Nos. 15-8699 &15A1000

IN THE
Supreme Court of the United States

JOHN DAVID BATTAGLIA,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Criminal District Court, Dallas County, Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A Texas jury convicted John David Battaglia of capital murder and sentenced him to death for the horrific murders of his daughters Mary Faith and Liberty Battaglia. Both state and federal courts upheld his conviction and sentence throughout the postconviction litigation process. With his execution imminent, Battaglia filed a motion in the convicting court for appointment of counsel with the apparent goal of eventually filing a motion challenging his competency to be executed under Article 46.05 of the Texas Code of Criminal Procedure. Relying on the same evidence that had been developed at trial and during state and federal habeas proceedings—but lacking any indication that he does not understand his impending execution and the reasons therefor—Battaglia argued that he had made a "colorable showing" of incompetency and, thus, due process required that his motion be granted so that he could make the threshold showing of incompetency required under Article 46.05. The trial court denied the motion. Battaglia did not appeal, nor did he ever file a proper motion under Article 46.05. Instead, he sought certiorari review straightaway.

This procedural history gives rise to the following question:

> Should a death-sentenced inmate who (1) deliberately bypasses proper state procedural channels and (2) has not even made a "colorable showing" of incompetency to be executed—much less the "substantial showing" required by *Ford v. Wainwright* and Article 46.05—be constitutionally entitled to the appointment of counsel?

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 2001, Battaglia murdered his daughters while on the phone with his ex-wife, solely as an act of revenge against her. Battaglia was found guilty of the capital offense. During the punishment phase of trial, the defense presented evidence that Battaglia suffers from mental-health problems, including bipolar disorder, but no expert testified that he was insane at the time of the offense or incompetent to assist in his defense. On federal habeas review, Battaglia sent various documents to the federal court which revealed recalcitrance, defiance, and pattern of blaming others for his actions, but again no evidence indicated that he was actually incompetent.

Now, using that same evidence and little else, Battaglia argues that he is incompetent to be executed. In the state trial court, he filed a motion for appointment of counsel, arguing that he made a "colorable showing" of incompetency, and thus, due process entitled him to counsel so that he could make the "substantial showing" required by Texas Code of Criminal Procedure Article 46.05.[1] The trial court denied the motion. Battaglia never asked the court to pass on the constitutional issue. He also deliberately chose not to take an appeal to the Texas Court of Criminal Appeals (CCA); instead, he comes to

[1] Article 46.05 is entitled "Competency to be Executed" and sets forth the exclusive remedy for such claims under state law. *Green v. State,* 374 S.W.3d 434, 439 (Tex. Crim. App. 2012).

this Court, asking for certiorari review of a federal constitutional claim that was never passed on by the state court. Under these circumstances, and because Battaglia has not even made a "colorable showing" of incompetence, certiorari review should be denied.

STATEMENT OF JURISDICTION

28 U.S.C. § 1257(a) states that "[f]inal judgments or decrees rendered by the highest court of the State in which a decision could be had may be reviewed by . . . writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of being repugnant to the Constitution[.]" Here, Battaglia argues that jurisdiction is proper because the state trial court's denial of his motion was not appealable to the CCA. Petition at 1-3. Therefore, "the last state court that could consider the matter is also the only one in which it could be considered—the trial court." *Id.* at 2. But as explained below, the trial court was without subject matter jurisdiction under state law, no appealable final order was entered, and Battaglia never raised the federal question he presses now to that court or the CCA. As a result, this Court lacks jurisdiction.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts of the crime as follows:

> Mary Jean Pearl was married to [Battaglia] for nine years, from 1991 to 2000. They had two daughters, Mary Faith, who was born in January 1992, and Liberty, who was born in January 1995. Throughout their marriage, [Battaglia] was verbally abusive toward Ms. Pearl, and she filed for divorce when she became afraid that [Battaglia] would be physically violent. On Christmas morning 1999, before the divorce was final but during the couple's separation, [Battaglia] went to Ms. Pearl's house to pick up the girls for church. [Battaglia] became angry at Ms. Pearl and attacked and beat her in front of the children. As a result of that incident, [Battaglia] was charged with assault and placed on probation.
>
> [Battaglia's] and Ms. Pearl's divorce was final in August 2000. An Agreed Protective Order was issued at that time which prohibited [Battaglia] from committing family violence against Ms. Pearl or their daughters, and from stalking, threatening, or harassing them. The order also prohibited [Battaglia] from possessing a firearm.
>
> Around Easter 2001, Ms. Pearl received a phone message from [Battaglia] in which he angrily swore at her and called her names. She reported the call to [Battaglia's] probation officer, and a warrant was issued for his arrest. [Battaglia] learned that his case was being considered for a probation revocation and on Wednesday, May 2, 2001, he found out that a warrant had been issued for his arrest. He was assured by a police officer that the warrant would not be executed in front of his children and that he could make arrangements with his lawyer to peacefully turn himself in.
>
> [Battaglia] had plans to have dinner with his daughters that evening. While making plans on the phone about where to eat, [Battaglia] told the girls that he was not very hungry because he might be arrested that night and would not see them again

