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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

THE STATE OF TEXAS,

Appellee,

v.

SCOTT PANETTI,

Appellant.

ON APPEAL FROM THE DENIAL BY THE 216TH JUDICIAL
DISTRICT COURT OF GILLESPIE COUNTY OF APPELLANT'S
MOTION FOR STAY OF EXECUTION, APPOINTMENT OF COUNSEL,
AND REQUEST FOR PREPAYMENT OF FUNDS
TO RETAIN MENTAL HEALTH EXPERT AND INVESTIGATOR
TO ASSIST DEFENDANT IN PREPARING ARTICLE 46.05 MOTION

APPELLANT'S OPENING BRIEF

**SCOTT PANETTI IS SCHEDULED TO BE EXECUTED
ON DECEMBER 3, 2014.**

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PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), the parties to the trial court's order and to this proceeding, and their counsel, are listed below.

- (1) **Scott Panetti**, No. 999164, Polunsky Unit, TDCJ-CID, 3872 FM 350 South, Livingston, Texas 77351, is the Appellant in this Court and was the Defendant in the District Court. He is represented in this Court by Gregory W. Wiercioch, University of Wisconsin Law School, 975 Bascom Mall, Madison, Wisconsin 53706; and Kathryn M. Kase, Texas Defender Service, 1927 Blodgett Street, Houston, Texas 77004. The same attorneys represented Mr. Panetti in the proceedings below.

- (2) **The State of Texas**, by and through the Gillespie County District Attorney's Office, 200 Earl Garrett Street, Suite 202, Kerrville, Texas 78028, is the Appellee and opposed Mr. Panetti's motion in the District Court. The State was represented below by Assistant District Attorney Lucy Wilke; and by Assistant Attorney General Ellen Stewart-Klein, Criminal Appeals Division, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548. Mr. Panetti anticipates that the same attorneys will appear for the State in this appeal.

TABLE OF CONTENTS

PARTIES AND COUNSEL	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	2
ISSUE PRESENTED	3
JURISDICTION.....	3
STATEMENT OF FACTS.....	4
A. BACKGROUND.....	4
B. MR. PANETTI’S COLORABLE SHOWING OF INCOMPETENCE	12
1. TDCJ Records	12
2. Current Observations of Mr. Panetti’s Competency to Be Executed	26
3. Consultation with Mental Health Expert	31
SUMMARY OF ARGUMENT	36
ARGUMENT	38
I. <i>FORD</i> AND <i>PANETTI</i> REQUIRE THE APPOINTMENT OF COUNSEL AND FUNDING FOR EXPERT AND INVESTIGATIVE ASSISTANCE ONCE AN INMATE HAS MADE A SHOWING OF INCOMPETENCY SUFFICIENT TO TRIGGER DUE PROCESS.....	39

II. THE RUDIMENTARY DUE PROCESS PROTECTIONS OF <i>FORD</i> AND <i>PANETTI</i> ARE EMPTY PROMISES IN THE ABSENCE OF A STAY OF EXECUTION	48
PRAYER FOR RELIEF	50
CERTIFICATE OF SERVICE	53
CERTIFICATE OF COMPLIANCE	53

INDEX OF AUTHORITIES

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985)	45
Ex parte Caldwell, 58 S.W.3d 127 (Tex. Crim. App. 2000)	42,46,47
Colburn v. State, 966 S.W.2d 511 (Tex. Crim. App. 1998)	41
Druery v. State, 412 S.W.3d 523 (Tex. Crim. App. 2013)	42,44
Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979)	4
Ford v. Wainwright, 477 U.S. 399 (1986)	<i>passim</i>
Grannis v. Ordean, 234 U.S. 385 (1914)	39
Green v. State, 374 S.W.3d 434 (Tex. Crim. App. 2012)	44,46
In re Hearn, 376 F.3d 447 (5th Cir. 2004)	47,48
Ex parte Johnson, 2003 WL 21715265 (Tex. Crim. App. 2003)	45
McFarland v. Scott, 512 U.S. 849 (1994)	48
Panetti v. Dretke, 401 F. Supp.2d 702 (W.D. Tex. 2004)	5
Panetti v. Dretke, 448 F.3d 815 (5th Cir. 2006)	6
Panetti v. Quarterman, 551 U.S. 930 (2007)	<i>passim</i>
Panetti v. Quarterman, 2008 WL 2338498 (W.D. Tex. 2008)	8
Panetti v. Stephens, 727 F.3d 398 (5th Cir. 2013)	9
Reyes-Requena v. United States, 243 F.3d 893 (5th Cir. 2001)	47

Staley v. State, 420 S.W.3d 785 (Tex. Crim. App. 2013)	3
Trop v. Dulles, 356 U.S. 86 (1958)	50
Wood v. Thaler, 572 F. Supp.2d 814 (W.D. Tex. 2008)	44
Wood v. Thaler, 787 F. Supp.2d 458 (W.D. Tex. 2011)	44

STATUTES

Tex. Code Crim. Proc. art. 1.051	42
Tex. Code Crim. Proc. art. 11.071	41,45
Tex. Code Crim. Proc. art. 46.05	<i>passim</i>
18 U.S.C. § 3599	41
26 U.S.C. § 7208	22

OTHER AUTHORITIES

American Bar Ass’n, Criminal Justice Mental Health Standards § 7-5.7 (1989).....	43
Hous. Chron., 11th Inmate Added to List of 2014 Executions (Oct. 30, 2014).....	9
D. Jeste, et al., Divergent Trajectories of Physical, Cognitive, and Psychosocial Aging in Schizophrenia, 37 Schizophrenia Bulletin 451 (2011)	34,35
S.R. Jones & C. Fernyhough, A New Look at the Neural Diathesis- Stress Model of Schizophrenia: The Primacy of Social-Evaluative and	

Uncontrollable Situations, in 33 Schizophrenia Bulletin 1171 (2007)	35
N. Koutsouleris, et al., Accelerated Brain Aging in Schizophrenia and Beyond: A Neuroanatomical Marker of Psychiatric Disorders, 40 Schizophrenia Bulletin 1140 (2014)	34
M. Kurtz, P. Moberg, & R.E. Gur, Aging and Schizophrenia, Clinical Geriatrics 6(6); 51 (1998)	34
Progressive Brain Volume Changes and the Clinical Course of Schizophrenia in Men, 58 Archives of General Psychiatry 148 (2001)	35
Tex. Dept. of Crim. Justice, Policy E-39.1	25,26

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APPELLANT'S OPENING BRIEF

Appellant Scott Panetti files this Opening Brief to appeal the trial court's order denying a stay of execution, appointment of counsel, and funding for a mental health expert and investigator to assist him in preparing a motion under Article 46.05 of the Texas Code of Criminal

Procedure asserting that he is presently incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007).

STATEMENT OF THE CASE

Mr. Panetti is a severely mentally ill, indigent death-sentenced inmate scheduled to be executed on December 3, 2014. He has not faced an execution date in eleven years. He has not been evaluated for competency for execution in seven years. He seeks to challenge his present competency to be executed under Article 46.05.

Mr. Panetti recently asked the trial court to stay his execution, appoint counsel, and provide funds so that he could obtain the assistance of a mental health expert and an investigator. In support of his motion, Mr. Panetti presented: (1) dozens of pages of records from the Texas Department of Criminal Justice documenting his unusual and atypical behavior over the past few years; (2) details of undersigned *pro bono* counsel's recent visit with him; and (3) a preliminary opinion from a mental health expert (who agreed to provide limited services *pro bono*) who reviewed records and consulted with counsel. Mr. Panetti argued that this evidence constituted a colorable showing of

incompetency, but that he cannot meet Article 46.05's triggering standard for additional process and an evidentiary hearing without a stay of execution, counsel, and funding for resources. The trial court denied Mr. Panetti's motion.

ISSUE PRESENTED

Upon a colorable showing that Mr. Panetti lacks a rational understanding of the connection between his crime and his punishment, do *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), entitle him to a stay of execution, the appointment of counsel, and the authorization of funds to retain an expert and an investigator to assist him in preparing an Article 46.05 motion?

JURISDICTION

This Court has jurisdiction to review the trial court's order denying Mr. Panetti a stay of execution, the appointment of counsel, and funding for an expert and an investigator, because that order is intertwined with Mr. Panetti's challenge that he cannot make the showing required under Article 46.05 for additional process without these fundamental resources. *Cf. Staley v. State*, 420 S.W.3d 785, 792 (Tex. Crim. App. 2013) (holding that this Court had jurisdiction under

Article 46.05 (1) to review trial court’s involuntary-medication order); *see Eichelberger v. Eichelberger*, 582 S.W.2d 395, 399 (Tex. 1979) (explaining that “implied powers are those which can and ought to be implied from an express grant of power” and finding appellate jurisdiction because no other mechanism existed to review lower court’s decision).

