NO. ______________ (CAPITAL CASE)

In The

Supreme Court of the United States

JOHN DAVID BATTAGLIA,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

PETITION FOR A WRIT OF CERTIORARI

Mr. Battaglia is scheduled to be executed after 6:00 p.m. central time on Wednesday, March 30, 2016.

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March 24, 2016

QUESTION PRESENTED (CAPITAL CASE)

Without appointed counsel or ancillary services, Petitioner John David Battaglia presented the Texas state court with evidence that he was not competent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007). Although Mr. Battaglia made at least a colorable showing of incompetency to be executed under *Ford*, the state court refused to appoint counsel. As a result, he could not present his execution-incompetency claim to the state court.

This Petition, therefore, presents the following question for consideration:

Based on a colorable showing of incompetency, is an indigent defendant constitutionally entitled to the assistance of appointed counsel necessary to present an execution-incompetency claim?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a Texas state-court proceeding in which petitioner, John David Battaglia, was the Defendant before the 1st Criminal District Court of Dallas County, Texas. Mr. Battaglia is a prisoner sentenced to death. Texas intends to execute him on March 30, 2016.

Mr. Battaglia asks that the Court issue a Writ of Certiorari to the 1st Criminal District Court of Dallas County, Texas.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

John David Battaglia respectfully petitions for a writ of certiorari to review the judgment of the 1st Criminal District Court of Dallas County, Texas.

OPINIONS BELOW

On March 2, 2016, the 1st Criminal Court for Dallas County, Texas denied Mr. Battaglia's Motion to Appoint Counsel, App. 1, without giving any reasons. The denials are attached as Appendix 3.

STATEMENT OF JURISDICTION

The 1st Criminal District Court of Dallas County, Texas had subject matter jurisdiction under TEX. CODE CRIM. P. art. 46.05(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), which provides in pertinent part that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.

Intermediate Texas appeals courts have no jurisdiction in Article 46.05 actions whatsoever. Because the Texas Court of Criminal Appeals ("TCCA") does not have appellate jurisdiction over a state trial court order refusing appointment of counsel, the trial court's order is a "[f]inal judgment[] or decree[] rendered by the highest court in which a decision could be had" and this Court may use its certiorari jurisdiction to reach the issues presented.

When the statute specifies that there is certiorari jurisdiction over a final judgment from "the highest court of a State in which a decision could be had," it refers to the last state court "to which the cause could be brought for review . . . regardless of the particular description or designation which may be applied to it by state statutes." *Gorman v. Washington Univ.*, 316 U.S.

98, 101 (1942). The possibility that some alternate form of relief may be available through the initiation of some other action in some other state court does not affect whether a state court is the "highest court of a State in which a decision could be had." *See Largent v. Texas*, 318 U.S. 418, 421-22 (1943) ("The possibility that the appellant might obtain release by a subsequent and distinct proceeding . . . in the same or a different court of the State does not affect . . . the fact that this judgment was obtained in the highest state court available to the appellant.").

Here, the last state court that could consider the matter is also the only one in which it could be considered—the trial court. The TCCA has jurisdiction over orders denying a request for an execution-incompetency finding under Article 46.05. The TCCA, however, has recently and in multiple cases emphasized that it does not have jurisdiction over orders denying motions for counsel and ancillary services to prepare Article 46.05 motions. *See, e.g., Wood v. Texas*, No. AP-75,970, at *3 (Tex. Crim. App. Aug. 19, 2008) ("To any extent appellant intended the motion filed in the trial court to be a general Due Process request for the tools necessary to meet the dictates of [the Texas execution-incompetency standard], and not an actual motion requesting a finding on appellant's competency under [that standard], there is no provision for an appeal on a ruling on such a motion. Thus, appellant's appeal is dismissed."). Most recently, in *Panetti v. Texas*, No. AP-77,049 (Tex. Crim. App. Nov. 25, 2014), Panetti filed motions raising the issue here: a "Renewed Motion to Stay or Modify Execution Date, Appoint Counsel, and Authorize Funds for Investigative and Expert Assistance to Provide Meaningful Opportunity to Prepare Article 46.05 Motion." *Id.* at *2. He also made the argument that is the subject of the Question Presented in this case. He argued that, although he made a "'colorable' showing of incompetency, he could not meet the threshold requirement of [the Texas execution incompetency statute] without a stay, the appointment of counsel, and funds to hire an expert and

an investigator." *Id.* at *2-*3. Holding that it had "no jurisdiction to review the trial court's ruling," the TCCA dismissed the appeal. *Id.* at *3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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