for a year or more. Ms. Pearl dropped the girls off with [Battaglia] at the agreed meeting place and then went to a friend's house. When she arrived, she received a message that the girls had called and wanted to ask her something. Ms. Pearl dialed [Battaglia's] phone number. [Battaglia] answered the phone, which was on the speaker-phone function, and ordered Mary Faith to "ask her." Mary Faith said, "Mommy, why do you want Daddy to go to jail?" Ms. Pearl began to tell [Battaglia] not to do this to the girls, and then she heard Mary Faith say, "No, daddy, please don't, don't do it." Ms. Pearl yelled into the phone, "Run, run for the door." She heard gunshots, and [Battaglia] scream, "Merry fucking Christmas." After hearing more gunshots, Ms. Pearl hung up and called 911.

The police discovered the girls' bodies in [Battaglia's] apartment. Nine-year-old Mary Faith had three gunshot wounds, including a shot to her back which severed her spinal cord and ruptured her aorta, a contact shot to the back of her head which exited her forehead, and a shot to her shoulder. Either of the first two shots would have been rapidly fatal.

Six-year-old Liberty had four gunshot wounds and a graze wound to the top of her head. One shot entered her back, severed her spinal cord, went through a lung, and lodged in her chest. After losing about one third of her blood, she received a contact shot to her head which passed through her brain, exited her face, and was immediately fatal.

The girls were shot with a semiautomatic pistol which was found near the kitchen phone. Mary Faith's body was found by the phone in the kitchen. Liberty's body was found ten to fifteen feet from the front door.

After shooting his daughters, [Battaglia] went with a girlfriend to a bar and then to a tattoo parlor where he got tattoos related to his daughters. [Battaglia] was arrested next to his truck outside the tattoo parlor. It took four officers to restrain and handcuff him. Officers took a fully loaded revolver from [Battaglia's] truck after his arrest.

> Police recovered two rifles, three shotguns, and a pistol (in addition to the murder weapon) from [Battaglia's] apartment. The morning after the offense, police retrieved an answering machine from Ms. Pearl's house. There were two messages from Mary Faith stating that they had a question and asking Ms. Pearl to call them back. There was also a message from [Battaglia], left after the murders, in which he told the girls goodnight, stated that he hoped they were resting in a different place, that he loved them and that they were very brave, and that he wished they had nothing to do with their mother, that she was "evil and vicious and stupid."

Battaglia v. State, 2005 WL 1208949, *1-*2 (Tex. Crim. App. 2005) (unpublished).

II. Direct Appeal and Postconviction proceedings

Battaglia was convicted and sentenced to death for the murders of his daughters Mary Faith Battaglia and Liberty Battaglia. CR 2, 299, 316-20. The CCA affirmed Battaglia's conviction and sentence in an unpublished opinion. *Battaglia v. State*, No. 74,348, 2005 WL 1208949.

Battaglia filed a state application for writ of habeas corpus in the trial court. SHCR 2. The trial court submitted findings of fact and conclusions of law recommending that Battaglia be denied relief. *Id.* at 494-534. The CCA adopted the trial court's findings and conclusions and denied Battaglia habeas relief. *Ex parte Battaglia*, No. 71,939-01 at cover and Order.

Thereafter, Battaglia filed a federal habeas petition in the federal district court. *Battaglia v. Thaler*, No. 3:09-cv-01904 (N.D. Tex.), DE 27. A magistrate issued findings, conclusions, and a recommendation that the

petition be denied. DE 76. The district court adopted the magistrate's findings, denied Battaglia habeas corpus relief, and denied him a certificate of appealability (COA). DE 81 & 82. Battaglia then filed a COA application in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied Battaglia a COA in an unpublished decision. *Battaglia v. Stephens*, 2015 WL 4257256 (5th Cir. 2015). This Court denied Battaglia certiorari review on January 11, 2016. *Battaglia v. Stephens*, No. 15-6548.