STATEMENT OF FACTS

A. BACKGROUND

In 1995, Mr. Panetti was convicted and sentenced to death for the murder of his wife’s parents. After the state and federal courts completed their review of his case, the State set an execution date for February 5, 2004. Former state postconviction counsel filed a motion pursuant to Article 46.05, asserting that Mr. Panetti was incompetent for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). The federal district court eventually stayed the execution to allow the state trial court to adjudicate the Article 46.05 motion. On February 20, 2004, the trial court found that Mr. Panetti had made a substantial showing of incompetency and, in accordance with the statute, appointed two mental health experts to exam Mr. Panetti. The court-appointed

experts concluded that Mr. Panetti was competent to be executed. Without providing funds so that Mr. Panetti could hire an expert to review the court-appointed experts' report, the trial court found Mr. Panetti competent for execution.

The federal district court held that the state court, by failing to provide expert assistance for Mr. Panetti and hold a hearing, had violated the minimal procedural due process requirements of *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti v. Dretke*, 401 F. Supp.2d 702, 705-06 (W.D. Tex. 2004). The federal district court ordered an evidentiary hearing and granted Mr. Panetti's motion for appointment of counsel, and motion for funds for expert assistance. In September 2004, the court held an evidentiary hearing. Counsel for Mr. Panetti presented the testimony of four mental health experts. The State presented the testimony of three death row correctional officers and the two mental health experts. The federal district court found that:

Mr. Panetti suffers from some form of mental illness, which some have diagnosed as a schizoaffective disorder. His illness is significantly characterized, first, by tangentiality and loose association, which means his cognitive processes are impaired in such a way that, when he speaks, he often jumps from topic to topic for no apparent reason, and second, by grandiosity and a delusional belief system in which he

believes himself to be persecuted for his religious activities and beliefs.

Id. at 707. Despite these findings, the district court, bound by the Fifth Circuit’s narrow interpretation of *Ford*, concluded that “a petitioner’s delusional beliefs – even those which may result in a fundamental failure to appreciate the connection between the petitioner’s crime and his execution – do not bear on the question of whether the petitioner knows the reason for his execution for purposes of the Eighth Amendment.” *Id.* at 712 (internal quotation marks omitted).

The Fifth Circuit affirmed the district court’s decision. *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). The Fifth Circuit held that, in *Ford*, “Justice Powell did not state that a prisoner must ‘rationally understand’ the reason for his execution, only that he must be ‘aware’ of it.” *Id.* at 819; *see id.* at 821 (holding that “‘awareness,’ as that term is used in *Ford*, is not necessarily synonymous with ‘rational understanding’”). Applying circuit precedent, the Fifth Circuit concluded that Mr. Panetti was competent to be executed, because even though he may lack a rational understanding of the reason for his

execution, he is “aware” of the reason the State has given for his execution. *Id.* at 821.

The United States Supreme Court granted certiorari and reversed. *Panetti v. Quarterman*, 551 U.S. 930 (2007). The Supreme Court squarely rejected the Fifth Circuit “factual awareness” standard, finding it “too restrictive to afford a prisoner the protections granted by the Eighth Amendment.” *Id.* at 956-57. The Supreme Court explained that:

The Court of Appeals’ standard treats a prisoner’s delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution. Yet the *Ford* opinions nowhere indicate that delusions are irrelevant to “comprehen[sion]” or “aware [ness]” if they so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

Id. at 958 (citations omitted). The Supreme Court remanded the case so that mental health experts could “clarify the extent to which severe delusions may render a subject’s perception of reality so distorted that he should be deemed incompetent.” *Id.* at 962.

Before holding a hearing on remand, the federal district first held that, because of the unique nature of a *Ford* claim, no presumption of

correctness would apply to its 2004 findings about Mr. Panetti's mental condition:

Panetti's suggestion that the 2004 findings should be "presumed correct" is of little real impact in the case, because the question is whether his *current* mental state is not competent to be executed under the Eighth Amendment.

* * * *

Even assuming the 2004 findings of fact are correct in every respect, however, their relevance is tempered by the fact that a claim of incompetence to be executed must be evaluated at the time execution is "imminent," regardless of a prisoner's prior mental state. This simple fact means Panetti's burden of proof is not measurably lightened by any presumption that prior findings of fact are correct. It also raises a very real possibility that not only Panetti, but any prisoner asserting a *Ford* claim will be entitled to multiple evidentiary hearings once he makes a threshold showing of incompetence to be executed

Panetti v. Quarterman, 2008 WL 2338498, at *33-34 (W.D. Tex. Mar. 26, 2008) (emphasis in original, citations omitted). In 2008, after the presentation of additional testimony at an evidentiary hearing, the federal district court once again confirmed the severity of Mr. Panetti's psychotic disorder. The district court found that:

- Mr. Panetti is seriously mentally ill.
- Mr. Panetti has suffered from severe mental illness since well before the crime.

- Mr. Panetti was under the influence of this severe mental illness when he committed the crime, and when he represented himself at trial.
- The severity of Mr. Panetti’s mental state may “wax and wane,” but it has continued to a significant degree throughout his incarceration and continues today.
- Mr. Panetti suffers from paranoid delusions.

Id. at *36. Nevertheless, the district court concluded that Mr. Panetti’s delusions did not prevent him from rationally understanding the connection between his crime and his punishment. *Id.* at *36-37.

The Fifth Circuit affirmed the district court’s decision, *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013), and the Supreme Court denied the petition for writ of certiorari on October 6, 2014. Ten days later, on October 16, 2014, the state district court signed an execution warrant, scheduling Mr. Panetti’s execution for December 3, 2014.

Neither the State, the trial judge, nor the district clerk’s office ever notified undersigned *pro bono* counsel – who have represented Mr. Panetti for nearly a decade in state and federal postconviction proceedings – of the execution date. Counsel did not learn of the execution date until two weeks later, on October 30, 2014, when an article appeared in the Houston Chronicle. *See 11th Inmate Added to*

List of 2014 Executions, Hous. Chron. (Oct. 30, 2014). On November 3, 2014, counsel filed in the state trial court an emergency motion to withdraw or modify the execution date and enter a scheduling order to give Mr. Panetti a meaningful opportunity to litigate his competency for execution. In the days that followed, undersigned *pro bono* counsel filed a motion for expedited discovery, motion for appointment of counsel, and *ex parte* motions for prepayment of funds to hire a mental health expert and investigator.

On November 6, 2014, the trial court held a telephonic hearing on the motions (for which undersigned *pro bono* counsel were ordered to provide a conference-call line for all the participants). The court denied the motion to vacate or modify the execution date. On November 7, 2014, the trial court denied the motion for appointment of counsel, as well as the *ex parte* motions for funding for expert and investigative assistance. The court also denied the motion for expedited discovery, based on the State's assurances that it would provide, informally, the records Mr. Panetti requested. Over the next ten days, counsel received over 8,500 pages of Texas Department of Criminal Justice records from

the State, which covered only the seven-year period since Mr. Panetti's previous competency evaluation in 2007.

On November 14, 2014, after conducting a preliminary review thousands of pages of records, undersigned counsel filed a renewed motion for stay of execution, appointment of counsel, and funding for expert and investigative assistance. In that motion, counsel appended 44 pages of TDCJ records in support of a colorable showing that Mr. Panetti can meet Article 46.05's standard for additional process. In addition, counsel provided a detailed account of a recent visit that undersigned counsel Kathryn M. Kase had with Mr. Panetti. Finally, counsel provided a summary of their consultations with a mental health expert who reviewed pertinent TDCJ records, read the reports of the mental health experts who evaluated Mr. Panetti in 2007, and heard Ms. Kase's recounting of her visit with Mr. Panetti. On November 17, 2014, Mr. Panetti filed a supplement to that motion based on the State's failure to disclose or locate records of a mental health evaluation by a Qualified Mental Health Professional in the past year. On November 19, 2014, the trial court denied the motion. App. 1 (Trial Court's Order). Mr. Panetti filed his Notice of Appeal that same day.

B. MR. PANETTI'S COLORABLE SHOWING OF INCOMPETENCE

Mr. Panetti provided the trial court with evidence of a colorable showing that he is incompetent to be executed. However, the trial court refused to give Mr. Panetti the tools he needs to present sufficient evidence in a motion filed under Article 46.05 that would trigger an evidentiary hearing and the appointment of at least two court's experts. *See* Tex. Code Crim. Proc. art. 46.05(f), (k). These tools include appointed counsel and funds for an expert and investigator to assist in preparing a motion under Article 46.05. Of course, even if the trial court had provided these tools, the assistance of counsel, an expert, and an investigator would be meaningless without a stay of execution.