The Fourteenth Amendment to the United States Constitution provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

John David Battaglia was convicted and sentenced to death for a double murder on April 30, 2002, in the 1st Judicial Criminal District Court of Dallas County, Texas. The Texas Court of Criminal Appeals ("TCCA") denied his direct appeal on May 18, 2005. *Battaglia v. State*, No. AP-74,348, slip op. (Tex. Crim. App. May 18, 2005). He did not seek certiorari on direct review of his conviction.

I. *Ford* Proceedings

Following the conclusion of federal habeas corpus proceedings, the Texas trial court scheduled Mr. Battaglia's execution for March 30, 2016.

Texas has provided a procedure in Article 46.05 of the Texas Code of Criminal Procedure for raising *Ford* claims. Article 46.05(h) provides that a "defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed." Under Article 46.05(d) and 46.05(k), to proceed to a hearing, an inmate must first make a threshold showing of

incompetency. Article 46.05(f) requires that, when an inmate makes that showing, a court appoint two mental health experts to examine him. But the statute does not provide for appointed counsel to assist an incompetent defendant in presenting or litigating his *Ford* claim. On February 22, 2016, Mr. Battaglia filed a Motion for Appointment of Counsel to Prepare Article 46.05 Motion. *See* App. 1 (Defendant's Motion for Appointment of Counsel to Prepare Article 46.05 Motion). Undersigned counsel filed this motion on Mr. Battaglia's behalf; however, undersigned has not agreed to represent Mr. Battaglia pro bono and does not consider himself to represent Mr. Battaglia in state court as to the *Ford* claim absent appointment by a court.[1]

In that February 22 motion, Mr. Battaglia showed that: three qualified psychiatrists, including a State psychiatrist, diagnosed Mr. Battaglia with bipolar disorder; at least one psychiatrist opined that Mr. Battaglia was experiencing a psychotic episode when he committed the murders; Mr. Battaglia's family had a history of severe mental illness – his mother's mental illness drove her to suicide; Mr. Battaglia was medicated with an antipsychotic medication before trial; Mr. Battaglia's initial federal habeas counsel believed that Mr. Battaglia did not understand why he was incarcerated or facing execution; Mr. Battaglia filed numerous bizarre letters and motions throughout his litigation that expressed elaborate conspiracies against him; and the magistrate judge presiding over his federal habeas application denied Mr. Battaglia self-representation because his "rambling and largely unintelligible missives to the court, together with his history of bipolar disorder," were evidence that he "may not be mentally competent to knowingly and intelligently waive his right to counsel."

[1] Although this Court has suggested that 18 U.S.C. § 3599 could authorize representation by federally appointed counsel in state court under some circumstances, Harbison v. Bell, 129 S.Ct. 1481, 1489 n.7 (2009), that proposition has not been clearly established, and Mr. Battaglia's federally appointed counsel at the time, Michael Gross, did not consider such representation to be within the scope of his appointment. Thus, Mr. Battaglia is wholly unrepresented for purposes of preparing and presenting an Eighth Amendment *Ford* claim in the state court.

Based on the evidence recounted below, pro bono counsel argued that he was entitled to court-afforded counselto assist him with presenting a *Ford* claim to the state court. *See* App. 1.

A. Mr. Battaglia's Psychiatric Diagnosis

Every psychological expert, including the state expert, who evaluated Mr. Battaglia agreed that he has bipolar disorder. Psychiatrist Judy Stonedale, retained by Mr. Battaglia's defense team at trial, concluded that Mr. Battaglia suffered from Bipolar I disorder. 53 RR 92. A person suffering Bipolar I disorder "can become very psychotic" and delusional. 53 RR 93, 107. *See also* DSM-IV-TR at 386. During Dr. Stonedale's first attempt to interview Mr. Battaglia, he "was so manic we had to terminate our interview." 53 RR 91. Dr. Stonedale, therefore, requested that the Dallas County jail psychiatrist prescribe Mr. Battaglia antipsychotic medication so that an interview could be re-attempted later. 53 RR 91. Battaglia was administered a therapeutic dosage of ten milligrams of Zyprexa, 54 RR 12, which Dr. Stonedale still considered "undermedicated." 53 RR 91. The second attempt at an interview was successful, although manic symptomology was still present. 53 RR 91. Dr. Stonedale concluded that Battaglia was experiencing a psychotic episode when he committed the underlying offense. 53 RR 108. Even medicated, Dr. Stonedale opined that Battaglia's "recollection of what happened do[es] not fit with the forensic information. But he is so sure he's adamant -- he has not waivered one iota, every time he's given us the reports, every time he's told other people. . . . He does not waiver. What he believes is delusional. It is someone in a depressed, psychotic state." 53 RR 108.