On February 19, 2016, Battaglia filed a motion with the state trial court: "Defendant's Motion for Appointment of Counsel to Prepare Article 46.05 Motion." The State subsequently filed a motion to dismiss but also requested a hearing. On March 2, 2016, the state trial court judge denied Battaglia's motion and the State's request for a hearing. Battaglia deliberately elected *not* to file a motion under Texas Code of Criminal Procedure Article 46.05 directly challenging his competency to be executed, or to appeal to the CCA the convicting court's denial of his motion. Rather, Battaglia filed motions for appointment of counsel and a stay in the federal district court ostensibly with the goal of challenging the Dallas County court's denial of his motion for appointment of counsel. The district court denied his motions. *Battaglia v. Stephens*, No. 3:16-cv-00687-B (N.D. Tex.), Docket Entry (DE) 11. Battaglia appealed that denial to the Fifth Circuit and again requested a stay of execution. *Battaglia v. Stephens*, No. 16-70009. At the same time, Battaglia

appealed the state trial court's denial of his motion for appointment of counsel to this Court and requested a stay of execution. The instant brief in opposition follows.[2]

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted for compelling reasons only. Sup. Ct. R. 10. Battaglia presents no special or important reason in this case, and none exists. First, as discussed below, the order denying Battaglia's motion for appointment of counsel is not a final judgment within the meaning of § 1257(a): the state trial court was without jurisdiction to consider the motion, and the federal question before this Court was never pressed in or passed on by the state courts. Second, Battaglia only sought counsel, arguing that due process allowed for this once he had made a "colorable showing" of incompetence. But neither *Ford*[3] nor *Panetti*[4] impose such a requirement on the states. Finally, Battaglia has not come close to making a "colorable showing," much less meeting the standard announced in *Ford* and codified in Texas Code of Criminal Procedure Article 46.05, that is, he has not made a substantial

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2 The State is also submitting four exhibits with this brief.

3 *Ford v. Wainwright*, 477 U.S. 399 (1986).

4 *Panetti v. Quarterman*, 551 U.S. 930 (2007).

showing that he does not understand (1) his execution is imminent, and (2) the reason he is being executed.

I. This Court is Without Jurisdiction to Consider Battaglia's Federal Constitutional Claim.

In this Court, Battaglia contends that due process requires the appointment of counsel if a death-sentenced inmate has made a "colorable showing" of incompetency to be executed. *See*, *generally*, Petition. While he made the same argument to the state court, he did not do so in a procedurally correct manner, that is, he did not file a motion pursuant to Article 46.05 (which deprived the court of subject-matter jurisdiction) or even ask the trial court to rule on his constitutional claims. He then bypassed the state's highest court altogether.

A. Under state law, the trial court was without subject matter jurisdiction to consider Battaglia's motion.

Although Texas district courts usually have general jurisdiction,[5] this rule does not apply when the cause of action and remedy for its enforcement are derived not from the common law but from a statute. *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084, 1087 (1926), *overruled on other grounds by*, *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000); *GuideOne Ins. Co. v. Cupps*, 207 S.W.3d 900, 904 (Tex. App.—Fort Worth 2006, pet. denied). When

[5] *See* Tex. Gov't Code § 24.008 (West 2015).

the cause of action and remedies for its enforcement are derived from a statute, the statutory provisions are mandatory and exclusive and must be complied with in all respects. *See Mingus*, 285 S.W. at 1087; *GuideOne*, 207 S.W.3d at 904. This is because the power to award relief is an essential component of subject-matter jurisdiction in Texas, and it may be restricted by a statute limiting the kinds of relief that may be rendered in certain kinds of cases. *See Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 645 (1933). Indeed, the authority of the court to act may only be properly invoked by filing a petition alleging a claim falling under the jurisdiction of the court. *TJFA, L.P. v. Texas Comm'n on Envtl. Quality*, 368 S.W.3d 727, 732-33 (Tex. App.—Austin 2012, pet. denied).