1. TDCJ Records

Counsel's preliminary review of the voluminous – but incomplete – TDCJ records reveals that mental health treatment professionals and correctional officers have noted alarming and aberrational changes in Mr. Panetti's behavior over the last two years.¹ Less than a year ago, during mental health rounds, one of the treatment staff reported that:

¹ Counsel have yet to receive any medical records covering the period after Mr. Panetti was informed, on October 30, 2014, that his execution date had been set.

While passing [Mr. Panetti's] cell, offender began making irrational comments to the escorting officer about the food trays. MHCM [Mental Health Care Management] asked offender how he was doing. He talked about his belief in God maintaining him but said he was thinking of contacting MH [Mental Health]. MHCM inquired as to why. He said he thinks he may need some assistance. After a few minutes of interviewing the offender, it appears that the offender is reporting that he has always heard voices, but for many years has dealt with them though reading the bible and prayer. He said a long time ago (before EMR [Electronic Medical Record]) he took antipsychotics. He said he remembers most of them caused him severe SEs [side effects] so he decided not to take them, but he asked if he could be referred to a clinician because he thinks he may need medicine again. He is finding it more difficult to function with only prayer and bible reading to sustain him, particularly over the past two years. MHCM told the offender he would review the record and make referrals as indicated.

Escorting officer mentioned the offender is always hyper-religious, and often acts irrational or delusional, but only recently has he been acting out aggressively. Review of FORVUS² indicates offender just received a case for telling an officer "you're crooked and I'm going to smite you for your wickedness" while trying to throw urine on the run. This is the first aggressive case since he was placed on death row in 1995 and he has never had a disciplinary for assault or threatening prior to this. Last month he had a case for yelling and singing loudly causing a disruption of pod operations. Most cases over his 18 years on death row appear to be for refusing to shave.

* * * *

Will refer to QMHP [Qualified Mental Health Professional] for eval.

² "FORVUS" is TDCJ's mainframe computer.

App. 2 (TDCJ Mental Health Referral). For several reasons, the importance of this record cannot be overstated.

FIRST, Mr. Panetti came to the attention of the treatment staff because he was making irrational comments about the food trays, indicating an increasing paranoia different in content and intensity from his other documented delusions. The day before he spoke with mental health treatment staff, Mr. Panetti had filed a grievance about the quality of the food being served to him:

[T]he food on my special diet trays has been consistantly [sic] bad. Vegetables [sic] rotten and spoiled, with the decent items stolen, such as cheese, boiled eggs, fried [sic] eggs, pork chops and chicken (meat) Now I do understand that this could be on my trays only as preaching honesty and repentance is punished here.

* * * *

Stop the theft of protein items P-nut butter et cetera by kitchen crew also mischeif [sic].

Renewed Motion for Stay, Ex. A at 4-5. TDCJ correctional staff investigated Mr. Panetti's allegations and found no evidence to support them. *Id.* at 6. Less than a month later, Mr. Panetti asked to be switched back to receiving a regular tray, apparently because of his belief that his food was being tampered with:

I need assistance to be put back on regular diet as the Diet tray I'm receiving [sic] with my name misspelled and often wrong number taped on it is very sloppy and not like the other diet trays so to simplafie [sic] make it easier [sic] for everyone and to assure anonimity [sic] in what tray I recived [sic] please call chow hall Captain to take me off the Diet tray and put me on Regular.

Ex. A at 7.

SECOND, Mr. Panetti told the treatment staff member that he was finding it difficult to function because he could no longer manage his psychotic symptoms through reading the Bible and praying. He admitted that he could no longer cope with his mental illness by himself and explicitly asked for help from mental health treatment staff. During his nearly two decades on death row, Mr. Panetti has repeatedly insisted that he is not mentally ill and has consistently refused to seek mental health treatment. However, TDCJ records indicate that in the past two years alone, Mr. Panetti made at least three additional requests for mental health assistance. On August 17, 2012, he submitted a written request for an "overall check-up," including a mental health assessment. Ex. A at 8. On November 12, 2013, Mr. Panetti filed a Health Services request, asking to see a "psych." *Id.* at 9. Finally, on November 21, 2013, Mr. Panetti wrote to complain about

not getting enough protein and salt in his diet, admitting that “my mental health seems to be affected.” *Id.* at 10.

THIRD, Mr. Panetti asked for antipsychotic medication. Mr. Panetti has repeatedly refused to take antipsychotic medication for nearly 20 years. On April 1, 1995, while awaiting trial, Mr. Panetti had a “revelation” that he was a “born-again April fool” whose schizophrenia had been cured by God. 15 RR 9.³ From that day forward, he believed he was no longer mentally ill and refused to take any medication to combat his psychotic symptoms.

FOURTH, Mr. Panetti said that his difficulty coping with his mental illness began approximately two years earlier, around the same time he began complaining about a conspiracy between gang members and guards that coincided with his being written up for serious

³ Mr. Panetti described this “revelation” in his opening statement at his capital murder trial:

In my year in the Waco Branch Davidian expert’s cell in Bell County, I didn’t hear from my previous law firm, and I got paranoid that I wasn’t being told or lost a chance to appeal the decision of the illegal evidence that was found illegal and then found legal, and I came to the conclusion after my medicine was taken from me and I went into the paranoia and the thought disorder that it depended on me, the April fool, as I consider myself the born again April fool, not saying being born again bars someone from being able to sin, but I depended on the Lord to do for me what the medicine wasn’t doing.

disciplinary violations for the first time in nearly two decades on death row. In the first three years after arriving on death row, in September 1995, Mr. Panetti received nearly two dozen disciplinary write-ups for refusing to shave, one for damaging state property (drawing and painting on his jacket), and one for possession of contraband (a piece of a cigar). Over the next 12 years, he received *no* disciplinary write-ups. However, the available evidence indicates that, in the latter part of 2011, his paranoid delusions and other psychotic symptoms became worse, and he was less able to manage them.

In November 2011, Mr. Panetti filed grievances about other inmates tormenting him for his Christian beliefs and falsely accusing him of misconduct. On November 15, 2011, he accused an inmate of using ink pens and shampoo bottles to spray urine into his cell. Ex. A at 11-12. Mr. Panetti also claimed that two other inmates “beat on the angle iron in cell corners to attempt to ‘drive off[f] the Christian.’” *Id.* at 11. On November 25, 2011, Mr. Panetti alleged that correctional officers wrongfully confiscated his property after he was accused of knocking out the electricity by placing pencil lead in the outlet in his cell. *Id.* at 13-16. After an investigation, TDCJ determined that pencil

lead had been found in the electrical outlet of Mr. Panetti's cell. Most likely due to Mr. Panetti's remarkably clean record over the past dozen years, TDCJ correctional officers did not bring disciplinary charges against him for this incident.

Several months later, on August 3, 2012, Mr. Panetti received his first disciplinary write-up for a serious offense since arriving on death row 17 years earlier. He was charged with creating a disturbance causing a significant disruption in institutional operations. *See Ex. A at 17-20.* Correctional officers alleged that Mr. Panetti was banging on his bunk, his table, and his cell door, and yelling repeatedly, interfering with the officers' duties. He refused to stop when ordered. Mr. Panetti was found guilty and placed on commissary and cell restrictions.

On August 17, 2012, Mr. Panetti filed a grievance, claiming that he had been falsely accused of creating a disturbance:

I respectfully ask that I be restored to Level one housing [sic] and returned to full status after being moved from B-pod by Lt. [redacted] and another Lt. also accused by a Sgt. of beating on a table making noise, investigation has proven all allegations false yet I'm still in a very uncomfortable cell and my property is not returned also [sic] my level is dropped [sic]? due to nothing more than lies and corruption, for instance when [correctional officer] wrote a case on B-pod i was already moved to F-pod, two days later. Well now nuff

said as Jake the cow poke would quip in Cow pokes cartoons by Ace Reid from Kerrville Texas. You may see his cartoons in the old Dovers/Journals a news paper for stockmen. Were [sic] it was reported back in the 1940's the Army, yes the United States Army invaded Mexico to put a stop to a screw worm out break. The only case of scew [sic] worms i've ever encountered [sic] was in Montna [sic] USA 1970's.

also may I add the only time i've cused [sic] out anyone is when they have attacked my mother or son, daughter with verbal disrespect or made threats against my family for my being a preacher of truth although I've not been preaching as when Election 2000 to early 2012. Now i'm just try'n to keep my own personal Jesus to my self and wonder is it Bar-Jesus or Jesus of Nazareth! at times I'm confused some.

