

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY

DEPUTY

SCOTT LOUIS PANETTI,
Petitioner,

-vs-

Case No. A-04-CA-042-SS

NATHANIEL QUARTERMAN, Director, Texas
Department of Criminal Justice, Institutional
Division,
Respondent.

ORDER

BE IT REMEMBERED on the 6th day of February 2008 the Court held a hearing in the above-styled cause, and the parties appeared through counsel. The Court held this evidentiary hearing to resolve the issue of whether Petitioner Scott Panetti is mentally competent to be executed under the standard established by *Ford v. Wainwright*, 477 U.S. 399 (1986) and further elaborated by *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007). Having reviewed the evidence and argument submitted at the hearing, the applicable law, and the case file as a whole, the Court now enters the following opinion and order.

Background

Petitioner's case is before this Court on remand from the Supreme Court, *Panetti v. Quarterman*, 127 S. Ct. 2842 (U.S. 2007) (by way of the Fifth Circuit, *Panetti v. Quarterman*, No. 04-70045, 2007 U.S. App. LEXIS 19379 (5th Cir. Aug. 15, 2007)). The Supreme Court's order reviewed this Court's September 29, 2004 denial of Petitioner Scott Panetti's claim for relief

pursuant to 28 U.S.C. § 2254, and reversed this Court's ultimate holding that Petitioner is competent to be executed under *Ford v. Wainwright* as the Fifth Circuit has interpreted that precedent.¹

The undersigned had found "Petitioner's delusional beliefs— even those which may result in a fundamental failure to appreciate the connection between Petitioner's crimes and his execution— do not bear on the question of whether petitioner 'knows the reason for his execution' for purposes of the 8th Amendment," because Fifth Circuit case law "requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." Order of September 29, 2004 at 17 (citing *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995); *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994)). The Supreme Court held this standard "is too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Panetti*, 127 S.Ct. at 2860.

Relying on the *Ford* majority's discussion of the retributive purpose of capital punishment, the Supreme Court concluded "a prisoner's recognition of the severity of the offense and the objective of community vindication are called into question . . . if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.* at 2861. Accordingly, a test that merely establishes a prisoner's factual awareness of the State's "announced

¹ The Supreme Court affirmed this Court's determination that the gatekeeping provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244, do not bar Panetti's §2254 claim based on *Ford v. Wainwright* as a "second or successive" petition. *Panetti*, 127 S. Ct. at 2854. The Supreme Court further affirmed this Court's determination that the state court's factual findings regarding Panetti's competence to be executed are not entitled to the deference normally afforded under AEDPA because the trial court's procedures were an unreasonable application of *Ford*, which is clearly established Supreme Court precedent. *Id.* at 2856–57.

reason” for his punishment is insufficient. *Id.* To satisfy the principles set forth in *Ford*, a prisoner must have a “rational understanding “ of the State’s rationale for his execution. *Id.*

The Supreme Court declined to define “rational understanding” in this context or set out a specific standard for when and whether a prisoner’s delusional beliefs would render him incompetent to be executed, notwithstanding his awareness of the factual predicate for his execution. Instead, the Supreme Court found “[i]t is proper to allow the court charged with overseeing the evidentiary record in this case the initial opportunity to resolve petitioner’s constitutional claim.” *Id.* at 2683.

In making this determination, the District Court is instructed to consider the Eighth Amendment analysis in *Roper v. Simmons*, 543 U.S. 551, 560-64 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311-14 (2002); and *Ford*, 477 U.S., at 406-10. *Panetti*, 127 S. Ct. 2683. Each of these three cases found the death penalty violated the Eighth Amendment with regard to certain classes of offenders (juveniles, the mentally retarded, and the insane) in light of “evolving standards of decency” coupled with the diminished reasoning capacity (and therefore diminished culpability) of these offenders generally. (Notably, the *Panetti* dissent specifically found Petitioner’s claims unlikely to survive the “evolving decency” standard articulated in *Roper* and *Atkins*. *See* 127 S. Ct. 2842, 2874 (Thomas, J., dissenting)).

The majority in *Panetti* suggested the existing record is not sufficient to adjudicate Panetti’s constitutional claims in light of the Supreme Court’s rejection of the Fifth Circuit’s competency test. *See Panetti*, 127 S. Ct. at 2863 (“And notwithstanding the numerous questions the District Court asked of the witnesses,. . . it did not press the experts on the difficult issue it identified in its opinion.”). The Supreme Court directed the District Court, on remand, to “address[], in a more definitive manner and in light of the expert evidence found to be probative, the nature and severity

of petitioner's alleged mental problems.” *Id.* The Supreme Court instructed this Court to consider “the conclusions of physicians, psychiatrists, and other experts in the field” with regard to “the extent to which severe delusions may render a subject’s perception of reality so distorted that he should be deemed incompetent.” *Id.* The Fifth Circuit’s brief remand opinion also suggests a further hearing is warranted: “The Supreme Court vacated our judgment and remanded the case for further development of an evidentiary record” No. 04-70045, Aug. 15, 2007. Therefore, the Court offered the parties the opportunity to present further evidence on the issue of whether and to what extent Panetti’s delusions render him incapable of understanding the reason for his punishment.

The evidence presented on this subject at the February 6, 2008 hearing was exhaustive. The Court heard expert opinions from psychiatrists, psychologists, and neuropsychologists for both Panetti and the State. Additionally, the Court heard testimony from fellow inmates and the guards and chaplain who have had contact with Panetti on Death Row. The Court reviewed volumes of medical, social security, and prison records regarding Scott Panetti’s longstanding mental illness and delusions. Finally, the Court heard some eleven hours of conversations between Panetti himself and his parents and other visitors, recorded by the State during his visitation hours in December of 2007 and January of 2008.

Mindful of the Supreme Court’s instruction to give a detailed explanation and evaluation of “[t]he underpinnings of Petitioner’s claims on remand,” the Court finds this voluminous record is best addressed, to the extent possible, as a chronological narrative.

I. Panetti’s medical history prior to the murders

A determination of competence to be executed looks to the Petitioner’s *current* mental state. *Panetti*, 127 S. Ct. at 2847-2848. In Panetti’s case, however, his past history of mental illness has

particular relevance. The State has alleged he is malingering— feigning or exaggerating the delusions that allegedly render him incompetent to be executed. Where malingering is an issue, any history of mental illness predating the alleged motive to mangle may assist the factfinder to separate fact from fiction regarding the current claims of incapacity.