Psychiatrist Edward Gripon, appointed by the trial court to evaluate Mr. Battaglia's competency to stand trial, also diagnosed Mr. Battaglia with Bipolar I disorder. 54 RR 11. Dr. Gripon also noted that Mr. Battaglia's mother was mentally ill and died of a self-inflicted gunshot. 54 RR 12. Before trial, the Dallas County Jail prescribed Mr. Battaglia therapeutic

dosages of antipsychotic medication. *Id.* Specifically, he was administered ten milligrams of Zyprexa. *Id.* Dr. Gripon concluded that Mr. Battaglia was competent to stand trial in his medicated state. 59 RR Def. Ex. 21. State's psychiatrist Richard Coons also opined that Mr. Battaglia has bipolar disorder. 54 RR 112.

B. Genetic Risk Factors.

Mr. Battaglia's mother suffered from severe mental illness. She ultimately lost her battle with her illness when she committed suicide.

Bipolar disorder has a strong genetic risk factor. In fact, the American Psychiatric Association notes that genetics is the highest risk factor for bipolar disorder and that the risk increases as the genetic similarities increase:

> A family history of bipolar disorder is one of the strongest and most consistent risk factors for bipolar disorders. There is an average 10-fold in-creased risk among adult relatives of individuals with bipolar I and bi-polar II disorders. Magnitude of risk increases with degree of kinship. Schizophrenia and bipolar disorder likely share a genetic origin, reflected in familial co-aggregation of schizophrenia and bipolar disorder.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 130 (5th ed. 2013). Accordingly, Mr. Battaglia has presented evidence to strongly suggest that his bipolar disorder passed to him genetically.

C. The Bizarre Pro Se Filings.

Mr. Battaglia's filings display his paranoid delusions about why he faces execution.

In his pro se filings during his federal habeas litigation, Mr. Battaglia steadfastly maintained that separate conspiracies murdered his daughters and framed him for their murders. Most times, he thinks that they are separate forces, but he sometimes seems to believe that the separate conspiracies somehow converged to form some super-conspiracy to kill his daughters

and have him executed. The writings reflect that Mr. Battaglia does not understand his moral culpability in relation to the deaths of his daughters.

First, Mr. Battaglia believes his daughters were murdered because they were experiments in incestuous reproduction that used his non-incestuous marriage as cover. App. 5 at 2. He believes that the cult responsible for these experiments are connected with the Ku Klux Klan in Dallas and that Dallas police, federal agents, and the Dallas District Attorney's Office. *See, e.g., id.* All these organizations are part of the cult or conspiring with the cult to avoid its exposure. *Id.* Mr. Battaglia says that he left this cult in 1999, which started events leading to the murder of his daughters. *Id.* Mr. Battaglia never adequately explains why the KKK would allow a Jewish man like himself, App. 5 at 15, to join its ranks.

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. *Id.* at 17. He believes that the IRS had his children murdered to frame him. *Id.* at 5. The IRS knew that he would be executed for the crimes, which would marginalize his attempts to expose the criminal conspiracy. *Id.* 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. *Id.* at 17. He repeatedly alleges that Ms. Pearle threatened to kill him for reporting her activities to the IRS, but he fails to connect the death of their daughters to this threat.

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. *Id.* at 40, 66. 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. *Id.* at 41.

At other points in the litigation, Mr. Battaglia seems to blame his first wife for the murders, or, at least, setting in motion parts of the conspiracies that led to the murders. *See id.* at 71. He never really articulated a logical connection between Ms. Ghetti and the murders, but he alleges that he informed her former Big Law employer about some of her personal activities, causing the firm to fire her. *Id.* Even though that firm allegedly fired her, she still apparently has prestigious legal employment in New Orleans.