The action i request respectfully is to be moved back were [sic] the "bad guys" are to show good example.

Ex. A at 21-22. TDCJ correctional officers investigated the complaint and found no evidence to support Mr. Panetti's allegations. *Id.* at 23.

Two months later, on October 6, 2012, Mr. Panetti received another write-up for creating a disturbance causing a significant disruption in institutional operations. *See* Ex. A at 24-26. Mr. Panetti was accused of yelling and singing loudly, and banging on his cell door, preventing correctional officers from completing their security checks. In his defense, Mr. Panetti said, "All the other inmates were making

noise trying to rile me.” *Id.* at 25. Mr. Panetti was found guilty and placed on commissary restriction.

A year later, on November 7, 2013, Mr. Panetti was accused of threatening to inflict harm on a correctional officer. *See* Ex. A at 27-33. According to the officer’s written statement, Mr. Panetti had been throwing urine onto the walkway in front of his cell. When the officer confronted him, Mr. Panetti said, “Your [sic] a crooked officer, Mr. Burks, and I’m going to smite you for your wickedness.” *Id.* at 27, 28. In his defense, Mr. Panetti said, “You all need to read the Bible.” *Id.* at 33. He then threatened to “get” the correctional officer who was conducting the investigation, according to the report. *Id.*

Mr. Panetti was immediately placed on a “food loaf” and container restriction for throwing urine. *Id.* at 29. He was found guilty of threatening an officer and placed on commissary and cell restrictions. *Id.* at 32. As the mental health treatment staff member noted in the November 21, 2013 report, this incident marked the first time Mr. Panetti had ever been charged with an assaultive or “aggressive” case. *Id.* at 2.

On November 10, 2013, Mr. Panetti filed a grievance about the threatening-harm charge. His written complaint contains references to being persecuted for his religious beliefs, the appearance of Satanic graffiti in his cell, and paranoid delusions that another death row inmate was using the Internet to contact his family and friends:

I was falsely accused of a deed done by [other death row inmate] moved 8 Nov. Past history shows cell location of his harrassment [sic] against me for various reasons:

#1 My obediance [sic] to Christ Jesus and TDCJ Rule Book . .

..

#2 My absinence [sic] from substance Drugs, Alcohol. AA now 20 years clean and sober.

#3 I've no line to traffi [sic] trade with or pass "kites" notes messeges [sic] gambling in the day room recreation area.

#4 My folks L.J. Jack and Yvonne Panetti visit weekly and preferr [sic] Thursdays and Fridays when [spiritual advisor] also visits. On these days mostly (record shows) [other death row inmate] visits and does not want me anywhere near him reason above 1,2,3 and my physical apperence [sic] fitness [sic]. He has stated openly how he would get me moved by continuing to throw urine and fish juice in pipe chase and on the run and on my door. He waited for the right Sargent [sic] and Lt. to do his dirty work on 7-8 Nov. 13. The cell I'm in now has much Satanic graffitti [sic] on the walls and ceiling and also on the bunk. This seems to be the plan of many involved in his group of grand gang criminals operating within the prison. Some officers of integrity seem to fear him and his techno savvy internet hook up and nightly bloging [sic]. As one who is ignorant of high tech devise [sic] I can only speculate, yet this [other death row inmate] has boasted about contacting my family & friends.

Ex. A at 34-36. TDCJ correctional staff investigated the allegations and found no evidence to support them.

On December 2, 2013, Mr. Panetti was accused of committing a federal felony offense – altering the cancellation marks on a stamp with the intent to reuse it, in violation of 26 U.S.C. § 7208. *See* Ex. A at 37-41. Mr. Panetti was found guilty of a major offense and placed on commissary and cell restrictions. In a letter that accompanied the disciplinary paperwork, Mr. Panetti wrote to his son: “Everyone knows I don’t make threats. All, the employees of integrity, yet the Bad guys bought some gaurds [sic] ‘not a few more than a few’ they say.” *Id.* at 41.

On December 17, 2013, Mr. Panetti complained that the recent disciplinary cases brought against him were “bogus” – the result of a gang-guard conspiracy to have him removed from the pod where the gang members resided. *See* Ex. A at 42-43 (“Now you have gang-members whom with a few bribed officers running a crime syndicate within the prison whereby [sic] they move those not in the gang or customers of what they a [sic] selling. It’s a sad fact that only an

ostrich [sic] with its head in the sand can't see.”). TDCJ correctional staff found no evidence to support his allegations. *Id.* at 44.

Of particular interest is Mr. Panetti's statement in his August 17, 2012 grievance that he ceased publicly preaching and proselytizing in early 2012. This noteworthy event occurred around the same time he began having difficulty managing his psychotic symptoms. Although Mr. Panetti continued to express “hyper-religious ideas,” according to the treatment staff member who interviewed in November 2013, he conceded that prayer and Bible-reading no longer adequately quelled his symptoms. At the same time, he received his first disciplinary write-up in over a dozen years, likely a product of his growing paranoid delusions about corruption at TDCJ, including a belief that gang members and bribed guards had conspired to bring false accusations against him so that he would be moved off the pod.

FINALLY, the treatment staff member who interviewed Mr. Panetti cell-side on November 21, 2013, concluded that a Qualified Mental Health Professional needed to evaluate him. Despite the volume of TDCJ records that the State has provided, undersigned counsel have been unable to locate the mental health evaluation that

was supposed to be conducted by a Qualified Mental Health. Nor have counsel seen any document explaining why a Qualified Mental Health Professional did not conduct an evaluation of Mr. Panetti. In fact, counsel have not seen a single document related to *any* mental health care follow-up or treatment notes since that date, nearly one year ago.

On November 10, 2014, undersigned counsel asked the State to locate Mr. Panetti's follow-up mental health records. On November 14, 2014, the State responded. Assistant Attorney General Ellen Stewart-Klein said that TDCJ had told her that: "Offender Panetti was referred, but was not assessed pursuant to the notes, but has been seen by medical personnel on a daily basis."

Undersigned counsel Gregory W. Wiercioch replied:

I find this response from TDCJ about the lack of an evaluation problematic. We have no records of the daily or weekly or monthly or 90-day medical/mental health follow-ups. We have no record of why mental health did not evaluate him. There should be records of all these interactions and decisions, yet we have nothing except an unattributed general response from someone at TDCJ. We need the names of the medical personnel who made this decision and who have supposedly been seeing him on a daily basis. We need records of the daily visits. We need records of the decision not to conduct an evaluation.

Later that same day, Ms. Stewart-Klein responded:

You have received all the medical records. I cannot produce what I do not have and what does not exist. There are no daily medical records because a report is only made when there is a problem. If the inmate is deemed fine, no report is made. Attached is a copy of current policy regarding daily medical rounds. This policy has not changed in many years. I have given you my client's response to your inquiry[;] there was no further assessment.

Contrary to the State's assertion, TDCJ policy actually requires mental health treatment staff to document their cell-side interactions with inmates, regardless of whether "there is a problem." According to the policy, there should be, at the very least, 90-day assessments of Mr. Panetti's mental health status. *See* TDCJ Policy E-39.1, § II.F ("All offenders remaining in segregation more than one month receive a mental health assessment by a QMHP [Qualified Mental Health Professional]. If segregation continues a mental health assessment is completed at least every three months for the duration of segregation status.") (attached as Ex. B to Supplement to Renewed Motion for Stay). The TDCJ Policy requires mental health treatment staff to document their rounds and assessments of inmates. *See* TDCJ Policy E-39.1, § II.C.5 ("Mental Health rounds will be *documented* in a Mental Health Segregation Rounds Log. Mental Health Segregation rounds may be

conducted concurrently with nursing rounds but are a distinct activity and must be *documented* as such.”) (emphases added). If, as the State claims, Mr. Panetti has been receiving daily visits from mental health treatment staff, then those visits should be documented. Indeed, section III of the TDCJ Policy is entitled “Documentation of Daily Rounds by Licensed Health Care Provider.” According to the policy, “[d]aily cell side visits by licensed health care providers . . . will be noted on the patient’s HSN-46.” TDCJ Policy E-39.1, §§ III.B, III.C.2. In the records provided by the State, there are no daily or weekly rounds, or monthly or 90-day mental health assessments following the November 21, 2013 cell-side interview by the mental health treatment staff.⁴ That the State has not produced *any* record of the mental health evaluation in a case where the central issue involves competency is troubling – and suspect.

2. Current Observations of Mr. Panetti’s Competency to Be Executed

On November 6, 2014, undersigned *pro bono* counsel Kathryn M. Kase visited Mr. Panetti for two hours on death row at the Polunsky

⁴ The last 90-day mental health assessment record that counsel received from the State is dated July 19, 2010.