Panetti has consistently reported to examiners that he had a “near-drowning incident” when he was five years old. *See, e.g.*, Report of Dr. Mary Alice Conroy at 2, Pet.’s Ex. 1; Report of Dr. Leslie Rosenstein at 1, Pet.’s Ex. 4. One medical evaluation states “there almost certainly was anoxia and some brain damage during this event.” Resp.’s Ex. 13, Tab B, 131. His first documented contact with mental health professionals, however, was on November 2, 1976, when he was 18 years old. *See* Timeline, Pet.’s Ex. 7B; Military Personnel Records; Pet.’s Ex. 7C at 1–2 (reproduced in full at Resp.’s Ex. 11 without page numbers).

Panetti had enlisted in the Navy in December of 1975, and during his first year of service he developed problems with arthritis in his hands. Pet.’s Ex. 7C at 1–2. On November 2, 1976, while waiting for the determination of the medical board regarding his arthritis, he “came to sickbay requesting appt. with psychiatrist,” complaining of depression and insomnia. *Id.* The psychiatrist who evaluated him stated Panetti felt “the period of time wasted for determination is causing most of his problems re: tension, resentment, etc. because seniors can’t put him to work.” *Id.* By November 18, 1976, Panetti’s medical record noted “he is becoming increasingly hostile and depressed due to a lack of specific diagnosis and inadequacy of therapy, and finally he is becoming somewhat disillusioned with the Navy because of his feeling they have little concern for his problem.” Pet.’s Ex. 7C at 3 (reproduced in full at Resp.’s Ex. 11 without page numbers). He was

honorably discharged by reason of physical disability (presumably arthritis) on January 17, 1977. Resp.'s Ex. 11 at 0015.

The following year, Panetti "sustained electrical injury while allegedly working as a power lineman in San Saba, Texas, 28 Jun. 1978." Pet.'s Ex. 7C at 4 (reproduced in full at Pet.'s Ex 1 without page numbers). He remembered no details of the accident, but suffered extensive electrical burns. Pet.'s Ex. 1 (second unnumbered page). A neurological examination conducted on admission to the burn unit concluded Panetti's neurological functioning was "basically intact," but "from the very beginning, patient exhibited an immature and uncooperative personality. Psychiatric evaluation was obtained and the conclusions by the consultant were that 1) the patient had a sociopathic personality disorder, which was moderate to severe; 2) the patient may, in fact, have early schizophrenia." *Id.* However, "[r]ecommendations . . . included no indications for medications and standard psychological support." *Id.*

Notes of the psychiatric evaluation, which was conducted on July 13, 1978, include the following: "Pt. has remarkably low frustration tolerance with high acting out potential when egocentric demands are not *immediately* met." Pet.'s Ex. 7C at 5 (reproduced in full at Pet.'s Ex. 1 without page numbers). "Of particular concern is the presentation of signs compatible with Early Schizophrenia although he has not decompensated." *Id.* The signs noted included "seeing flashes of red light," "confusing his voice with that of others (i.e. whispers)," and some "flight of ideas." *Id.* The evaluator emphasized, however, that "at the present time the patient is *not* psychotic." *Id.* The symptoms noted by the evaluator did not include any religious delusions or preoccupation with religion.

Panetti's physical treatment for electrical burns was "medically uneventful," Pet.'s Ex. 7C at 4, but his disruptive personality disorder complicated treatment and his physician recommended "continued psychiatric follow up." Pet.'s Ex. 7C at 7 (reproduced in full at Pet.'s Ex. 1 without page numbers). Panetti was nevertheless discharged when his second degree burns healed with no instructions on further psychiatric care. Pet.'s Ex. 7C at 4. He was simply given a copy of the "burn patient's discharge booklet" and instructed to avoid exposure to sunlight for the next few months. *Id.*

On January 17, 1981, Panetti was involuntarily committed to a psychiatric ward at the Kerrville State Hospital. Timeline, Pet.'s Ex. 7B; Resp.'s Ex. 13, Tab A, 004. An evaluation conducted on January 19, 1981 states his chief complaint was "drinking too much." Pet.'s Ex. 7C at 9; Resp.'s Ex. 13, Tab A, 025. More specifically, Panetti told the examiner he had been drinking for about eight years and had been in jail two times for alcohol abuse. *Id.* He stated he had been married for two years and had been abusing his wife, who had him under a "peace bond." *Id.* He had been drinking more and becoming more aggressive under the peace bond, and "they had him committed to the Kerrville State Hospital for treatment and evaluation." *Id.*

The evaluation notes Panetti exhibited some grandiose and paranoid ideation on admission and was very irritable, impulsive, and "wants to be the best cowboy around." *Id.* The evaluation does not note any preoccupation with religion, demons, or spiritual warfare. The evaluation concludes Panetti has alcohol dependence and a dependent personality disorder. *Id.* A related evaluation on January 22, 1981 notes Panetti had been using "a variety of drugs, including cannabis and methamphetamines" over the previous seven years, in addition to his excessive drinking, and that

he had been “aggressive, delusional, and paranoid” before committment. Resp.’s Ex. 13, Tab A, 033.

Panetti was given thiamin, valium, and mellaril concentrate during this involuntary commitment. *Id.* at 010, 012. After a course of individual and group therapies, *id.* at 014, Panetti was discharged on March 30, 1981 with no prescription for continued psychiatric medication, but with the recommendation that he continue Alcoholics Anonymous and outpatient therapy. *Id.* at 016.

On April 1, 1986, approximately five years later, Panetti was admitted to the Starlite Village Alcohol and Drug Abuse Treatment Center for “drug abuse, alcohol abuse, and psychotic behavior.” Pet.’s Ex. 7C at 15. The nature of this behavior is not clear from the record, but Panetti was diagnosed as psychotic on admission and placed on an antipsychotic drug regimen including Thorazine, Benadryl, Loxitane, Dilantin, and Cogention. *Id.* His psychosis reportedly lessened in severity over the next several days, but on April 17, 1986, he left the hospital against medical advice while still actively psychotic. *Id.* at 23. Specifically, when his wife came to visit him, he chased her car down the hill and she apparently allowed him to get in and leave with her. *Id.* His wife “would not have police pick him up at home and bring him back.” *Id.* However, he appears to have been readmitted on April 18, 1986, accompanied by his wife. *Id.* at 27. He was “cooperative and pleasant,” but his “thought processes remained somewhat loose and psychotic” during this brief admission. *Id.* He was again discharged against medical advice when his wife came for him on April 22, 1986.