Here, Battaglia's cause of action is derived from Article 46.05 of the Texas Code of Criminal Procedure, which creates a cause of action for death-sentenced inmates to establish their incompetency to be executed, and authorizes the trial court to grant several remedies, including a stay of execution. Because Battaglia's cause of action and the remedies for its enforcement are derived from Article 46.05, its provisions are mandatory and exclusive. *See Mingus*, 285 S.W. at 1087; *GuideOne*, 207 S.W.3d at 904. Unless he properly invokes the trial court's subject matter jurisdiction with reference to the statutorily created cause of action in Article 46.05, the trial court is without jurisdiction to consider the application. *See Hughes v. Atlantic*

Refining Company et al., 424 S.W.2d 622, 625 (Tex. 1968); *Morrow*, 62 S.W.2d at 645.

Here, Battaglia failed to invoke the trial court's subject matter jurisdiction with reference to Article 46.05—indeed, he explicitly *disclaimed* application of Article 46.05. Battaglia titled his state court motion: "Defendant's Motion for Appointment of Counsel to Prepare Article 46.05 Motion." The title indicates an intention to file the Article 46.05 motion; it is not an Article 46.05 motion. As the CCA recently determined in an analogous context, this failing is fatal to subject matter jurisdiction:

> *But appellant has not filed an Article 46.05 pleading*, and he has not pointed to any statute that gives this Court jurisdiction to review the trial court's ruling on a freestanding motion such as the one he did file.

Panetti v. State, 2014 WL 6764475, at *1 (Tex. Crim. App. Nov. 25, 2014) (emphasis added).

Because the state district court did not possess subject matter jurisdiction to resolve the federal question Battaglia now asks this Court to resolve, the Court is without jurisdiction to grant certiorari. *See City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) ("A judgment rendered without subject matter jurisdiction cannot be considered final.").

B. In any event, no federal question was pressed or passed on in the state court.

Battaglia argues that the decision of the state trial court was final within the meaning of § 1257(a) because the CCA has held that it lacks jurisdiction to review denials of the motion he filed. Petition at 2. This is true; the court has explained that very clearly. In fact, the CCA enunciated this rule well before Battaglia initiated the instant litigation, as long ago as 2008 and as recently as December 2014.[6] Thus, Battaglia knew full well what the consequences would be if he did not file a proper motion under Article 46.05. And in not doing so, Battaglia has deliberately bypassed constitutional state procedures.

By choosing the route he did, he entirely deprived the CCA of the opportunity to review the lower court's decision and/or correct any errors in its application of Article 46.05. Such action should not be validated by the granting of certiorari review because "it would be unseemly . . . to disturb the finality of state judgments on a federal ground that the state did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 90 (1997); *see also Edelman v. People of State of Cal.*, 344 U.S. 357, 358-59 (1953) ("It is clear that this Court is without power to decide whether constitutional rights have been

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[6] *See Panetti v. State*, 2014 WL 6764475, at *1; *Wood v. State*, 2008 WL 3855534, at *1 (Tex. Crim. App. Aug. 19, 2008).

violated when the federal questions are not seasonably raised in accordance with the requirements of state law.") (internal citations omitted).

II. Due Process, as Defined by *Ford* and *Panetti*, Does Not Require that States Appoint Counsel to Death-Sentenced Inmates so that They May Make a Substantial Showing of Incompetency.

At the heart of Battaglia's petition is his claim that he has made a "colorable showing" of incompetency to be executed and, thus, due process requires the appointment of counsel so that he may make the "substantial showing" required under Article 46.05. But it is well established that "Justice Powell's opinion [in *Ford*] . . . sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim." *Panetti*, 551 U.S. at 949. A petitioner must make a "substantial showing of incompetency," then—and only then—is he entitled to "an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court" and "a 'fair hearing' in accord with fundamental fairness." *Id.* at 948, 949 (quoting *Ford*, 477 U.S. at 424 (Powell, J., concurring in part and concurring in the judgment)). Article 46.05 is but a codification of this,[7] and *Panetti* implicitly approved it.[8]

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[7] *See Ex parte Caldwell*, 58 S.W.3d 127, 129 (Tex. Crim. App. 2000).

[8] 551 U.S. at 951-52.