Relatedly, Mr. Battaglia has argued that these conspiracies drugged him before his daughters were murdered. *Id.* at 68-69. It is unclear if Mr. Battaglia believes that they drugged him to make sure he could not remember an alibi or to cause him to murder his daughters.

Mr. Battaglia also believes that every attorney appointed in his case has been secretly working with the State to have him executed. He swore that his trial lawyer told him that he was not appointed to defend him. *Id.* at 35. Mr. Battaglia believes that Mr. Johnson told him that Mr. Johnson had been appointed "to make sure all of the i's were dotted and t's crossed on [his] Death Sent[e]nce." *Id.* He claims that Mr. Johnson repeatedly told him that this was his role. Additionally, Mr. Battaglia believes that Mr. Johnson ordered the jail not to feed Mr. Battaglia. *Id.* at 53-54. 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. *Id.* at 101-02. 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.

Later, Mr. Battaglia's delusions changed. He charged that Mr. Johnson told him that he had ensured Mr. Battaglia received the death penalty because Mr. Battaglia called him a "motherfucker," *id.* at 44, as opposed to Mr. Battaglia's earlier delusion that Mr. Johnson was appointed to help the jury return a death verdict.

Furthermore, Mr. Battaglia's conspiracy includes an important aggravating factor for his sentence. The court placed him on probation for a previous domestic assault against Ms. Pearle. The assistant district attorney in that case agreed to allow Mr. Battaglia to plead guilty to a misdemeanor offense if Mr. Battaglia would have homosexual sex with him. Mr. Battaglia reports that he agreed. *Id.* at 70-71.

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 still hallucinations. First, he reports conversations with his deceased mother. *Id.* at 177. 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. *Id.* at 58. But other hallucinations are directly connected to the murders in his case, although their connection is not yet clear. Mr. Battaglia reports that he saw purple marks on both his deceased daughters when they were born. He attaches supernatural significance to these marks. *See id.* at 177-78.

* * *

In his February 22 motion, Mr. Battaglia explained that, taken together, the evidence raised serious red flags about his capacity to rationally comprehend the connection between his crime and his execution. The motion asserted that the evidence made at least a colorable showing of incompetency, entitling Mr. Battaglia to a lawyer to assist in the preparation and presentation

of a *Ford* claim. Without a hearing or explanation, the state court denied Mr. Battaglia's motion on March 2, 2016. *See* App. 3.

REASONS FOR GRANTING RELIEF

The Eighth Amendment prohibits the execution of defendants who, disabled by mental illness, lack the capacity to rationally understand the State's reason for executing them. *See Panetti v. Quarterman*, 551 U.S. 930, 959 (2007) (affirming competency standard set forth in *Ford v. Wainwright*, 477 U.S. 399, 422-23 (1986) (Powell, J., concurring)). An execution-incompetency challenge is known as a "*Ford* claim" and usually becomes ripe when a state signs a death warrant and sets an execution date—long after direct review of the conviction concludes. A right to counsel, however, only applies during a criminal trial and on direct appeal of convictions from that trial. *See Douglas v. California*, 372 U.S. 353, 355-56 (1963) (establishing equal protection right to counsel on appeal); *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) (establishing Due Process right to counsel in all felony trials); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (establishing right to counsel at arraignment for a capital charge because, in Alabama, arraignment "is a critical stage in a criminal proceeding" where "[a]vailable defenses may be . . . irretrievably lost").

Because a right to counsel applies only at trial and direct review, and because *Ford* claims by definition ripen after trial, there is a constitutional lacuna: Capital inmates never have a constitutional right to have a lawyer assist in the presentation and litigation of a *Ford* claim. And because there is never a constitutional right to have a lawyer assist in presenting a *Ford* claim, there exists an entire Eighth Amendment exemption that is unsecured by traditional guarantees of constitutional process. In *Ford* and *Panetti*, the Court recognized that certain minimal due-process protections were necessary to afford defendants a meaningful opportunity to present their

execution incompetency claims. *See Panetti*, 551 U.S. at 949-51; *Ford*, 477 U.S. at 424. Yet the Court did not formally declare counsel to be among those protections. This Court should eliminate this constitutional gap by holding that, upon a colorable showing of incompetency, a condemned inmate is entitled to a lawyer.