On May 12, 1986, Panetti was diagnosed by Starlite physicians with chronic undifferentiated schizophrenia. Timeline; Pet’s Ex. 7B. On May 14, 1986, he was transferred on an emergency basis from Starlite to the Kerrville State Hospital. Resp.’s Ex. 13, Tab A, 041. The transfer to Kerrville

was to be an overnight stop “so that a court hearing could be held and his transfer [and involuntary committal] to the Waco V.A. hospital could be effected.” *Id.* He did not require antipsychotic medication while at Kerrville. *Id.*²

The Waco V.A. hospital conducted an initial interview of Panetti and his wife on May 15, 1986. Pet.’s Ex. 7C at 35. Panetti stated alcohol abuse was his “sole problem,” but his wife described episodes of “paranoid thinking including a belief the devil was in the furniture and burying some [furniture] outside; nailing curtains shut so neighbors wouldn’t film them etc.” *Id.* Panetti’s wife stated “he can present a coherent front but . . . it disintegrates soon.” *Id.* A more detailed evaluation on discharge states Panetti was admitted “by temporary commitment from Kerr County, Texas dated 5-13-86. . . . [He] had been reported to have been agitated, violent, and threatening his wife and children. The family wanted him out of the county until he was stabilized.” *Id.* at 37 (reproduced in full at Resp.’s Ex. 13, Tab G, 462).

During his time at the Waco V.A. hospital, Panetti repeatedly requested treatment for alcohol and marijuana abuse in the “Alcohol Program,” but upon his discharge decided he did not want to participate in the Alcohol Program after all. Resp.’s Ex. 13, Tab G, 462. He was discharged on May 29, 1986 with a diagnosis of chronic undifferentiated schizophrenia, and given a month’s supply of antipsychotic medication, with follow-up outpatient care scheduled at the Kerrville facility. *Id.*

²There is a handwritten note at the bottom of the 5/14/86 admission record noting “in July ‘86 he [Panetti] was in VA Hosp. in Tomah, Wis. . . . exorcising the Devil.” Resp.’s Ex. 13, Tab A, 041. It is unclear who made this notation, when it was made, or what relevance it has to the May 14, 1986 overnight Kerrville stay.

Panetti and his first wife separated soon after his hospitalization in the Waco V.A. facility. Panetti moved to Wisconsin, where he entered the Tomah V.A. Hospital for psychiatric treatment on July 29, 1986. Resp.'s Ex. 13, Tab D, 14. In a detailed "discharge summary," a psychiatrist at Tomah diagnosed Panetti with current chronic undifferentiated schizophrenia, alcohol dependence, and episodic opiate dependence, also noting past cannabis dependence and abuse of hallucinogens. *Id.* This evaluation described Panetti's separation from his wife: "He scared his wife by taking many of their possessions, putting them outside, spraying them with water and generally exorcising the house." *Id.* According to this evaluation, Panetti stated he has heard voices and music since he was an adolescent (prior to any alcohol or drug abuse), but the voices do not tell him to harm himself or others. *Id.* He stated he drank alcohol "to quiet the voices." *Id.* He stated he began using alcohol at fourteen and marijuana at sixteen, and despite numerous attempts to treat his dependency, he had not been sober for more than two weeks since. *Id.*

The Tomah evaluation noted Panetti exhibited "exactly the same pattern he exhibited while being hospitalized at the Waco, Texas VA Medical Center": he readily admitted an alcohol problem but refused to follow through with treatment, stating he "could handle it himself," and talking about going home to family members. *Id.* He was discharged as "psychiatrically stable" with regard to his schizophrenia on August 6, 1986, with a month's supply of antipsychotic medications and an appointment for outpatient follow up care. *Id.*

Panetti was admitted to Cumberland Memorial Hospital later that month, on August 26, 1986, because he was having thoughts of suicide. Resp.'s Ex. 13, Tab B, 126, 129. An initial evaluation on August 27, 1986 notes Panetti "does have a history of intermittent paranoid delusional states, he also has a history of LSD flashbacks which can be very vivid and can involve visual

hallucinations. There is no history however of any psychotic symptomatology at a time when the patient was not taking drugs or at a time when the patient was not experiencing an LSD flashback.” *Id.* at 130. Nevertheless, the evaluator recommended increasing Panetti’s dose of Elavil. *Id.* at 132. A further evaluation on August 28, 1986 notes “The patient was labeled as being a chronic undifferentiated schizophrenic at the Tomah VA. At this time I will agree with Dr. Gilbert that the patient has . . . major depression. There does seem to be some schizoid quality about him however that is hard to put a finger on at this time. He does seem to be on the edge of having a possible psychotic break however. . . . If the patient did decide to leave at this time I don’t think he would be eligible for committal.” *Id.* at 141. On August 29, 1986, Panetti was diagnosed with “major depression with psychotic features.” *Id.* at 143. The psychiatrist noted “possible schizophrenia, although at this time it does not appear to be so.” *Id.* Panetti was discharged “on his present medications” with outpatient follow up scheduled. *Id.*

Records of his outpatient follow up treatment at Northern Pines Unified Services in Wisconsin include a notation on September 10, 1986 that Panetti left a suicide threat on his psychiatrist’s telephone recorder over the weekend, but later stated he owed the doctor an apology and was having less suicidal ideation. *Id.* at 123. However, on September 19, 1986, the evaluator noted Panetti had been “faking recovery” and “using booze with meds.” *Id.* On September 23, 1986, the evaluator noted Panetti “says he wants sobriety but apparently is not willing to go to any length to achieve it.” *Id.* There are no notations regarding any religious delusions or preoccupation with religion during Panetti’s outpatient treatment at Northern Pines.

Panetti moved back to Texas in October of 1986. He returned to Starlite Village for treatment of “chronic undifferentiated schizophrenia and acute exacerbation” that same month.

Timeline, Pet.'s Ex. 7B at 7; Pet.'s Ex. 7C at 56, 60. He reported continued drinking and marijuana use. Pet.'s Ex. 7C at 56. An evaluation conducted at Starlite Village on October 5, 1986 emphatically states "[t]here is no doubt in my mind that he is delusional and that at this point he is unable to have any realistic orientation towards his own situation. . . . I'm also sure that he is unable to function in any form or fashion at this point." Pet.'s Ex. 7B at 7; Pet.'s Ex. 7C at 59. The evaluation noted Panetti was raised as an Episcopalian and occasionally attended services but "at this point church attendance should be discouraged as the patient is too delusional as it is." *Id.* Nevertheless, the evaluator noted "In comparison to his previous admission [in April of 1986] it appears to me that the psychosis is greatly improved. . . . No doubt the psychotropic medication that he is receiving now has been most helpful and I would recommend that we continue with it." *Id.* at 61.