It is unclear from where Battaglia developed this "colorable showing" standard or even what it means.[9] What is clear is that Battaglia believes a "colorable showing" is an easier standard to meet than a "substantial showing." It is also clear that Battaglia would have this Court guarantee yet another layer of "certain minimum procedures" to "condemned prisoner[s] [who] [do] not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced." *Panetti*, 551 U.S. at 948-49. Specifically, Battaglia would have certain aspects of due process attach *before* they are required even by *Ford*. But as the Fifth Circuit has made clear, the "substantial showing of incompetence" is a permissible threshold under *Ford*. *Green v. Thaler*, 699 F.3d 404, 411-12 (5th Cir. 2012). And the CCA has explained that this is not

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[9] Battaglia may have derived this standard from the Fifth Circuit's decision in *In re Hearn*, 376 F.3d 447 (5th Cir. 2004). There, the court found that Hearn had made a "colorable claim" of intellectual disability "sufficient to justify the appointment of counsel to investigate and prepare a" second federal petition. This was so because 18 U.S.C. § 3599 "does not condition the appointment of counsel on the substantiability or non-frivolousness of petitioner's habeas claim." 376 F.3d at 454-55 (citation omitted). At the same time, however, the court noted that the evidence was "certainly insufficient to establish a prima facie case of mental retardation." *Id.* at 455. Importantly, the Fifth Circuit limited this holding in its opinion on panel rehearing to "a petitioner who: (i) has already filed state and federal petitions; (ii) presently *lacks* [§ 3599] counsel; (iii) may have [28 U.S.C.] § 2244(b)(2)(A) claim based on the previously unavailable, new Supreme Court rule in *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)]; and (iv) to whom *Atkins* may apply." *In re Hearn*, 389 F.3d 122 (5th Cir. 2004). Clearly, Battaglia is in a much different position because there is no requirement (statutory or constitutional) that a death-sentenced inmate receive appointed counsel to raise a claim of incompetency. Further, as the federal district court found, Battaglia has never been without counsel, contrary to his allegations. DE 11 at 3-6. He certainly was not without counsel at the time his claim became ripe, that is, once an execution date was set.

a difficult burden to meet: "making a 'substantial showing' of incompetency to be executed requires something more than presenting 'some evidence' of incompetency, although this threshold burden is less than the final burden of establishing incompetency by a preponderance of the evidence." *Druery v. State*, 412 S.W.3d 523, 539 (Tex. Crim. App. 2013).

Even when discussing due process *after the threshold showing*, the Fifth Circuit has held, "due process does not require a full trial on the merits, but a process that affords the prisoner an 'opportunity to be heard.'" *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (quoting *Ford*, 477 U.S. at 424 (Powell, J., concurring in part and concurring in the judgment)). "Due process is a flexible concept, requiring only 'such procedural protections as the particular situation demands.'" *Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). The States "'should 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." *Panetti*, 551 U.S. at 949-50 (quoting *Ford*, 477 U.S. at 427 (Powell, J., concurring in part and concurring in the judgment)). Here, Texas enacted Article 46.05, which lays out the procedure for raising a competency-to-be-executed claim, and in so doing, tracks the requirements for minimum due process *Ford* established. That it does not allow for the appointment of counsel before a threshold

showing is made does not violate the Eighth Amendment as explained in *Ford* and *Panetti*.

Battaglia did not file an Article 46.05 motion attempting to assert a substantial showing of incompetency to overcome the threshold. Rather, he filed a motion for appointment of counsel, and later, a motion for stay of his execution date, arguing that he had made a "colorable showing" of incompetency and due process entitled to him counsel.[10] But, as the federal district court found, Battaglia has never been without counsel; counsel simply never considered filing an Article 46.05 motion. "The reason appears obvious. Battaglia has been repeatedly examined for mental issues and has never been found incompetent." DE 11 at 8, n.8 (citing Findings, Conclusions and Recommendation, doc. 76, at 3-4, *Battaglia v. Stephens*, No. 3:09-CV-1904-B-BN (N.D. Tex., Aug. 19, 2013)).

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[10] Battaglia's federal constitutional claim—seeking a new rule—is arguably barred by the well-established principles of non-retroactivity. A new rule of constitutional law announced by this Court is not retroactive to convictions that are final unless the rule "place[s] certain kinds of primary individual conduct beyond the power of the States to proscribe" or announces a "watershed" rule of criminal procedure. *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). All other new rules "may not provide the basis for a federal collateral attack on a state-court conviction." *Id.* By his claim, Battaglia seeks to expand the due process requirements announced in *Ford*. Such a holding was not dictated by the precedent in place at the time Battaglia's conviction became final, and he seeks to impose substantial, onerous, implausible, and infeasible burdens on the state. His claim is, thus, arguably *Teague*-barred.