Unit in Livingston, Texas. Although Mr. Panetti spoke in a measured but ponderous tone, he quickly lost control over his ability to converse normally. Within 15 minutes, he began exhibiting flight of ideas and looseness of associations. He was still speaking with a moderate pace, but his speech flowed from one unconnected idea to the next. He started to lose the ability to respond directly to Ms. Kase, giving increasingly disjointed and discursive answers. He touched on numerous topics, including:

- working as a cowboy on a ranch;
- admitting that he has no religion and has told the Chaplain he is not Catholic;
- attending horse-shoeing school with a famous blacksmith who shoed one of John Wayne's horses;
- having a listening device implanted in his tooth;
- playing football in high school and being invited to try out for the Green Bay Packers professional football team;
- the misspelling of his last name on the TDCJ execution paperwork, signifying something sinister that Mr. Panetti could not articulate;
- enlisting and serving in the Navy;

- TDCJ's stealing care packages sent to him by his family, his lawyers, and his pen pals.
- working as an extra in Western movies;
- his horse, Coca Cola;
- the videotaping of his prior sexual exploits with women without his knowledge;
- his high school friend, Peggy Sue;
- reading the Gospel; and
- his knowledge of donkeys, burros and horses.

While bouncing among these topics, Mr. Panetti said that he hears voices. When he hears them, he reads the Gospel to keep the voices from overwhelming him. He told Ms. Kase that his "treatment" for the voices the day before had consisted of reading Romans 7:25, Romans 8:1, Psalm 58, and Proverbs 3. He also asks "Jehovah Rafa the healing God" and Jesus for help. He told Ms. Kase, "Jesus is my treatment program because I can't afford mental health treatment." However, Mr. Panetti later asked her if he could be bench-warranted to the Menninger Clinic (a private psychiatric hospital in Houston) because he wants "decent treatment." He also said that he does a thousand calisthenics per day in his cell in an effort to cope with the voices.

Mr. Panetti did not directly answer Ms. Kase's question about what the voices say. Mr. Panetti said that he had a hard time distinguishing among the voices and that the voices lie. At another point in the conversation, he said the voices have information about the cheerleaders and his friends from high school. Mr. Panetti said that he tries to cope by not responding audibly to the voices.

Mr. Panetti exhibited paranoia in several different ways. At various times during the conversation, Mr. Panetti would not finish his sentences out loud, but mouth the final two or three words. Frequently, Ms. Kase had to ask him to repeat himself because she could not figure out what he was trying to say. Mr. Panetti also pointed to a gold tooth on the right side of his mouth. He suggested, via a combination of mouthed words and pointing and exaggerated nodding, that he thought TDCJ had implanted a listening device in the gold tooth.

Mr. Panetti explained that TDCJ's surveillance began with his visits to the Polunsky Unit dentist for routine treatment. He said that he went to the dentist two months before Halloween and that decorative pumpkins were hanging from the office ceiling. When Ms. Kase said that she did not understand how the pumpkins were related to

surveillance, Mr. Panetti used a combination of gestures and exaggerated nodding to indicate that TDCJ had placed surveillance equipment inside the decorative pumpkins. He also believes that TDCJ must have been surveilling him for a long time before this incident, because the correctional officers seem to know what he is going to do before he knows. In addition, Mr. Panetti said that he only recently discovered that someone – he could not say who or why – had videotaped him while he was having sex with women. Ms. Kase attempted to gather more information about Mr. Panetti's paranoia. However, his disorganized thinking prevented him from comprehensively answering her questions.

Mr. Panetti said he was being executed because TDCJ wants him to “shut up” about the corruption and to stop him from preaching the Gospel. At that point, he referred to the misspelling of his surname on the warden's execution paperwork. Ms. Kase asked him to explain what he meant about the “corruption.” Mr. Panetti replied that he had never received a care package during his entire stay on death row, because the guards were stealing his care packages. He called it a

“freaking racket,” and said that TDCJ does not want him to reveal what he knows.

When Ms. Kase asked him about preaching the Gospel, Mr. Panetti said that he no longer publicly preaches in the day room as he had in the past. He stopped doing so because it caused too much strife. Mr. Panetti said he now tries to teach the Gospel to those on death row by his good deeds and by how he lives the Word of God. At various points throughout the visit, he emphasized that TDCJ does not want him preaching the Gospel and that is the reason “they want to rub me out.”

3. Consultation with Mental Health Expert

On November 7 and November 10, 2014, undersigned *pro bono* counsel spoke with Diane Mosnik, Ph.D., a neuropsychologist. Dr. Mosnik received her Master’s of Science in Clinical Neuropsychology and her doctorate in Clinical Neuropsychology from the University of Chicago. She has extensive experience in the area of schizophrenia. Dr. Mosnik has had academic appointments at the Baylor College of Medicine, where she taught in the Departments of Neurology and Psychiatry. She is licensed to practice in the State of Texas.

Dr. Mosnik agreed to consult with counsel on a limited *pro bono* basis. Counsel provided her with the five expert evaluations of Mr. Panetti in 2007, as well as portions of Mr. Panetti's recent TDCJ records. In addition, undersigned counsel Kathryn M. Kase recounted her recent visit with Mr. Panetti. Based on Dr. Mosnik's review of this information, she reached a preliminary conclusion that Mr. Panetti is experiencing an exacerbation of his psychotic symptoms significant enough to warrant a current and thorough evaluation of his competency for execution. She based her opinion on a constellation of factors, including (1) a noteworthy change in Mr. Panetti's symptoms, exemplified by his atypical aggressive behaviors on death row at least since last year; (2) his age, coupled with his unmedicated state and long-term institutionalization; and (3) the stress created an uncontrollable event – the imminent execution.

Based on her review of the records, Dr. Mosnik determined that Mr. Panetti has exhibited signs of acute psychosis over the past year. She pointed to Mr. Panetti's consuming paranoia, characterized by his delusional beliefs that everything he does is being videotaped and that a TDCJ dentist implanted a transmitter in his teeth. Dr. Mosnik noted

that his presentation has become more guarded as his anxiety over constant surveillance has heightened. This “turning inward” can be a warning sign for mental deterioration, Dr. Mosnik said.

Dr. Mosnik found it significant that Mr. Panetti himself admitted that his symptoms have grown worse in the last two years and that prayer and reading passages from the Bible were no longer effective coping techniques. According to Dr. Mosnik, Mr. Panetti’s inability to manage his symptoms resulted in a seminal event – his request for mental health assistance and antipsychotic medication.

Another sign of exacerbated psychotic symptoms, Dr. Mosnik recognized, is Mr. Panetti’s atypical conduct on death row. Mr. Panetti said that he no longer proselytizes by publicly reading his Bible but, instead, “preaches” through his good works and deeds. However, at the same time, Mr. Panetti has been engaging in aggressive behavior toward correctional officers and other inmates. Dr. Mosnik emphasized that Mr. Panetti’s acting on his delusions about gang-guard conspiracies and TDCJ corruption – even though his hostile conduct conflicts with his religious philosophy – provides additional evidence

that he can no longer control his psychotic symptoms because they are getting worse.

Another important factor to consider, according to Dr. Mosnik, is Mr. Panetti's age, unmedicated psychosis, and lengthy stay in prison. Mr. Panetti is 56 years old. He was first diagnosed with schizophrenia 36 years ago. For the last 19 years, Mr. Panetti's mental illness has gone untreated with antipsychotic medication, coinciding with his long institutionalization.

Dr. Mosnik explained that aging can exacerbate the symptoms of schizophrenia. *See, e.g., M. Kurtz, P. Moberg, & R.E. Gur, Aging and Schizophrenia, Clinical Geriatrics 6(6); 51-60 (1998).* In addition, compared with the population at large, individuals with schizophrenia have accelerated physical decline with age, coupled with mild cognitive impairment. *D. Jeste, et al., Divergent Trajectories of Physical, Cognitive, and Psychosocial Aging in Schizophrenia, 37 Schizophrenia Bulletin 451, 451-52, 454 (2011).* The average life span of a person with schizophrenia is 20–25 years shorter than that of an unaffected person. *Id.* at 452. Schizophrenics can also experience accelerated brain aging. *See, e.g., N. Koutsouleris, et al., Accelerated Brain Aging in*

Schizophrenia and Beyond: A Neuroanatomical Marker of Psychiatric Disorders, 40 *Schizophrenia Bulletin* 1140-53 (2014); *Progressive Brain Volume Changes and the Clinical Course of Schizophrenia in Men*, 58 *Archives of General Psychiatry* 148-57 (2001). Finally, studies of older patients who have been chronically institutionalized most of their adult lives suggests greater than age-expected cognitive decline and conversion to clinical dementia. Jeste, *supra*, at 452.