From October 16, 1986 until December 11, 1986, Panetti was treated for "schizoaffective disorder" and alcohol and substance abuse at the Kerrville VA Medical Center. Timeline; Pet.'s Ex. 7B at 7-8; Pet.'s Ex. 7C at 63 (reproduced in full at Resp.'s Ex. 13, Tab F, without page numbers). The records of this treatment period are sparse but include notations that Panetti is experiencing some "distortion of reality" and needs to be "observe[d] CLOSELY." Pet.'s Ex. 7C at 62.

From 1987 to 1990, Panetti was treated on an outpatient basis at the Kerrville facility. Timeline; Pet.'s Ex. 7B at 8. On April 11, 1988, he was evaluated for disability benefits. Pet.'s Ex. 7C at 69. During this evaluation, he reported "I've been dead three times— electrocuted, drowned, and overdosed on cocaine—I like it. I want to have my spirit in peace." *Id.* He also stated, regarding his separation from his first wife, "she's scared of me when I was on codeine I thought I had demons in the house with us." *Id.* He reported a continuing addiction to codeine and beer. *Id.*

When asked why he was not working at the time of the interview, Panetti stated “I think God has a purpose for me— maybe people are to learn from my mistakes.” *Id.*

Notwithstanding his statements during the examination for disability benefits, Panetti appears to have been relatively stable during his outpatient years in Texas. It is during this period that he married his second wife, Sonja Alvarado. On August 18, 1990, however, Panetti was again involuntarily committed to the Kerrville State Hospital, this time because he had reportedly threatened to kill his wife Sonja, their baby, his father-in-law, and himself by burning down the house, and had actually swung a cavalry sword at his wife and daughter. Pet.’s Ex. 7C at 75. He had begun calling himself “Sergeant Iron Horse.” *Id.* at 81. His initial evaluation, however, stated “[t]here was no evidence of delusions, hallucinations, ideas of reference, paranoid ideas, loose associations, tangentiality, pressured speech or any suicidal or homicidal ideations.” *Id.* at 75. On admission to the hospital, Panetti denied any homicidal ideation and stated he had contacted a divorce attorney. *Id.* at 75. The initial evaluation acknowledged his history of mental illness but noted “it is also possible that his wife is currently trying to set him up for a divorce by having him institutionalized at this time.” *Id.* at 77.

Panetti was discharged from the Kerrville State Hospital on August 29, 1990 with prescriptions for antipsychotic medication and a recommendation for continued outpatient treatment at the Kerrville V.A. Hospital. A progress notation, dated October 10, 1990, states Panetti was, at that time, “doing well” and had gradually decreased his dose of Elavil, though the psychiatrist continued to prescribe a regimen of antipsychotic drugs. Resp.’s Ex. 13, Tab E, 227.

On July 8, 1991, Panetti checked himself in to the Kerrville V.A. Medical Center because he “feared being committed to the state hospital.” Timeline, Pet.’s Ex. 7B at 9; Resp.’s Ex. 13, Tab

F, 279. He had apparently discontinued his medication and had been drinking heavily: on admission, "meds that he had been on were re-instituted" and he was placed on a "detox protocol" for alcohol withdrawal. Resp.'s Ex. 13, Tab F, 261. The evaluation noted "some religiosity and preoccupation with religion," but "no evidence of homicidal or suicidal ideation at this time." Pet.'s Ex. 7C at 86. At Panetti's request, he was enrolled in a group treatment program called ADTP (most likely a substance abuse treatment program; the record is unclear on this point), but he was removed from the program because of his inability to comply with group rules and schedules. *Id.* The examiner noted Panetti's "demeanor and pattern of interaction and poor impulse control [are] not unlike that seen in people who have basic underlying personality disorder who have used significant amounts of LSD during youth." *Id.* The examiner determined Panetti was "stabilized for his schizophrenic illness" and he was discharged on July 25, 1991, with a prescription for "maintenance meds" and an appointment for followup outpatient care in one month. *Id.*

An outpatient "progress notation" dated September 17, 1991 notes Panetti is "more stable" on a new prescription combination. Resp.'s Ex. 13, Tab E, 224. However, there are no further progress notes until August 19, 1992. *Id.* The evaluator's notes from that date state Panetti's "second wife has left him. Currently he is breaking horses and injured his back. Pt. states he has not been drinking. However, he has not maintained appts. *Has not been here for 1 year.* He remains immature [and has] poor judgment." *Id.* (emphasis in original). On September 1, 1992, there is a notation that Panetti needs a refill on one of his prescriptions. *Id.* at 223. There are no further notations until September 9, 1992.

On September 8, 1992, Panetti kidnapped his wife and daughter and murdered his mother and father-in-law in front of them.

II. Panetti's medical history after the murders

Though drug abuse, alcoholism, and domestic violence appear to have been consistent themes in Panetti's medical history since the late 1970's, his criminal history begins, for all intents and purposes, with the murder of his mother-and father-in-law, Amanda and Joe Alvarado.

The Texas Court of Criminal Appeals described the killings in detail in its opinion affirming Panetti's conviction:

In August 1992, approximately one month prior to the instant offense, [Petitioner's] wife Sonja, separated from [Petitioner] due to his drinking and threatening behavior – behavior which included hitting Sonja in the face with a rifle. Sonja took their three-year old daughter and moved in with her parents, Joe and Amanda Alvarado. [Panetti] was staying at a cabin or “bunkhouse” about five minutes away. During this time, [Panetti] would call the Alvarado home and threaten to burn down the house or kill Sonja and her parents if Sonja would not let him see his daughter.... The family called the police on at least one occasion. Sonja obtained a protective order on September 2, 1992....

[Panetti] awoke in the early morning hours of September 8, 1992. He shaved his head, sawed off the end of a shotgun, and dressed in his camouflage “jungle” gear. He further grabbed his 30.06 rifle and put on his “web gear” which consisted of a belt with various knives. [Panetti] then drove to his in-laws' home.

Upon arriving at the house, [Panetti] went to the sliding glass door next to the bed where Sonja and his three-year old daughter were asleep. [Panetti] broke the window with the butt of the sawed-off shotgun, breaking the gun in the process. [Panetti] left the shotgun on the steps outside the door. Upon the breaking of the glass door, Sonja screamed and ran from [Panetti] through the house and out the front door. [Panetti] followed.

Once on the front lawn, [Panetti] caught up with Sonja and told her to stop. She begged him not to kill her and after he said something to her about talking to the police, he hit her on the side of her face with the 30.06 rifle. Sonja fell to the ground. [Panetti] disappeared momentarily and Sonja's mother Amanda came to the front porch and told Sonja to hurry up and get inside. Sonja and Amanda locked the door behind them.