I. On a colorable showing of incompetency, the Due Process clause should entitle an indigent death-row inmate to counsel and ancillary services necessary to present an execution-incompetency claim.

The procedural protections recognized in *Ford* and *Panetti* naturally extend to include appointed counsel for capital inmates who can make at least a colorable showing of execution incompetency. A colorable showing is lower than the showing required to prevail on a *Ford* claim. It is a "modest evidentiary threshold," less rigorous a standard than a "prima facie case." *In re Hearn*, 376 F.3d 447, 455 (5th Cir. 2004). It merely requires presenting evidence demonstrating a "fair probability," *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17 (1986), or "non-frivolous" claim of execution incompetency, *Wood v. Quarterman*, 572 F. Supp. 2d 814, 820 (W.D. Tex. 2008), *vacated on other grounds*, *Wood v. Thaler*, 787 F. Supp. 2d 458 (W.D. Tex. 2011). If colorably incompetent defendants are not entitled to counsel, then the Eighth Amendment protections recognized in *Ford* and *Panetti* would fail to produce relief for many, if not most, insane inmates.

A. Texas affords trial judges unbridled discretion in deciding whether to provide counsel and ancillary services to inmates with potential execution-incompetency claims.

This case reflects the fact that Texas judges enjoy unbridled discretion to decide whether to provide *Ford* claimants with counsel to investigate and present their claims. To receive a formal adjudication of a *Ford* claim—including a hearing and court-appointed expert evaluations—a defendant must first make a "substantial showing of incompetency" and meet

detailed statutory pleading requirements. See TEX. CODE CRIM. PROC. art. 46.05(c), (f). The statute has no provision regarding the appointment of counsel at any time—not even for those inmates that can make a colorable showing of incompetency. Texas law leaves trial courts with absolute discretion to decide whether an indigent capital inmate with colorable *Ford* evidence gets counsel necessary to present the claim. *See Ex Parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000). Texas vests its trial judges with this discretion even though the statute contemplates that *Ford* claimants will file supporting materials that no indigent and insane death row inmate could possibly prepare without counsel.

B. Texas courts enjoy discretion over appointment of counsel and provision of services that is representative of most, but not all, death-penalty jurisdictions.

In the vast majority of states, the constitutional lacuna left by *Ford* and *Panetti* has not been repaired by statute or case law. Most states do not provide a statutory right to appointed counsel to present *Ford* claims. *See* ALA. CODE § 15-16-23 (2015); ARIZ. REV. STAT. ANN. §§ 13-4021–4023 (2015); ARK. CODE ANN. § 16-90-506(d)(1) (West 2014); CAL. PENAL CODE §§ 3702–3704 (West 2015); FLA. STAT. ANN. § 922.07 (West 2015); FLA. R. CRIM. P. 3.811–3.812; GA. CODE ANN. § 17-10-63 (2015); MISS. CODE ANN. § 99-19-57(2)(a) (West 2015); MO. ANN. STAT. § 552.060(2) (West 2015); NEB. REV. STAT. § 29-2537 (2014); N.C. GEN. STAT. ANN. §§ 15A-1001–15A1002 (West 2015); OHIO REV. CODE ANN. §§ 2949.28-2949.29 (West 2015); OKLA. STAT. ANN. tit. 22, §§ 1005–1006 (West 2015); UTAH CODE ANN. §§ 77-19-202–77-19-203 (West 2014); *see also Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), *abrogated on other grounds*, *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010) (setting forth procedures for determining inmate's execution competency but not mentioning entitlement to appointed counsel or ancillary services); *Amaya-Ruiz v. Stewart*, 136 F. Supp. 2d 1014, 1026 n.5 (D. Ariz. 2001) ("Nothing in the [state execution-incompetency]

statute provides for pre-application assistance of mental health experts."). Only two states require courts to appoint counsel to present an incompetent inmate's *Ford* claim. *See* COLO. REV. STAT. § 18-1.3-1403(1)(a)-(b) (West 2015) (A court must appoint counsel if it has "good faith reason to believe" defendant may be incompetent.); WYO. STAT. ANN. § 7-13-902(h) (2014) (stating that if a defendant presenting a *Ford* claim is not represented by counsel, "the court shall appoint an attorney to represent him," but not clarifying whether counsel is appointed to present the claim, or only in the event the claim is meritorious enough to require a hearing).