The final factor that supports a worsening of Mr. Panetti's symptoms of psychosis since the previous determination of competency, according to Dr. Mosnik, is the effect of the stress caused by the imminent execution date. Recent research has indicated that elevated levels of cortisol, a steroid hormone that the body releases in response to stress, precipitate psychotic symptom exacerbation. Because cortisol is most strongly produced in response to stress caused by uncontrollable situations, it is this type of stressor that worsens the symptoms of schizophrenia. See, e.g., S.R. Jones & C. Fernyhough, *A New Look at the Neural Diathesis-Stress Model of Schizophrenia: The Primacy of Social-Evaluative and Uncontrollable Situations*, in 33 *Schizophrenia Bulletin* 1171-77 (2007). Of particular import, studies have shown that

unmedicated schizophrenics have higher basal cortisol levels than those being treated with antipsychotics. *Id.* at 1172. Consequently, an unmedicated individual like Mr. Panetti is likely to be more susceptible to symptom exacerbation caused by the stress of an uncontrollable situation.

“Uncontrollable situations” have been defined as ones where individuals cannot avoid negative consequences, *id.* at 1172, or events in which individuals experience others attempting to exert control over them. *Id.* at 1174. Dr. Mosnik emphasized that Mr. Panetti’s imminent execution date is precisely the kind of uncontrollable event that can exacerbate his psychotic symptoms of schizophrenia. She noted that Mr. Panetti was not facing an execution date seven years ago when he was last evaluated.

SUMMARY OF THE ARGUMENT

In denying Scott Panetti’s request for a stay of execution, assistance of counsel, and funding for a mental health expert and investigator, the trial court made precisely the same mistake that Judge Stephen B. Ables made in this case over a decade ago – a mistake that, the United States Supreme Court held, violated bedrock principles

of due process. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court reached two conclusions that squarely address the issue this Court now faces. First, the Supreme Court found that the preliminary showing of incompetency dictated by *Ford v. Wainwright*, 477 U.S. 399 (1986), is neither onerous nor requires an inmate to present evidence that answers the *Ford* inquiries. Instead, the inmate need only make a sufficient showing of possible merit to warrant a more thorough exploration by the court. Second, the Supreme Court confirmed that, once an inmate has made this preliminary showing, the Due Process Clause and the Eighth Amendment require the court to give the inmate the tools needed to meaningfully develop and present evidence of incompetency. *Panetti*, 551 U.S. at 952. It is a bitter twist that the trial court is again depriving Mr. Panetti of the due process rights the Supreme Court announced in this very case seven years ago.

Mr. Panetti made the preliminary showing that triggers the due process protections of *Ford* and *Panetti*. Without first being afforded that rudimentary due process, Mr. Panetti cannot make the requisite Article 46.05 showing. Accordingly, this Court should conclude that Mr. Panetti is constitutionally entitled to a stay of execution, the

appointment of counsel, and funding to retain a mental health expert and an investigator to assist him in preparing his Article 46.05 motion.

ARGUMENT

Mr. Panetti seeks a stay of execution and rudimentary procedural due process protections so that he may have sufficient time and resources to investigate the facts and prepare an adequate Article 46.05 motion. Without a stay, appointed counsel, and funding for investigative and expert assistance, the state-court process will be ineffective to protect Mr. Panetti's Eighth and Fourteenth Amendment rights. *Panetti* and *Ford* hold that a state must provide due process to inmates who raise non-frivolous claims that they are incompetent to be executed. Mr. Panetti cannot meet the requisite showing under Article 46.05 in the absence of appointed counsel and investigative and expert assistance. However, by making a colorable showing of incompetency, he has triggered his due process rights guaranteed by *Ford* and *Panetti*.

I. FORD AND PANETTI REQUIRE THE APPOINTMENT OF COUNSEL AND FUNDING FOR EXPERT AND INVESTIGATIVE ASSISTANCE ONCE AN INMATE HAS MADE A SHOWING OF INCOMPETENCY SUFFICIENT TO TRIGGER DUE PROCESS.

“If there is one ‘fundamental requisite’ of due process, it is that an individual is entitled to an ‘opportunity to be heard.’” *Ford v. Wainwright*, 477 U.S. 399, 424 (Powell, J., concurring in part and concurring in the judgment) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Although the Texas Legislature codified the procedures for determining a condemned inmate’s competence for execution, Article 46.05 does not provide adequate procedural safeguards to protect a person like Mr. Panetti, who can make a colorable showing of incompetency, but who cannot make the requisite showing under Article 46.05 without the assistance of appointed counsel, a mental health expert, and an investigator.⁵

⁵ Mr. Panetti asserts that the showing set out in Article 46.05(f) applies, rather than the showing required under Article 46.05(e). *Cf.* Tex. Code Crim. Proc. art. 46.05(f) (requiring defendant to make a “substantial showing of incompetency”), *with* Tex. Code Crim. Proc. art. 46.05 (e) (requiring defendant to make “a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to the defendant’s competency to be executed at the time of filing the subsequent motion under this article”). In Mr. Panetti’s case, the United States Supreme Court concluded that “the state court failed to provide [Mr. Panetti] with the minimum process required by *Ford*.” *Panetti v. Quarterman*, 551 U.S. 930, 950 (2007). As a result of the state court’s violation of Mr. Panetti’s constitutional right to procedural

Panetti v. Quarterman, 551 U.S. 930 (2007), and *Ford* establish that a death row inmate has a constitutional right to due process in state-court proceedings to determine whether he is competent to be executed. Although seven Justices, in three separate opinions in *Ford*, could not agree on the minimum level of procedural due process required by the Constitution, all seven assumed that the death row inmate would have the assistance of counsel during the competency determination. See *Ford*, 477 U.S. at 414 (noting that “any procedure that precludes the prisoner or his *counsel* from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate”) (Marshall, J., joined by Brennan, J., Blackmun, J., Stevens, J.) (emphasis added); *id.* at 427 (pointing out that “[t]he State should provide an impartial officer or board that can receive evidence and argument from the prisoner’s *counsel*, including expert psychiatric evidence that may differ from the State’s own psychiatric examination”) (Powell, J., concurring in part and concurring

due process in the earlier Article 46.05 litigation, “the factfinding 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 the truth.” *Id.* at 954 (internal quotation marks omitted). The unreliable results of an unconstitutional process cannot trigger Article 46.05(e)’s presumption of competency.

in judgment) (emphasis added); *id.* at 430 (finding Florida’s competency procedures inadequate because “*counsel* for the inmate was not permitted to participate in the examination of the mental health experts in any adversarial manner) (O’Connor, J., concurring in result in part and dissenting in part, joined by White, J.) (emphasis added).

A claim of incompetency to be executed cannot be asserted at trial or on direct appeal – where the Sixth and Fourteenth Amendments guarantee the right to counsel – because the execution is not imminent and the claim is not ripe. *See Colburn v. State*, 966 S.W.2d 51, 513 (Tex. Crim. App. 1998). Nor can a claim of execution competency be asserted during an initial state or federal postconviction proceeding – where Texas law (Tex. Code Crim. Proc. art. 11.071) and federal law (18 U.S.C. § 3599) ensure the right to counsel – because the claim still is not ripe in the absence of an imminent execution date. *Panetti*, 551 U.S. at 942. In short, at no time during which a person has a constitutional or clear statutory right to appointed counsel can he raise a claim that he is incompetent to be executed.

While *Ford* left to the States “the task of developing appropriate ways to enforce” the constitutional ban on executing the incompetent,

Ford, 477 U.S. at 416-17, it required the States to comply with due process when an inmate raises a non-frivolous claim that he is incompetent to be executed. *Panetti*, 551 U.S. at 948-54. However, Article 46.05 contains no express provision for appointment of counsel or funding for mental health experts or investigators to assist the inmate in preparing the motion. *See Druery v. State*, 412 S.W.3d 523, 539 (Tex. Crim. App. 2013). (“Article 46.05 does not expressly contemplate that an attorney will represent the defendant until after the trial court has determined that the defendant has made a substantial showing of incompetency.”); *but see Ex parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000) (recognizing that trial courts have the discretion under Article 46.05 to appoint counsel “in any given case”); *Panetti*, 551 U.S. at 952 (citing *Caldwell* with approval as a tool for implementing basic due process rights, including the appointment of experts “before a petitioner has made a substantial showing of incompetency”); *see also* Tex. Code Crim. Proc. art. 1.051(c), (d)(3), (d)(4) (providing counsel for an indigent defendant in any criminal, appellate, or postconviction proceeding if the court concludes that the interests of justice require representation).