Sonja went to the phone to call the police. However, before she could place the call, [Panetti] shot the doorknob off the front door. Sonja's father Joe was now

also present.... While Sonja stood in the adjoining hallway, [Panetti], while pointing his rifle at each of them, asked her who she wanted to see die first – her parents or herself.... [Panetti] then shot Joe in the chest from less than ten feet away. Sonja at this point realized that her three-year old daughter had come into the hallway and was sitting on the floor watching the episode take place.

Next, Amanda attempted to move towards her husband and [Panetti] told her to stop. Sonja begged [Panetti] not to kill her mother.... [Panetti] then placed the rifle against Amanda's chest and shot her. At this point blood flew onto Sonja and her small daughter.

Sonja again began begging [Panetti] not to shoot her and not to take her daughter away. [Panetti] responded by saying the rifle had jammed. He then grabbed Sonja by the arm and told her, "Let's go!" Sonja voluntarily went along at this point because she was scared. [Panetti] drove them back to the bunkhouse. Along the way, Sonja asked [Panetti] if he was going to kill her and their daughter. [Panetti] replied that he did not know at the time.

Once at the bunkhouse, the three immediately went inside and [Panetti] locked the door. When Sonja inquired as to why [Panetti] had shaved his head, he said he felt Sonja did not love him anymore. He then told her to wash the blood off her and their daughter and gave them some clothes to put on. Sonja testified at this point she asked [Panetti] if she could go back and check on her parents. [Panetti] told her "the place was probably full of police" and also stated, "I just shot your parents. No more mommy, no more daddy; get that through your head." [Panetti] further told her she and her parents had betrayed him by going to the police and told her to repeat to herself that it was all her fault. [Panetti] then handed her a copy of the protective order and made her read it out loud – if she skipped a part, he would make her start over again from the beginning. At some point during this, [Panetti] reloaded the 30.06 rifle.

Eventually, [Panetti] told Sonja to go lay on the bed with their daughter. [Panetti] stated, "Look what I've done to you." [Panetti] then sat down on the bed and broke down saying, "What are my parents going to think of me? What is your family going to think of me? I only wanted to provide for you and Amanda and I couldn't stay away from the alcohol." Sonja then asked if he would let them go. [Panetti] said yes and walked Sonja and his daughter to the door. It was beginning to become light outside and Sonja asked why he did not turn himself in, but [Panetti] replied that he did not want to. He figured the police were already surrounding the bunkhouse and he might shoot two or three police officers then shoot himself. [Panetti] then told Sonja to take the jeep and locked the door behind them. Sonja testified [Panetti] did not appear to be intoxicated during this ordeal and he appeared to know what he did was wrong.

Panetti v. State, No. 72,230, slip op. at 2-5 (Tex. Crim. App. 1997).

Panetti surrendered to police later that same day and was arrested and charged with capital murder in connection with the deaths of Amanda Alvarado and Joe Alvarado. The “progress notations” kept by the Kerrville V.A. resume on September 9, 1992 with a notation that antipsychotic medications and a psychiatrist would be sent to the Sherriff’s office for Panetti. Resp.’s Ex. 13, Tab E, 221. Kerrville V.A. personnel continued to monitor Panetti throughout his pretrial incarceration.

Panetti was indicted on September 18, 1992, in the 216th Judicial District Court of Gillespie County, Texas, and the trial court appointed Preston Douglas as defense counsel on September 21, 1992.

At a psychiatric evaluation on September 28, 1992, Panetti stated he had three personalities: Scott, “the weak one,” Sarge, “the eternal mercenary,” and Will James, who “mediates between Scott and Sarge.” Resp.’s Ex. 13, Tab E, 216–20. This is the first mention of multiple personalities in Panetti’s medical history. The evaluator described Panetti’s thought processes as “in general, coherent, purposeful, logical (except for the description of his three ‘personalities’), goal directed. He did not appear to hallucinate. He responded to questions appropriately but at times, evasively . . . i.e. when asked if he got along well with his in-laws or his wife.” *Id.* at 219. Panetti had shaved his head prior to this interview. When asked why, he explained he was a Nazarite, and “you shave your head before you get in contact with a corpse . . . it’s in the Bible.” *Id.* The evaluator noted “It seems like Mr. Panetti may have wanted to impress me with how mentally disturbed he is, perhaps in an exaggerated way.” *Id.* at 220.

On October 15, 1992, the trial court appointed Richard Mosty as additional defense counsel for Panetti and further ordered a psychiatric exam to determine Panetti's competence to stand trial.

On December 4, 1992, continued progress notes from the Kerrville V.A. psychiatrist indicate Panetti had again asked to be placed in a hospital for treatment of his alcoholism. *Id.* at 207. Panetti also stated he had post traumatic stress disorder (PTSD) from his time as a Navy SEAL with a top secret security clearance in Thailand and Cambodia. *Id.* He recounted detailed stories about this experience, but the evaluator noted "his military records show he was never overseas." *Id.* The evaluator stated "I still am of the impression that this man exhibits a personality disorder with narcissistic, impulsive, paranoid, and antisocial features . . . rather than the [diagnosis] of schizoaffective disorder." *Id.* at 207.

On January 8, 1993 and January 15, 1993, respectively, Panetti requested "stronger," "more sedating" medication. *Id.* at 205. On January 8, 1993, he told his evaluator that he felt he was competent to stand trial, and on January 15, 1993, he claimed he had dismissed his lawyer and intended to plead guilty and face the death penalty, but "was told he might get 65 yrs sentence." *Id.* at 205. There is a notation on January 25, 1993 that his jailer had been accidentally overdosing him with Cogentin, which would be corrected. *Id.* at 204.

In April 1994, counsel Douglas filed a motion for hearing on Panetti's competence to stand trial due to his history of mental illness. In July 1994, the trial court empaneled a jury in Kendall County, Texas, to hear evidence on Panetti's competency. The jury was unable to reach a decision despite lengthy deliberations, and the trial court granted a mistrial. After a change of venue, the trial court again empaneled a jury for the competency hearing, and on September 9, 1994 the jury found Panetti competent to stand trial.