Indeed, many states do not even allow death-row inmates to initiate an inquiry into their own incompetency; the matter is left to the district attorney or the director of the department of corrections where the inmate is incarcerated. *See* ARK. CODE ANN. § 16-90-506(d)(1) (West 2014) (The Director of Department of Correction notifies Deputy Director of the Division of Behavioral Health, who causes an inquiry to be made.); CAL. PENAL CODE § 3701 (West 2015) (The warden must inform district attorney that innate may be incompetent; then district attorney must file a petition in the superior court requesting an inquiry.); *id.* § 3702 (providing that district attorney must attend the hearing on the issue of inmate's competency, but making no mention of appointed defense counsel); CONN. GEN. STAT. § 54-101 (West 2015) (The warden is responsible for raising the issue of a death-row inmate's competency by making an application to the Superior Court.); MO. REV. STAT. § 552.060(2) (West 2014) (The Director of the Department of Corrections must notify the governor if he believes a death-row inmate is incompetent.); NEB. REV. STAT. § 29-2537 (2014) (If a death-row inmate appears incompetent, the Director of Correctional Services gives notice to a judge of the district in which the convict was tried and sentenced); OKLA. STAT. ANN. tit. 22, § 1005 (West 2015) (The warden must notify district attorney if a death-row inmate has become insane; the district

attorney must then notify the district or superior court.); *id.* § 1006 (provides that district attorney must attend inquisition into defendant's competency but does not mention defense attorney); *see also Stanley v. Davis*, No. C–07–4727 EMC, 2015 WL 435077, at *4 (N.D. Cal. Feb. 2, 2015) ("The statutes in question, which have not been substantively amended since *Ford*, state that only the warden or the governor can initiate an inquiry into whether a condemned inmate is competent to be executed. . . . [T]he statute does not explicitly provide an avenue for an inmate to initiate an inquiry . . ."); *Singleton v. Endell*, 870 S.W.2d 742, 746-47 (Ark. 1994) (upholding the constitutionality of state-competency procedures even though they empowered the Director of the Department of Corrections to deny inmate's requests for an inquiry into his incompetency to be executed).

With rare exception, then, states have not erected procedures to ensure that incompetent, indigent inmates have appointed counsel and services to present *Ford* claims. For the reasons set forth below; however, a truly incompetent inmate could never raise a *Ford* claim on his own behalf. Without direction from the Supreme Court, state courts exercise virtually unregulated discretion over whether an inmate gets a lawyer to present a *Ford* claim. The consequence is a proliferation of state statutory procedures that fail to protect indigent, incompetent inmates from execution.

C. On a colorable showing of incompetency, Due Process requires that an indigent death-row inmate have assistance of counsel to present an execution-incompetency claim.

Mentally ill offenders lacking rational comprehension also lack the capacity to present the legal arguments, documents, and evidence required to secure their rights under *Ford*. As a doctrinal matter, controlling authority supports the proposition that capital inmates making a colorable showing of competency have a constitutional right to have the lawyer to present their

Ford claim. As an intuitive matter, this protection is necessary to ensure that *Ford* and *Panetti* are applied effectively. Without a constitutional entitlement to a lawyer, an inmate has little in the way of procedure securing the substantive capital eligibility exemption that *Ford* and *Panetti* establish.

1. *Ford* and *Panetti* Left Formally Unresolved a Capital Inmate's Right to Counsel in Presenting a *Ford* Claim.

The Due Process Clause should ensure that certain *Ford* claimants have the opportunity to present their claim of execution incompetency to the courts. Capitally convicted persons who may be incompetent are unquestionably entitled to the "fundamental fairness" that is "the hallmark of the procedural protections afforded by the Due Process Clause." *Ford*, 477 U.S. at 424 (Powell, J., concurring); *see also Panetti*, 551 U.S. at 952 (holding that putatively incompetent defendants are entitled to "a constitutionally adequate opportunity to be heard"). Neither *Ford* nor *Panetti* states explicitly that "fundamental fairness" or an "opportunity to be heard" includes a right to have a lawyer help present the *Ford* claim, but such an entitlement—along with a right to services necessary to make that representation effective—follows naturally from the more abstract expressions of procedural fairness.