Without counsel or funding for resources, it is impossible for a putatively incompetent person to prepare and file the Article 46.05 motion and litigate a *Ford* claim. See American Bar Ass'n, *Criminal Justice Mental Health Standards* (1989) § 7-5.7, comment at 298 (“[T]he prospect of an incompetent defendant litigating his or her own competence *pro se* does not afford sufficient assurance of a fair adjudication.”). Indeed, a federal district court found a state trial court’s application of Article 46.05 unconstitutional precisely because the state court refused to appoint counsel or approve funding for a mental health expert:

The initial constitutional deficiency with what transpired during petitioner’s latest state habeas corpus proceeding is that petitioner was afforded neither court-appointed counsel nor expert assistance to challenge his own competence to be executed. Instead, the State of Texas insisted an arguably insane death row inmate proceeding without the assistance of court-appointed counsel was required to satisfy the threshold requirement of Article 46.05, *i.e.*, make a “substantial showing of incompetency,” before the inmate was entitled to either the assistance of counsel or the assistance of any mental health expert. With all due respect, a system which requires an insane person to first make “a substantial showing” of his own lack of mental capacity without the assistance of counsel or a mental health expert, in order to obtain such assistance is, by definition, an insane system. . . . 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 arcane pleadings requirements so intellectually challenging they test the skill of even the most seasoned attorney.

Wood v. Thaler, 572 F. Supp.2d 814, 817 (W.D. Tex. 2008). Even though *Wood* found the evidence of incompetence “far from compelling” (noting that the petitioner had never been definitively diagnosed with *any* mental illness) and far from satisfying the ultimate standard, *id.* at 818, the court concluded that the petitioner was entitled to appointed counsel, expert assistance, an evidentiary hearing, and a stay of execution. *Id.* at 820-23; *see Wood v. Thaler*, 787 F. Supp.2d 458, 487 (W.D. Tex. 2011) (“Where, as was also true in Panetti’s case, the State of Texas has denied a petitioner a reasonable opportunity to present his *Panetti* claim despite a threshold showing of insanity, the federal habeas court must consider the petitioner’s claim of incompetency to be executed.”) (citation omitted).

In *Druery*, this Court recognized the potential due process violations caused by a trial court’s failure to appoint counsel or approve resources until after the inmate had satisfied the Article 46.05 standard. *Druery*, 412 S.W.3d at 540 (citing *Wood*). In *Green v. State*,

374 S.W.3d 434 (Tex. Crim. App. 2012), this Court avoided the issue. *Id.* at 440 (noting the “obvious distinction” between Wood and Green is that Green was provided with counsel and expert assistance). Mr. Panetti’s case now squarely presents the issue, and this Court should address it.

Courts fall short of due process when they appoint counsel but then refuse to provide appointed counsel with the tools necessary to investigate, develop, prepare, and present the evidence of incompetency. *Cf. Ake v. Oklahoma*, 470 U.S. 68 (1985). Fortunately, undersigned *pro bono* counsel located a mental health expert willing to review documents and consult with counsel, but only on a limited *pro bono* basis. *See, e.g., Ex parte Johnson*, 2003 WL 21715265 (Tex. Crim. App. 2003) (Johnson, J., concurring, joined by Price and Cochran, JJ.) (recognizing that expert opinion is useful in establishing *prima facie* case of mental retardation). Mr. Panetti still needs funds to retain that expert to evaluate him and review additional records in preparation for filing an Article 46.05 motion.

Denying access to counsel and funding to prepare an Article 46.05 motion while providing that assistance to prepare an Article 11.071

postconviction application lacks any rational basis. *Ford* claims are raised in habeas corpus proceedings in federal court. *See Panetti*, 551 U.S. at 945-48. In state court, however, *Ford* claims are not cognizable under Article 11.071, the statute governing postconviction procedures for death-sentenced inmates. *Green*, 374 S.W.3d at 438-40. Nonetheless, a *Ford* claim must be thoroughly investigated and properly presented, just as any typical postconviction claim must. Where constitutionally required procedures are not forbidden by statute – but also are not expressly permitted – courts must temporarily provide a remedy until the legislature establishes a constitutionally sufficient procedure. *See Caldwell*, 58 S.W.3d at 131 (explaining that “[t]he absence of a provision in [Article 46.05] which explicitly deals with the appointment of counsel should not be read as negation of the constitutional right to counsel at critical stages of a criminal prosecution. Silence is not negation.”) (Johnson, J., dissenting).

Due process demands that counsel be appointed to represent Mr. Panetti, and that appointed counsel have access to an investigator and a mental health expert to assist him in litigating his *Ford* claim. Such a requirement does not mean that every death-sentenced inmate with

an imminent execution date is entitled to these same rudimentary elements of procedural due process. A colorable showing – a showing an attorney working *pro bono* could reasonably be expected to make – must first be made to trigger these due process protections. *See, e.g., In re Hearn*, 376 F.3d 447, 455 (5th Cir. 2004) (holding that the federal statutory right to appointed counsel to litigate an *Atkins* claim in a successive habeas petition attaches when the inmate makes a colorable showing of a constitutional violation); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (defining a “colorable showing” as “a sufficient showing of possible merit to warrant a fuller exploration by the district court”).

In sum, based on the detailed and extensive information set out in Mr. Panetti’s Renewed Motion for Stay of Execution filed in the trial court, Mr. Panetti triggered his right to the minimal due process rights guaranteed by *Ford* and *Panetti*. He is entitled to the appointment of counsel and the authorization of funds to hire an investigator and mental health expert to assist him in making the requisite showing under Article 46.05. *Caldwell* implies, and *Panetti* and *Wood* confirm,

that the trial court erroneously exercised its discretion and violated due process when it denied the requested resources.

II. THE RUDIMENTARY DUE PROCESS PROTECTIONS OF *FORD* AND *PANETTI* ARE EMPTY PROMISES IN THE ABSENCE OF A STAY OF EXECUTION.

The appointment of counsel and authorization of funds for expert and investigative assistance are meaningless without a stay of execution. Because Mr. Panetti's *Ford* claim is not "frivolous and designed to delay" his execution, the trial court should have granted his request for a stay. *Panetti*, 551 U.S. at 946. The Supreme Court has recognized that the appointment of counsel in advance of filing a habeas corpus petition – without an accompanying stay of execution giving counsel time to adequately investigate the facts and brief the claims – renders the statutory guarantee of counsel "an empty promise." *Hearn*, 376 F.3d at 457; see *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (explaining that "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims").

Consistent with the reasoning of *McFarland*, a stay of execution is imperative to ensure the effective development and presentation of Mr.

Panetti's Article 46.05 motion. Mr. Panetti has not ignored any opportunity to develop the claim, nor has he flouted the available process. This is not a last-minute filing designed to delay the execution: Mr. Panetti began litigating the competency claim three days after his *pro bono* counsel became aware of the execution date. Nor is his claim frivolous. He has made a colorable showing that he is not competent to be executed.

Ford claims are unique in that they are forward-looking: the constitutional violation occurs when the State announces its intention, through the setting of an execution date, to carry out the execution of a potentially incompetent inmate. Under these singular circumstances, courts must ensure due process by appointing counsel and providing resources for the inmate who can make a colorable showing that he is incompetent to be executed. In Mr. Panetti's case, a stay of execution is imperative to vindicate his rights under the Eighth and Fourteenth Amendments.

Finally, a stay of execution will not substantially harm the State of Texas. Although the State has a strong interest in carrying out

executions, it has no interest in executing a person whose execution is prohibited by the Eighth Amendment.

PRAYER FOR RELIEF

The Cruel and Unusual Punishments Clause of the Eighth Amendment is unique among all the Amendments to the Constitution dealing with criminal procedure, for its primary purpose is not concerned with protecting a criminal defendant from an unfair trial but with protecting society itself from inflicting barbarous and uncivilized punishments. As the Supreme Court famously announced more than a half century ago:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The Supreme Court in *Ford* relied upon this understanding of the Eighth Amendment's purpose – protecting *our* fundamental human dignity – in outlawing the execution of the incompetent. The Court concluded that the Eighth Amendment ban “protect[s] the dignity of society itself from the barbarity of exacting

mindless vengeance.” *Ford*, 477 U.S. at 410. The State and this Court have a constitutional obligation to ensure that an abhorrent punishment that diminishes our civilized society is not inflicted on Scott Panetti. We cannot place on Mr. Panetti the sole responsibility for enforcing a right that is designed to preserve our humanity.