Battaglia's strategy is evident: he cannot satisfy the requirements under Article 46.05, otherwise he would have filed the proper motion. Thus, he decided to bypass the statute altogether, as well as the CCA, and seek a stay—or further delay—on the premise that he *may* be able meet his burden if granted the time and resources. Ironically, as the federal district court also pointed out, Battaglia's underlying incompetency claim is based on trial and postconviction evidence that has been available to him for years. DE 11 at 17 ("Battaglia relies upon expert testimony from his trial in 2002, and on pro se filings and correspondence known to counsel during the pendency of habeas proceedings, dating back to 2009."). He does not, and cannot, identify any recent evidence of true incompetence. Therefore, his last-minute appeal amounts to a fishing expedition. This Court should deny his request.

III. At the End of the Day, Battaglia Simply Cannot Demonstrate that He Is Incompetent to be Executed, Whether Using the "Colorable Showing" He Argues or the "Substantial Showing" Required by *Ford*.

Ultimately, Battaglia does not offer this Court—just as he did not offer the state court or the federal district court—evidence that can surmount the "colorable showing" standard he proposes, much less the threshold of a substantial showing of incompetence. Competency merely requires "a prisoner: (1) "know the fact of [his] impending execution and the reason for it," and (2) "[have a] rational understanding of the reason for the execution," *Ford*,

477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment); *see also Panetti*, 551 U.S. at 958; Tex. Code Crim. Proc. art. 46.05.

Battaglia's underlying incompetency claim is premised on evidence presented at trial of his mental-health issues, genetic risk factors, and his "bizarre pro se filings" on federal habeas review. Petition at 3-10. However, Battaglia does not allege that he lacks an understanding that he is to be executed or an understanding that his execution is imminent. Rather, in asserting that he believes he will be executed for the actions of others, Battaglia admits he is aware that he is to be executed. Indeed, according to Battaglia's Texas Department of Criminal Justice (TDCJ) health records, Battaglia has been refusing to receive treatment for prostate cancer due to his knowledge that he will soon be executed. Exhibit A; Exhibit B (document from UTMB Health, dated April 21, 2014, noting that treatment options for prostate cancer were discussed with Battaglia but that he is considering just observation because he is on death row); Exhibit C at 6 (UTMB notations, dated September 9, 2014, stating "given life expectancy observation is ok"). Thus, Battaglia understands not only that he is to be executed, but also that his execution is imminent.

The most striking aspect of Battaglia's TDCJ records is what they fail to say. In over 600 pages of medical and mental-health records, the only conditions Battaglia is documented to suffer from are prostate cancer, high

blood pressure, and a few other minor ailments such as hemorrhoids and skin rashes. There is not a single notation in the records demonstrating that Battaglia is mentally ill, delusional, divorced from reality, on psychiatric medication, or otherwise does not comprehend his imminent execution. His routine mental health rounds portray a normal and grounded individual. The State recognizes that experts at Battaglia's trial testified that he has bipolar disorder and perhaps other mental-health problems. But if he is truly incompetent to be executed, his TDCJ records should contain some evidence supporting that claim. Instead, they show nothing of the sort. And with respect to the evidence presented at trial, the federal district court correctly pointed out the following:

> Despite the fact that the experts were obtained to evaluate Battaglia's sanity and competency, none of them opined that he was insane at the time of the offense or incompetent to stand trial. In fact, all three of the defense experts agreed that Battaglia knew what he was doing at the time of the murders. And some experts affirmatively testified that he was sane and/or competent.

DE 11 at 12.

Battaglia also contends that the letters and motions he filed on his own behalf in federal court exhibit his lack of understanding as to the reason for his execution. However, the statements in these federal court filings are entirely uncorroborated and, for the most part, mischaracterized. In the

interest of clarity, the State will identify each of these mischaracterizations in the following table:

Cited documents	What Battaglia claims the provision shows	What the document actually shows or does not show
DE 2	"First, Mr. Battaglia believes his daughters were murdered because they were experiments in incestuous reproduction that used his non-incestuous marriage as cover. He believes that the cult responsible for these experiences are connected with the Ku Klux Klan in Dallas and [the] Dallas police, federal agents, and the Dallas District Attorney's Office. All these organizations are part of the cult or conspiring with the cult to avoid its exposure. Mr. Battaglia says that he left this cult in 1999, which started events leading to the murder of his daughters." (Petition at 7) (internal citations omitted).	Battaglia does not state that the cult was responsible for his daughters' murders. He merely discusses the cult in the context of alleging that members of the cult have concealed evidence from his trial. Although Battaglia claims that members of the cult threatened his and his children's lives, he makes no connection between these threats and his daughters' deaths.
DE 14 at 8; DE 8 at 2.	"Additionally, Mr. Battaglia claims that the Internal Revenue Service orchestrated the murder of his daughters because he exposed a criminal conspiracy to evade tax laws between his ex-wife and a Texas state district judge.	Although Battaglia alleges that the IRS had a "role" in the death of his daughters, he does not specify what this role was, much less claim that the IRS orchestrated the murders. While Battaglia states that his ex-wife's actions either "directly or