The appointment of counsel was not in question in *Ford* and *Panetti*. In both cases, the capital inmate had an attorney to litigate the execution-incompetency claim at issue. As a result, those cases left formally unresolved the Due Process right to counsel during *Ford* litigation. *Panetti* represented this Court's recognition that the exemption announced in *Ford* would be insufficient without auxiliary Due Process guarantees. But because the issue of whether those auxiliary Due Process guarantees include a right to counsel has not been presented to it, this Court has not explicitly recognized it. *Cf. Panetti*, 551 U.S. at 976 (Thomas, J., dissenting) ("This Court has never recognized a constitutional right to state funding for counsel in state

habeas proceedings—much less for experts—and Texas law grants no such right in *Ford* proceedings."); *id.* at 975 n.9.

2. A colorable showing of execution incompetency triggers a Due Process right to representation to investigate and present the claim.

In practice, the Texas rule of unfettered discretion is inconsistent with *Ford* and *Panetti*, which recognize that *Ford* claimants have "a constitutionally adequate opportunity to be heard." *Panetti*, 551 U.S. at 952. Upon a colorable showing that the claimant might be entitled to relief, the Due Process right to "be heard" on an execution-incompetency claim encompasses a right to appointed counsel to meaningfully present the claim. The appointment of counsel and provision of ancillary services are essential if mentally ill inmates are to receive "an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quotation marks omitted).

The absence of counsel severely dilutes the Eighth Amendment exemption for mentally incompetent offenders. By definition, people so disabled by mental illness that they cannot rationally understand the State's reason for executing them lack the capacity to prepare and present execution-incompetency claims. As the Court has recognized, the hallmark symptoms of mental illness can significantly impair a person's ability to present his claims within the legal system. *See Indiana v. Edwards*, 554 U.S. 164, 176 (2008) ("'[D]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness can impair the defendant's ability to play the significantly expanded role required for self-representation'" at trial.) (quoting Brief for American Psychiatric Association et al., as Amici Curiae). Indeed, a common symptom of psychotic mental illnesses is the inability to recognize one's own condition. For this reason, the Due Process Clause accounts for the special vulnerabilities of those with mental illness and erects added protections to save

such individuals from facing without aid the complex machinery of our legal system. *See Edwards*, 554 U.S. at 1777 ("An amicus brief reports one psychiatrist's reaction to having observed a patient . . . try to conduct his own defense: '[H]ow in the world can our legal system allow an insane man to defend himself?'"); *Massey v. Moore*, 348 U.S. 105, 108 (1954) ("No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."). The procedural protections recognized in *Ford* and *Panetti* naturally extend to protect colorably incompetent defendants from challenging a punishment they cannot rationally understand.

The provision of counsel is particularly important in light of the stringent requirements appearing in the Texas execution-incompetency statute. Texas has erected substantial statutory hurdles that a capitally convicted inmate must meet simply to trigger his right to the adjudication of his execution competency. The complex statutory requirements are simply impossible to surmount for "[e]ven the intelligent and educated layman [with] . . . no skill in the science of law." *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932). A defendant who wishes to challenge his competency to be executed in Texas courts must file a motion in which he identifies the proceedings in which he was convicted, lists the date of his final judgment, sets forth the fact of his impending execution, "clearly set[s] forth" alleged facts in support of the assertion that the defendant is presently incompetent to be executed, and attaches affidavits, records, and any previous proceedings in which his competency was challenged. TEX. CODE CRIM. PROC. art. 46.05(c). These complex briefing requirements present problems for all indigent inmates, and especially for those whose indigency is compounded by serious mental illness or cognitive impairment. *See Powell*, 287 U.S. at 69 (If it is true that "men of intelligence" require "the guiding hand of counsel at every step" to craft legal argumentation, "how much more true is it of

the ignorant or illiterate, or those of feeble intellect."); *Wood*, 572 F. Supp. 2d at 817 ("It is inconsistent with the mandates of both *Panetti* and *Ford* for the State of Texas to deny an indigent death row inmate asserting a claim that he is incompetent to be executed the assistance of counsel until said inmate first satisfies [Article 46.05's] arcane pleadings requirements[, which are] so intellectually challenging they test the skill of even the most seasoned attorney."). The Texas statute even recognizes that a mentally ill defendant cannot meet this threshold showing on his own, requiring that "[t]he motion [raising a competency-to-be-executed claim] must be verified by the oath of some person on the defendant's behalf." TEX. CODE CRIM. PROC. art. 46.05(c). To impose onerous pleading requirements on the mentally ill and then fail to empower them with representation to meet those requirements is not only illogical, it is incompatible with the rule announced in *Ford* and *Panetti*. As a practical matter, it would mean that incompetent defendants are rarely exempt from the death penalty, even though *Ford* and *Panetti* guarantee them this right.