Mr. Panetti has made a colorable showing that he is incompetent to be executed. He is entitled to the rudimentary procedural due process protections guaranteed by *Ford* and *Panetti*, and the Eighth and Fourteenth Amendments. He cannot make the requisite showing under Article 46.05 motion without additional time, appointed counsel, and funding for assistance. To ensure that the state-court process can effectively vindicate Mr. Panetti’s constitutional rights, he asks this Court to:

1. Stay the execution currently scheduled for December 3, 2014;
2. Order the trial court to appoint undersigned counsel to assist him in preparing the Article 46.05 motion;
3. Order the trial court to authorize funds so that he can hire a mental health expert and an investigator to assist him in preparing the Article 46.05 motion; and

4. Remand the case to the trial court so that he can litigate his *Ford* claim.
5. In the alternative, Mr. Panetti asks the Court to stay his execution and submit this case for full briefing and oral argument.

Respectfully Submitted,

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Counsel for Scott Louis Panetti

CERTIFICATE OF SERVICE

I certify that on this 20th day of November 2014, a copy of this motion was served on Counsel for the State via electronic transmission to:

Lucy Wilke
Kerr County Assistant District Attorney
lucy216@bizstx.rr.com

Ellen Stewart-Klein
Assistant Attorney General
Ellen.Stewart-Klein@texasattorneygeneral.gov

/s/ Gregory W. Wiercioch

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitations of Tex. R. App. Proc. 9.4(i)(2), because this brief contains 9,678 words, excluding the parts of the brief exempted by Tex. R. App. Proc. 9.4(i)(1).

Dated: November 20, 2014

/s/ Gregory W. Wiercioch

APPENDIX 1

**TRIAL COURT'S
ORDER
(NOV. 19, 2014)**

NO. 3310

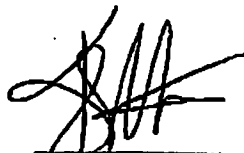
THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	216 th JUDICIAL DISTRICT
	§	
SCOTT LOUIS PANETTI	§	GILLESPIE COUNTY, TEXAS

**ORDER DENYING DEFENDANT'S 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**

On this date came on for consideration the "Defendant's 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". The Court having considered said motion and the State's response to said motion as well as the Defendant's Supplement to Renewed Motion to Stay or Modify Execution Date, and the State's response to said supplement, is of the opinion that said motion should, in all things be, and is hereby, DENIED

It is therefore ORDERED that the Defendant's 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 is hereby, in all things, DENIED.

SIGNED on this the 19 day of November, 2014.



Judge N. Keith Williams
Judge Presiding

Copies:

District Attorney

Gregory Wiercioch (fax 608/263-3380)

Kathryn Kase (fax 512/476-0953)

Ellen Stewart-Klein (fax 512/320-8132)

Texas Court of Criminal Appeals

Gillespie County District Clerk

APPENDIX 2

TDCJ MENTAL HEALTH REFERRAL (NOV. 21, 2013)

**CORRECTIONAL MANAGED CARE
OUTPATIENT MENTAL HEALTH SERVICES**

WEEKLY MENTAL HEALTH AD SEG ROUNDS

Patient Name: PANETTI, SCOTT L TDCJ#:999164 DATE: 11/21/2013 15:11 FACILITY: POLUNSKY (TL)
Age:55 Race: W Sex: male

Patient Language: ENGLISH **Name of interpreter, if required:**

Most recent vitals from 11/15/2013: BP: 142 / 70 (Sitting) ; Wt: ; Height: 75 In.; Pulse: 60 (Sitting) ; Resp: 18 / min;
Temp: BMI:

Allergies: THIORIDAZINE, THORAZINE, HALDOL, PENICILLINS

Current Medications:

FLUOCINONIDE 0.05% CREAM 15GM

1 APPLICS TOPICALLY TWICE DAILY for 10
Days KOP
APPLY THIN LAYER SPARINGLY. TO DRY
AREAS

ORDERING FACILITY: POLUNSKY (TL)
ORDERING PROVIDER: JACKSON, DIANE E

LAST DATE GIVEN KOP: 11/18/2013 08:12:48PM
REFILLS: 0 / 0

EXPIRATION DATE: 11/25/2013 12:55:00PM

IBUPROFEN 600MG TABLET

1 TABS ORAL TWICE DAILY for 30 Days KOP
As Needed (PRN)

ORDERING FACILITY: POLUNSKY (TL)
ORDERING PROVIDER: JACKSON, DIANE E

LAST DATE GIVEN KOP: 11/13/2013 08:49:11PM
REFILLS: 1 / 2

EXPIRATION DATE: 1/14/2014 03:17:00PM

Active Problems:

Dental:

Hard Tissue Disease First Observed 9/21/2012 12:00PM
Perio Type II First Observed 9/21/2012 12:00PM
Dental Examination First Observed 9/21/2012 12:00PM
Gingival/periodontal First Observed 3/5/2013 09:39AM
Other Dental First Observed 7/11/2013 11:12AM

Mh Other:

No Diagnosis On Axis I/axis II First Observed 2/25/2004 01:49PM

Not Specified:

Tb Class 0 (no Exposure Pulm. Tuberculosis) First Observed 9/25/1995 07:45AM
Low Back Pain First Observed 10/6/1995 07:46AM
Age First Observed 11/10/1998 07:48AM
Screening Exam For Suspected Condition First Observed 9/18/2003 09:03AM (Rule Out)
Knee Pain First Observed 5/25/2006 07:52AM
Ankle/foot Pain First Observed 12/23/2009 08:30AM
Extremity Pain First Observed 8/1/2011 12:45PM
Sprains And Strains Of Elbow And Forearm First Observed 6/28/2012 03:30PM
Misc Diagnosis First Observed 8/28/2012 12:41PM
Skin Conditions First Observed 10/31/2012 01:50PM
Observation- Cond Not Found First Observed 11/6/2012 10:56AM

Seen this date at (time): 1530

S: Offender seen on weekly ad seg rounds.

Patient reported:

- Voices no complaints
- Medication Problems/Side effects
- Requested PAMIO Referral

Other (Describe): Offender was seen during 12 bldg rounds. While passing his cell, offender began making irrational comments to the escorting officer about the food trays. MHCM asked offender how he was doing. He talked about his belief in God maintaining him but said he was thinking of contacting MH. MHCM inquired as to why. He said he thinks he may need some assistance. After a few minutes of interviewing the offender, it appears that the offender is reporting that he has always heard voices, but for many years has dealt with them though reading the bible and prayer. He said a long time ago (before EMR) he took antipsychotics. He said he remembers most of them caused him severe SEs so he decided not to take them, but he asked if he could be referred to a clinician because he thinks he may need medicine again. He is finding it more difficult to function with only prayer and bible reading to sustain him, particularly over the past two years. MHCM told the offender he would review the record and make referrals as indicated.

Escorting officer mentioned the offender is always hyper-religious, and often acts irrational or delusional, but only recently has he been acting out aggressively.
Review of FORVUS indicates offender just received a case for telling an officer "you're crooked and I'm going to smite you for your wickedness" while trying to throw urine on the run. This is the first aggressive case since he was placed on death row in 1995 and he has never had a disciplinary for assault or threatening prior to this. Last month he had a case for yelling and singing loudly causing a disruption of pod operations. Most cases over his 18 years on death row appear to be for refusing to shave.
Assignment history shows trips to J4 in 1995 and 1997.
Review of offense shows that in 1992 he killed his in-laws and kidnapped his wife and daughter. After he was arrested, he told the police his alter ego "Sarge" did the killing.
Will refer to QMHP for eval.

O: Behavioral observations: (MAY USE DECISION TREE)

Spoke to offender through Plexiglas so had limited ability to assess behavior. He did express hyper-religious ideas and was observed making irrational comments to the officer about his food tray. He denied any suicidal ideation.

A: Procedures Ordered:

Date Time	Description	Diagnosis	Comments	Special Instructions
11/21/2013 03:30PM	MH OP SICK CALL/REFERRAL TRIAGE (F)	no diagnosis on axis I/axis II		

- P:
- Continue to be seen on regularly scheduled rounds
 - Refer to QMHP
 - Refer to psychiatrist/psychiatric PA/NP
 - Other (Describe):

Electronically Signed by PACE, JACK B. BA on 11/21/2013.
 Electronically Signed by MOORE, ANDREA CCA on 11/22/2013.
 Electronically Signed by PATEL, HEMANT S. M.D. on 11/22/2013.

Electronically Signed by HARDEN, JEANETTE M. MA, MHC on 12/05/2013.
Electronically Signed by CHANCELLOR, MICHAEL R. MA, LPC, MHM on
02/21/2014.
##And No Others##