	He believes that the IRS had his children murdered to frame him. The IRS knew that he would be executed for the crimes, which would marginalize his attempts to expose the criminal conspiracy. Relatedly, Mr. Battaglia believes that his ex-wife, and the mother of his deceased daughters, murdered his daughters because he contacted the IRS about her illegal activities and the resulting unreported income." (Petition at 7) (internal citations omitted).	indirectly" resulted in his daughters' deaths, he does not explain how this happened, nor does he allege that his ex-wife murdered the girls. Battaglia mentions only that his ex-wife threatened to kill him but he does not state that she threatened to kill his daughters. He does not connect his ex-wife's threat to kill him to his daughters' deaths.
DE 14 at 31; DE 62 at 18.	"Third, Mr. Battaglia contends that Ms. Pearle, her lesbian lover, and the Dallas District Attorney were involved in his daughters' murder because Mr. Battaglia saw a video of them sharing cocaine at an Oak Lawn restaurant. Because these individuals are involved in dealing drugs to the rich suburbs of Dallas, they were involved in the murder to keep Mr. Battaglia from informing on them." (Petition at 7-8) (internal citations omitted).	Although Battaglia states that he watched such a video, he makes no connection between his viewing of the video and his daughters' deaths. Moreover, although Battaglia mentions that Ms. Pearle and some of her friends were known cocaine dealers, he does not link these drug activities to the murder of his daughters in any way.
DE 62 at 23.	"At other points in the litigation, Mr. Battaglia seems to blame his first wife	Battaglia neither states nor implies that there is any connection between his first

	for the murders, or, at least, setting in motion parts of the conspiracies that led to the murders." (Petition at 8) (internal citations omitted).	ex-wife, Ms. Laborde-Ghetti, and his daughters' murders. He merely discusses Ms. Laborde-Ghetti in the context of asserting that she lacks credibility.
DE 62 at 5-6	"Additionally, Mr. Battaglia believes that [his trial attorney] Mr. Johnson ordered the jail not to feed Mr. Battaglia." (Petition at 8) (internal citations omitted).	Battaglia does not claim that Mr. Johnson ordered the jail not to feed Battaglia. Rather, Battaglia states that Mr. Johnson ordered that Battaglia be fed only two bologna sandwiches and water per day.
DE 74 at 21-22	"When Mr. Battaglia subsequently reviewed the transcripts for examples of Mr. Johnson's statements to the jury that Mr. Battaglia should be put to death, he was shocked that those statements were not recorded. He then understood the true depths of the conspiracies against him. These powerful figures had altered the record to cover-up Mr. Johnson's malfeasance." (Petition at 8) (internal citations omitted).	Although Battaglia claims that the record of his trial is inaccurate, he does not allege who was responsible for the alteration of the record other than the court reporter or state that the alteration was performed for the purpose of covering up Mr. Johnson's malfeasance.
DE 78 at 28	"Mr. Battaglia also self-reported hallucinations in his writings to courts. Some of the hallucinations were only moderately connected to his case, even though alarming because they are	Battaglia seems to indicate that he initially thought Ms. Pence was a hallucination, but he states that he became certain that she was not.

	still hallucinations. . . . Second, he reported the presence of Irene Pence, the author of a widely publicized book about him, in the courtroom during his trial. Her presence is, of course, not surprising, but Mr. Battaglia reports that he was unsure if she was real." (Petition at 9)	

When the federal district court analyzed this evidence, it determined:

> [The State] adequately rebuts each of Battaglia's assertions regarding the pro se filings and explains that, even if they accurately portray Battaglia's current state of mind, they would not reflect delusions that would so impair Battaglia's concept of reality that he could not reach a rational understanding of the reason for the execution. Battaglia's allegations do not show that such self-serving filings are anything other than attempts to avoid responsibility or make what he perceives to be advantageous legal positions.