On February 17, 1995, Panetti filed a medical request form in the Bell County Jail stating "I am hallucinating. I would like to quit Haldol and try Cosarill for my Schizophrenia. . . . I am not sound in mind. . . . God loves me U2." Pet.'s Ex. 7C at 95 (reproduced in full at Resp.'s Ex. 12 without page numbers). The doctor determined his medication should not be changed. *Id.* On March 18, 1995, Panetti filed a second medical request asking to be taken off Haldol and placed on Cosaril, Prozac, and Nicorette gum. *Id.* at 104. On this form, Panetti wrote "Shoot me in the heart, no more, slay me please, I request death, coup de grace, THANK YOU." *Id.* On March 26, 1995, he filed another medical request form announcing "I have not been taking the medicines as prescribed at all, to get (clean) of drugs so I can be evaluated and hopefully get the NEW meds for paranoid schizophrenia, depressive as the 'Guru' striped [sic] me from my prozac and elivil [sic]. . . who is this Guru, any who? I'd like the 'most effective' medication at any cost. Thank you 'drug free' Ranahan. No more Haldol! How long? Long enough!" *Id.* at 106.

On April 1, 1995, Panetti claims to have experienced an "April Fool's Day conversion" wherein he was healed of his schizophrenia, stopped taking all medication, and began preaching the word of God. *See, e.g.,* Pet.'s Ex. 11; Resp.'s Ex. 4.

Panetti then sought to represent himself in the trial. In June 1995, the trial court held a hearing on Panetti's request to represent himself, and found that he properly had waived his right to counsel and allowed Douglas and Mosty to withdraw, over the objections of the District Attorney. To protect Panetti's rights, given his *pro se* status and the gravity of the case, the trial court appointed Scott Monroe as standby counsel.

The trial began on September 12, 1995. Panetti, representing himself, claimed he was not guilty by reason of insanity. Panetti's conduct of his own defense has been described charitably as

"bizarre." *Panetti*, 127 S. Ct. at 2849. Among other things, he dressed in a cowboy costume throughout the trial. *See Panetti v. Johnson*, No. A 99 CA 260 SS (W.D. Tex. March 8, 2001). One courtroom eyewitness "described the scene as a 'circus.'" *Id.* According to another observer, "the jury was 'antagonized by [Panetti's] verbal rambling and antics.'" *Id.* Panetti's dismissed counsel, Douglas, was of the opinion "the goofy things [Panetti] said and did scared the jury." *Id.*

After the close of evidence and arguments, the jury returned a verdict of guilty of the offense of capital murder after less than two hours of deliberation on September 21, 1995. *Id.* At sentencing, Panetti spoke at length on his own behalf. The sentencing jury returned an answer of "yes" on the special issue of whether Panetti was a continuing danger, and "no" on the special issue of mitigation. *Id.* Therefore, as required by the jury's verdict, the trial court sentenced Panetti to death on September 22, 1995.

Panetti consented to be represented by counsel on direct appeal. His appellate counsel challenged his conviction on several grounds related to his competence to stand trial and to represent himself. *See Panetti v. State*, AP-72,230 (Tex. Crim. App. Dec. 3, 1997).

During the pendency of this appeal, in December of 1995, Panetti was referred to the Jester IV Crisis Management unit of the Texas Department of Corrections because he "appear[ed] to be delusional and verbalized auditory and visual hallucinations." Pet.'s Ex. 7C at 110 (reproduced in full at Resp.'s Ex. 20 without page numbers). During his treatment, he was reportedly "very circumstantial and evasive . . . treatment team thinks this is looseness of thought association and part of it thinks that this is contrived evasiveness." *Id.* at 116. Panetti apparently "ke[pt] talking about various alters" including "Sarge, Ranahan, James I and James II, and Wounded Sunbird," but was "unable to be consistent about when the alters showed up and who they were." *Id.* He was

ultimately discharged to his regular prison unit with a prescription for Trilafon and Depakote. *Id.* at 110.

In January of 1996, Panetti was again referred to TDCJ mental health services complaining of hallucinations. *Id.* at 124. The hallucinations are not described in the record. TDCJ physicians recommended Panetti be continued on the psychotropic medication, but deferred a rule out of malingering. *Id.*

In June of 1996, Panetti began refusing to groom because he had taken a "Nazarat vow" as "an alternative to his not getting the medical and psychiatric treatment he thinks he needs." *Id.* at 125.

In October of 1996, Panetti reported hearing "Bob Dylan lyrics" in his head and feeling "spiritually persecuted" because of his beard. *Id.* at 126.

Panetti's appellate counsel presented oral argument before the Texas Court of Criminal Appeals on June 11, 1997. The Court affirmed Panetti's conviction and death sentence on December 3, 1997, *Panetti v. State*, No. 72,230 (Tex. Crim. App. Dec. 3, 1997), after which Panetti filed his petition for writ of certiorari with the United States Supreme Court. The Supreme Court denied the petition on October 5, 1998. *Panetti v. Texas*, 525 U.S. 848 (1998).

Panetti, represented by counsel, filed a state application for writ of habeas corpus on June 19, 1997, raising several claims related to his competency. While his state application was pending, on September 29, 1997, Panetti was again admitted to the Jester IV Acute Care Unit, complaining of auditory and visual hallucinations. Pet.'s Ex. 7C at 132 (reproduced in full without page numbers at Resp.'s Ex. 20). He had told TDCJ medical staff he "needed to get back on my medicine that I had in the freeworld." *Id.* at 131. During the course of this stay at Jester IV, Panetti "displayed

circumstantial speech” and “exhibited religious preoccupations.” *Id.* at 132. The evaluating physician noted, however, that his claimed hallucinations were “extremely vague,” and “this patient’s expressed complaints were inconsistent with his clinical presentation.” *Id.* The examiner found Panetti’s “[d]elusional activity was questionable.” *Id.* He was discharged back to his regular unit at his own request, but against medical advice, on October 8, 1997. *Id.* “Treatment with psychotropic medication was not recommended.” *Id.*

Panetti’s state application for writ of habeas corpus was denied on May 20, 1998. The trial court signed an order that no material facts existed and denied an evidentiary hearing, and then entered its findings of fact and conclusions of law denying relief. *See Ex Parte Panetti*, No. 37, 145-01 (Tex. Crim. App. May 20, 1998).

