

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

MOTION TO STAY THE EXECUTION

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

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Dated: February 1, 2018

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

Petitioner John David Battaglia respectfully files this Motion to Stay the Execution scheduled for February 1, 2018 at 6:00 p.m. CST:

SUMMARY OF REQUESTED RELIEF

1. Battaglia will request that the Court stay the execution date of February 1, 2018 so that he may pursue the relief requested in the Petition for Writ of Certiorari filed on February 1, 2018

PROCEDURAL HISTORY

2. All citations to the Appendix (“App.”) refer to the Appendix filed with the underlying petition for writ of certiorari that is filed today with this motion.

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

4. On April 30, 2002, Battaglia was sentenced to death. (RR-Trial-56.74-77; CR-Trial-2.318-320).

5. On May 18, 2005, the judgment and sentence were affirmed. *Battaglia v. State*, No. AP-74,348, 2005 Tex. Crim. App. Unpub. LEXIS 47 (Tex. Crim. App. May 18, 2005) (not designated for publication).

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

6. On September 23, 2009, the Texas Court of Criminal Appeals (“TCCA”) adopted the trial court’s findings that Battaglia’s application for writ of habeas corpus under Tex. Code Crim. Proc. Art. 11.071 (2009) be denied. *Ex parte Battaglia*, No. WR-71,939-01, 2009 Tex. Crim. App. LEXIS 1822 (Tex. Crim. App. Sep. 23, 2009) (not designated for publication).

7. On August 19, 2013, the federal magistrate judge recommended that Battaglia’s petition for writ of habeas corpus filed under 28 U.S.C. § 2254 be denied. *Battaglia v. Stephens*, No. 3:09-CV-1904-B, 2013 U.S. Dist. LEXIS 146808 (N.D. Tex. Aug. 19, 2013).

8. On October 9, 2013, the district judge adopted the magistrate judge’s findings and entered an order denying the petition. *Battaglia v. Stephens*, No. 3:09-CV-1904-B, 2013 U.S. Dist. LEXIS 146473 (N.D. Tex., Oct. 9, 2013). On July 15, 2015, the Fifth Circuit denied Battaglia’s certificate of appealability. *Battaglia v. Stephens*, 621 Fed.Appx. 781 (5th Cir. 2015).

9. On January 11, 2016, this Court denied Battaglia’s petition for writ of certiorari. *Battaglia v. Stephens*, No. 15-6548, 2016 U.S. LEXIS 236 (U.S. Jan. 11, 2016).

10. On December 16, 2015, the first execution-date was set for March 30, 2016. (CR1.10-11).

11. On February 22, 2016, undersigned counsel filed a Motion for Appointment of Counsel to Prepare an Article 46.05 Motion (*Panetti*-motion) and a motion to admit Mr. Gardner *pro hac vice*. (CR-Supp-Motion.1-24).

12. On February 29, 2016, the trial court denied both motions. (CR4.1229-1232).

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

14. On March 18, 2016, the federal district court denied the motion. *Id.* at *30.

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

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

17. On October 19, 2016, Battaglia filed a motion under Article 46.05(f) and *Panetti*, and the hearing was held on November 13-14, 2016. (RR1 & RR2).

18. On November 18, 2016, the trial court denied Battaglia's motion. (CR-Supp-Ruling 1-14).

19. On November 21, 2016, Battaglia filed in the TCCA a motion to stay execution, which was granted on December 2, 2016. *Battaglia v. State*, No. AP-77,069 (Tex. Crim. App. Dec. 2, 2016) (per curiam).

20. On September 20, 2017, the TCCA entered its Opinion. *Battaglia*, 2017 Tex. Crim. App. LEXIS 908.

21. Battaglia is set to be executed on February 1, 2018. (App.035-046).

22. On December 13, 2017, Battaglia filed the Petition for Writ of Certiorari.

The Petition presents one Question:

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

Did the lower court misapply this Court's decision in *Panetti*?

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

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

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

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

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

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

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

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

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

MOTION

32. The facts supporting the Petition and this Motion are stated in the Petition.

33. In the Petition filed today, Battaglia asks "Where a state court has deprived a capital habeas applicant of reasonably necessary investigative services to develop the state court record on a material issue related to a *Panetti/Ford* claim,

may a federal court rely on 28 U.S.C. § 2254(d) to deny investigative services under 18 U.S.C. § 3599 to an applicant sought to develop and plead the claim in a federal habeas corpus application?”

34. If this Court is inclined to grant the Petition, Battaglia **cannot** be executed today (February 1, 2018) at 6:00 p.m. because the Question and the arguments made in the Petition obviously will become moot.

35. And, even if this Court were to determine that Battaglia was not entitled to investigative services, as argued in the Petition, he is entitled to proceed with a petition for writ of habeas corpus under 28 U.S.C. § 2254. It is counsel’s duty under 18 U.S.C. § 3599 to provide Battaglia with this legal representation, and thus Battaglia and his counsel should be allowed to do so.

36. For these reasons alone, this Court should grant this Motion.

37. This Court has jurisdiction to consider the Petition and this Motion under 28 U.S.C. § 1254 (2017).

38. Battaglia presents compelling facts and arguments in the Petition filed today and in the Petition filed on December 13, 2017 that show that his rights under the Eighth and Fourteenth Amendments were violated.

39. This Honorable Court has the final say on matters under the United States Constitution.

40. This Court also has the power to stay execution-dates of state death row inmates like Battaglia. *See Rosenberg v. United States*, 346 U.S. 273, 286-287 (1953) (Observing that even a single justice of this Court has the power and duty

to stay the execution of a death sentence if the justice thinks that there is a substantial question to be preserved for further proceedings in the courts.).

41. Here, there is a substantial question to be preserved for further proceedings in this Court.

CONCLUSION AND PRAYER

Battaglia prays that this Court stay the execution date of February 1, 2018 at 6:00 p.m. so that he may pursue the relief requested in the Petition for Writ of Certiorari filed on February 1, 2018 and the Petition filed on December 13, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on February 1, 2018, this motion was served on the following counsel by the method stated.



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