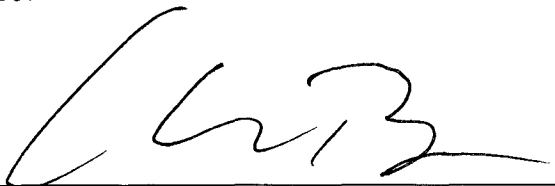
The Defendant has submitted ex parte and confidential motions to the Court. The Court, after considering those motions, hereby makes the following rulings:

The Court hereby GRANTS IN PART, the Defendant's ex parte motion for funds for a mental health professional. The amount, however, is limited to \$12,000 (inclusive of travel expenses should an out of state witness be secured) unless good cause is shown for more funds. The court will pay bills submitted but will not pre-fund an account for said witness.

The Defendant's ex parte motion for funds for a mitigation expert is DENIED.

THIS ORDER AND THE DEFENDANT'S EX PARTE MOTIONS, SHALL BE SEALED IN THE RECORD AND PLACED IN AN ENVELOPE IN THE RECORD AND SHALL BE SEEN BY AND DISTRIBUTED TO DEFENSE COUNSEL AND THE COURT ONLY.

SIGNED this the 29th day of July, 2016.


ROBERT BURNS, JUDGE
CRIMINAL DISTRICT COURT
DALLAS COUNTY, TEXAS