Subsequently, Panetti moved for appointment of counsel to represent him in a federal habeas petition, and John Wilson Rowland was appointed on May 7, 1999. In his first federal habeas proceeding, Panetti raised fourteen procedural and substantive grounds for relief, including thorough challenges to the trial court’s findings that he was competent to stand trial and waive counsel and the argument that the jurors were unduly influenced by his “frightening” behavior during the trial. *See Panetti v. Johnson*, No. A 99 CA 260 SS (W.D. Tex. March 8, 2001). This Court denied relief on all counts on March 8, 2001. *Id.*

In May of 2001, while his appeal of the federal habeas application was pending, Panetti was referred for psychiatric evaluation because he was “acting strange” on his unit. Pet.’s Ex. 7C at 134 (reproduced in full without page numbers at Resp.’s Ex. 20). In his evaluation, Panetti described being “spit on and squirted with liquid substances” by the other inmates, “all because I’m a Christian.” *Id.* He stated “I’ll do where Jesus did and quote Scripture at them, they are evil.” *Id.*

The evaluator noted Panetti “went on and extensively spoke of his religious beliefs,” but the evaluator found “no psychosis noted” at this time. *Id.*

The Fifth Circuit affirmed the denial of Panetti’s federal habeas petition on June 19, 2003, *Panetti v. Cockrell*, 73 Fed. Appx. 78 (2003), and the Supreme Court again denied certiorari. *Panetti v. Dretke*, 540 U.S. 1052 (2003). Panetti’s execution was set.

III. Panetti’s *Ford* proceedings

On December 9, 2003, Panetti’s attorney filed a motion under Article 46.04 of the Texas Code of Criminal Procedure asserting Panetti was mentally incompetent to be executed. On December 23, 2003, the state district judge, after considering the exhibits attached to the motion, denied Panetti’s motion, finding Panetti had failed to make a “substantial showing of incompetence” or raise a “substantial doubt” as to his competence as required by the statute.

Panetti then filed a motion for stay of execution in this Court in conjunction with an application for habeas relief, arguing the trial court’s finding was contrary to clearly established Supreme Court precedent, specifically *Ford v. Wainwright*, 477 U.S. 399. The undersigned initially denied the motion because Panetti and his attorney failed to include the Article 46.05 motion filed in the state court or any evidence of Panetti’s current mental status.

After this Court denied the first motion, counsel for Panetti submitted a copy of the Article 46.05 application along with his first motion for reconsideration. This motion too was denied as Panetti and his attorney still failed to offer any evidence of Panetti’s current mental status.

Finally, along with a second motion for reconsideration, Panetti presented evidence to support his contention he was presently incompetent to be executed in the form of the report of a clinical and forensic psychologist, Dr. Mark Cunningham, and the affidavit of a law professor, David

Dow, each of whom had recently observed Panetti and concluded that he suffers from delusions that prevent him from understanding whether and why he will be executed.

The Court held it appropriate that Panetti present his new evidence to the state court first. However, because the execution was scheduled for the following day, February 5, 2004, the Court stayed the execution for 60 days to allow the state court a reasonable period of time to consider the evidence of Panetti's current mental state and decide whether he had "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency to trigger a mental health evaluation by at least two mental health experts under Article 46.05. TEX. CODE. CRIM. P. Art. 46.05.

On February 23, 2004, relying on Article 46.05(f), the state court entered an order appointing psychiatrist Dr. Mary Anderson and clinical psychologist Dr. George Parker to examine Panetti, thereby implicitly finding Panetti had made "a substantial showing of incompetency" with the documentary evidence submitted. On April 28, 2004, the appointed experts filed their joint report concluding Panetti was competent to be executed. On May 26, 2004, Judge Ables entered an order concluding, "[b]ased on the aforesaid doctors' reports, the Court finds the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *See Panetti v. Quarterman*, No. 04-cv-042 (W.D. Tex. July 20, 2004) (quoting Judge Ables' order).

This Court held, in its July 20, 2004 Order, that the state court's failure to hold a final competency hearing in which Panetti could present his own evidence constituted non-compliance with Article 46.05. *Id.* This Court further held, since the state court had determined counsel for Panetti had made "a substantial showing of incompetency," its failure to "receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the

State's own psychiatric examination," was a violation of due process under *Ford. Id.*, citing *Ford*, 477 U.S. at 427.

On that basis, the Court set an evidentiary hearing to determine Panetti's competence to be executed, pursuant to *Ford*. The Court appointed counsel and authorized funds so that Panetti could obtain investigative and expert assistance. The hearing is summarized in this Court's order of September 7, 2004:

Counsel for Petitioner presented the testimony of four expert witnesses: Dr. Mary Alice Conroy, a clinical and forensic psychologist; Dr. Susana Rosin, a clinical psychologist; Dr. Seth Silverman, a psychiatrist; and the aforementioned Dr. Cunningham. The State presented two expert witnesses, Dr. Parker and Dr. Anderson, appointed to evaluate Panetti by the state habeas court, and three fact witnesses, Major Steven Miller, Lieutenant Terri Hill, and Victoria Williams, TDCJ corrections officers who have had the opportunity to observe Panetti at his place of incarceration, to varying degrees, in recent months and years. All of the expert witnesses based their testimony on their respective meetings with Panetti, interviews with people that know him, and Panetti's medical and custodial records.

The expert witnesses, on both sides, seemed to agree Panetti suffers from some form of mental illness. They disagreed, however, about the extent (and diagnosis) of his illness as well as the extent his illness interferes with his ability to understand the reason for his impending execution. Certain facts may be regarded as established, however. First, the testimony of the witnesses, in sum, supports a finding 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. Although Dr. Parker and Dr. Anderson concluded that some portion of Panetti's behavior could be attributed to malingering, their testimony merely casts doubt on the extent of Panetti's mental illness and symptoms, as they too concluded that his illness was at least, to some degree, genuine.

The expert witnesses for both sides agreed that Panetti understood he was going to be executed. However, "each witness testified Panetti told them he believes that he is to be executed

for preaching the Gospel.” *Id.* at n.3. According to Panetti’s experts, this statement was the product of Panetti’s genuine delusional belief that his execution is part of a “‘spiritual warfare’ which has been going on since the 1980s.” *Id.* at 11.

Notably, the multiple personalities (Sarge, Will James, and Scott) that appeared in Panetti’s medical records immediately following the murders were not identified by any of the experts as part of Panetti’s current delusional belief system in 2004, though Panetti told at least two of the experts that he was under the influence of “Sarge” when he committed the murders in 1992. *See Panetti v. Quarterman*, No. 04-cv-042, Transcript of Sept. 7, 2004 hearing vol. 1 at 85, 110. During his interviews with expert witnesses in 2004, Panetti denied any current visual or auditory hallucinations. *Id.*

Dr. Mary Alice Conroy testified Panetti believed he has been under attack by “supernatural demonic anti-forces” since the mid-1980’s, when demons were possessing his house and personal belongings. *Id.* at 25–26. Dr. Conroy noted this statement is consistent with the record of Panetti’s involuntary commitment in May of 1986, when his first wife reported he was burying their furniture in an attempt to exorcise the house. *Id.*

Dr. Conroy reported Panetti refused to talk about killing his in-laws, stating repeatedly that God had “wiped the slate clean” and it would be a sin to talk about it. *Id.* at 24. He did state that he understood the State “is saying that they wish to execute him for this murder,” but maintained “that’s really a sham The state wants to execute him to stop him from preaching.” *Id.* at 25.