The constitutional lacuna left by *Ford* and *Panetti* also undermines the justice system's interest in accurate outcomes. When a mentally ill defendant faces a death sentence, "the consequences of an erroneous determination of competence are dire" and "threaten[] a fundamental component of our criminal justice system—the basic fairness of the trial itself." *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (quotation marks and citation omitted). The "risk of an erroneous deprivation," *Ake*, 470 U.S. at 77, is high because a mentally ill defendant lacks the ability to sufficiently demonstrate his own insanity. This risk outweighs the government interest at stake in carrying out executions, as the government has no interest in executing persons constitutionally exempt from the death penalty. *Id.* at 77. Indeed, the government has a

"compelling interest . . . in accurate dispositions," *id.* at 79, which cannot be obtained without adequate procedural protections.

In both *Ford* and *Panetti*, the Court was concerned with how to ensure reliability when a severely mentally ill and indigent person faces execution. Despite the fact that the death row inmates in both *Ford* and *Panetti* had counsel to represent them in competency proceedings, the Court nevertheless ruled that the process they received was inadequate because it invited "arbitrariness and error." *Ford*, 477 U.S. at 424 (Powell, J., concurring). In *Ford*, Justice Powell reasoned that Florida's refusal to allow the defendant to submit his own psychiatric examinations, as a counterweight to those presented by the state-appointed psychiatrists, violated the Due Process Clause because it would produce unreliable outcomes. *See id.* In *Panetti*, the state court similarly failed to provide the defendant "with a constitution-ally adequate opportunity to be heard" because he was not afforded even the "rudimentary process" of submitting an expert report as a counterweight to the reports of the court's own experts. *Panetti*, 551 U.S. at 952. The Court explained that "the fact-finding procedures upon which the court relied were not adequate for reaching reasonably correct results, or, at a minimum, resulted in a process that appeared to be seriously inadequate for the ascertainment of truth." *See id.* at 954 (quotation marks and brackets omitted).

Thus, the result of the Texas practice—depriving indigent defendants of counsel—is to so seriously impair a court's ability to accurately ascertain whether a particular defendant is incompetent such that the practice violates the Due Process Clause of the United States Constitution.

II. Mr. Battaglia has made a colorable showing of incompetency entitling him to a lawyer, an expert, and an investigator.

This case highlights the risk that the constitutional lacuna creates: that states will unknowingly execute incompetent defendants who never had appointed counsel or services to present their *Ford* claims. Exercising its discretion under Texas law, the state court ruled that Mr. Battaglia was not entitled to appointed counsel to present an execution-incompetency claim. The ruling in this case is representative of a broader practice in which inmates with colorable evidence of incompetency are simply not able to litigate their claims. Ultimately, the state court denied Mr. Battaglia's request for appointed counsel without comment. App. 3. But the State opposed Mr. Battaglia's efforts to have counsel appointed, accusing him of having "put the cart before the horse" by requesting counsel before presenting his claim of incompetence. App. 2. This evidence is impossible for an indigent and putatively incompetent defendant to obtain without the assistance of appointed counsel.

Texas seeks to execute a severely mentally ill man while fighting to ensure that he has no legal representation before it does so. This situation is morally bankrupt and violates basic notions of fairness in our capital-punishment system. This Court should intervene to allow Mr. Battaglia to have an attorney before he is killed.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Petitioner John David Battaglia respectfully asks this Honorable Court to grant a writ of certiorari to resolve the Question Presented.

March 24, 2016

Respectfully Submitted,

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NO. ______________ (CAPITAL CASE)

In The

Supreme Court of the United States

JOHN DAVID BATTAGLIA,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

CERTIFICATE OF SERVICE

I, Gregory W. Gardner, certify that true and correct electronic versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on March 24, 2016, via electronic mail to:

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