DE 11 at 13. The federal district court further held that Battaglia's pro se filings expose repeated efforts to castigate his ex-wife, shift blame to others, and discredit his conviction and sentence, all the while revealing that Battaglia knows his eventual execution will be based on his conviction and sentence for murdering his daughters. *Id.* at 13-14. "Persistent attempts to avoid responsibility and blame others for a horrible crime may make him appear to be out of touch with ordinary human sensibilities, but it does not make him incompetent to be executed." *Id.* at 13.

Contrary to the statements in Battaglia's petition, there is nothing in the available evidence that suggests, much less shows, that Battaglia is incompetent. The following evidence demonstrates that there is no need for this Court to stay Battaglia's execution so that he may investigate an incompetency claim:

- On July 22, 2015, Battaglia wrote a letter to Susan Hawk, the elected Criminal District Attorney for Dallas County. Exhibit D. In the letter, Battaglia requests DA Hawk's assistance in connection with his claim that his trial record was altered or changed. He acknowledges that he may have "defaulted the claims," but nevertheless, respectfully requests assistance from the "Integrity Unit." Battaglia's letter is logical, it is organized, and it includes citations where appropriate.

- In 2014, Battaglia was interviewed by Dallas Morning News reporter Sarah Mervosh. In the interview, Battaglia states that he does not "feel like [he] killed [his daughters]." Contrary to the statements in his petition, however, he does not allege that "separate conspiracies somehow converged to form some super-conspiracy to kill his daughters and have him executed."[11] Petition at 6-7. An additional clip of this interview was published on the NBC DFW website on February 21, 2014.[12] As above, while Battaglia exhibits considerable anger at times, he makes no mention of conspiracies, and he does not appear to be suffering from any delusions.

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[11] *See interview,* https://www.youtube.com/watch?v=UaU79hjGrjs (last visited March 28, 2016).

[12] *See Jailhouse Interview with Man on Death Row for Shooting, Killing Daughters*, http://www.nbcdfw.com/news/local/Jailhouse-Interview-With-Man-Sentenced-to-Death-for- Shooting-Killing-Daughters-246634031.html (last visited March 28, 2016).

- Battaglia's TDCJ classification file contains no information to suggest that he is delusional or experiencing any mental distress. Indeed, the records reflect that Battaglia is functioning well in prison. He has not been involved in any staff assaults, inmate assaults, or any incidents. Battaglia routinely communicates with TDCJ officials in writing to add and delete names from his approved visitor list. He routinely orders food and hygiene products through the commissary.

- As stated, Battaglia's TDCJ medical/mental health records contain no information to suggest that he is delusional or experiencing any mental distress. According to these records, Battaglia routinely communicates his needs to TDCJ staff and requests medical and dental treatment when necessary. There is nothing in these records that shows that Battaglia is currently under the care of a mental health professional or is taking any kind of psychiatric medications.

In sum, the available evidence does not come close to suggesting Battaglia is incompetent to be executed. The fact that Battaglia relies on evidence presented at trial and letters written years ago rather than actual documentation of current incompetence demonstrates that he has not met his burden. *See Charles v. Stephens*, 612 Fed. App'x 214, 220-21 (5th Cir.) (where petitioner relied on evidence marshalled during state and federal habeas review to show history of mental illness, petitioner failed to meet his burden; "even assuming [petitioner] has some form of mental illness, none of this evidence shows that he does not know about his execution or that he does not rationally understand the reason for it") (unpublished), *cert. denied*, 135 S. Ct. 2075 (2015). Therefore, the Court should deny Battaglia's petition.

IV. Battaglia Is Not Entitled to a Stay of Execution.

Battaglia is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right which would become moot if he were executed. In *Barefoot v. Estelle,* this Court explained that a stay is appropriate only when there is a "reasonable probability" that certiorari will be granted, a "significant possibility" that the Court will reverse the lower court's decision after hearing the case, and a "likelihood" that the applicant will suffer irreparable harm absent a stay. 463 U.S. 880, 895 (1983). Battaglia has met none of these requirements. As discussed above, the trial court was without jurisdiction to consider his claim, and no federal question was pressed or passed on in the state court. Battaglia's substantive constitutional claim is also without merit. Furthermore, the Court may also "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*). Under the circumstances of this case, a stay of execution would be inappropriate, and Battaglia's motion should be denied.

CONCLUSION

For the above reasons, the Court should deny Battaglia's petition for writ of certiorari and motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Brief in Opposition has been served electronically to Greg Gardner and Michael Mowla, counsel for the Petitioner, on this the 28th day of March, 2016.

/s/ Erich Dryden
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