Dr. Conroy found Panetti credible in part because of the pressured, tangential speech pattern she noted during her interview of him; in her experience, this speech pattern is one of the most

difficult things to “fake,” and to consciously manufacture it for more than an hour would be, in her opinion, “almost impossible.” *Id.* at 27.

Dr. Susana Rosin testified Panetti told her he believes there “has been a conspiracy to kill him for years; and that the forces of evil, demons, devils are basically set against him.” *Id.* at 89–90. He told Rosin he has been placed on Death Row to “preach the gospel” and to “help and save the other inmates.” *Id.* at 89. He volunteered that he is being executed for preaching the gospel. *Id.* at 82-83.

Dr. Rosin testified Panetti remembers killing his in-laws, but the memory is not grounded in reality; it includes thoughts that his wife and daughter were hostages and that he was “partly possessed” by Sarge. *Id.* at 89.

Dr. Seth Silverman stated Panetti does not believe he is being executed because he murdered his in-laws, but because he preaches the gospel. *Id.* at 110–111. Regarding the killings, Dr. Silverman stated Panetti “takes no personal responsibility,” and states alternately that “it was Sarge” and he himself “was insane at the time.” *Id.* at 109. Dr. Silverman found Panetti to be paranoid, tangential, pressured, and unable to “keep all his thoughts together.” *Id.* at 108–109.

Panetti spoke to all three of his defense experts only after asking them “which side” they worked for and ascertaining they did not work for the State. *See id.* at 112–113; 95–96; 75. In contrast, when the State’s expert witnesses sought to interview him, Panetti stated they were “destroyers,” and refused to take a psychiatric survey or give consent to access his records without clearing it with “Marine Corps Gross,” his attorney. *See* Transcript vol 2 at 39–40, 46. Nevertheless, he told the State’s experts the same thing he told the defense experts: he believed the State wanted to execute him for preaching the gospel. *Id.* at 30. He exhibited the same religious

preoccupation and tangential speech noted by the defense experts, but the State's experts interpreted this behavior as intentional and manipulative, intended to maintain control of the conversation and deflect certain questioning. *Id.* at 28–30, 39–40. As a result, the State's experts were unable to render a conclusive opinion regarding Panetti's actual understanding of the reason for his impending execution. *Id.* at 31–32. The State's experts, however, opined that Panetti was likely *capable* of understanding the reason for his execution. *Id.*

The Court heard testimony at the 2004 hearing from several corrections officers who had dealings with Panetti. Major Steven Miller, in particular, helped Panetti fill out his “death packet”: a bundle of documents given to a prisoner before execution that assists him to create a will and leave other legal instructions related to his personal affairs. Major Miller stated he had previously had several brief, “normal” conversations with Panetti on his daily rounds, Tr. vol.1 at 183–189. He stated Panetti was mostly cooperative and followed directions when filling out the death packet. *Id.* at 173–174.

The section of the death packet regarding wills has been signed by Panetti in several places that are contradictory. Major Miller explained these signatures were the result of Panetti's attempts to negotiate certain items he wanted at his execution, including a pair of cowboy boots to “go out in comfort.” *Id.* at 179. Over the course of these negotiations, Panetti was given updated, computer generated copies of his death packet reflecting his changes. *Id.* at 180. Each time he didn't agree “he would write something in there and we'd have to [redo the form].” *Id.* Panetti eventually filled out the form in his own handwriting. *Id.*; 182. Major Miller stated Panetti appeared to him to understand the questions on the form. *Id.*

Officers Terri Hill and Victoria Williams also testified about their contact with Panetti on Death Row. Both officers stated Panetti is generally polite and respectful, not a “problem offender.” Tr. Vol. 1 at 195–196; 199–200. Both officers noted Panetti did seem unusual with regard to his preaching: Officer Williams stated the “only thing that’s different from him than anybody else is that . . . I feel like he overreacts or overpreaches, you know, down there to the inmates and to the officers.” *Id.* at 201. Officer Hill recounted one incident where she saw Panetti running around the unit’s day room reading the Bible loudly, “real frantically.” *Id.* at 195. When other inmates yelled at him to stop, he responded “that’s why I’m preaching . . . they need this.” *Id.*

On the basis of the testimony presented by these witnesses and the record introduced at the hearing, this Court found Panetti competent to be executed because, despite his mental illness, the record established (1) Panetti was aware he was to be executed; (2) he was aware he committed the murders that serve as the basis for his execution; and (3) he understood the “State’s stated reason” for executing him is that he committed these murders, notwithstanding his belief that the underlying reason for his execution was his preaching the Gospel. *Id.* The Fifth Circuit affirmed, but the Supreme Court reversed and remanded for the reasons outlined above.

IV. Panetti’s current mental state

The Court has attempted to highlight all relevant facts in the thorough record presented by the parties, which spans over 30 years. However, the Court uses the term “relevant” advisedly: the Court’s job is not to determine whether and to what extent Panetti was mentally ill in 1992, when he murdered Joe and Amanda Alvarado; nor in 1994, when he was found competent to stand trial; nor in 1995, when he represented himself at trial for this offense, was found guilty, and was sentenced to death; nor even in 2004, when he brought his first *Ford* claim. The *Ford* inquiry hinges

on the petitioner's mental state at the time execution is imminent. 477 U.S. at 407. Therefore, what is at issue is Panetti's *current* mental state, and the comprehensive record set forth above is relevant only insofar as it gives a context for evaluating Panetti's present claims of incompetence and the State's claims that he is presently malingering.

a) Panetti's Experts

At the evidentiary hearing conducted on February 6, 2008, Panetti called several expert witnesses to support his claim that he is presently incapable of understanding the reason for his impending execution.

(i) Dr. Leslie Rosenstein

Panetti's first witness, Dr. Leslie Rosenstein, is a board certified clinical neuropsychologist. Pet.'s Ex. 3. Dr. Rosenstein was not hired to develop an opinion on Panetti's competence to be executed, but only on his cognitive functioning in general. Pet.'s Ex. 4. Dr. Rosenstein testified a neuropsychological examination generally gives insight into a subject's language, memory, attention, spatial, and "executive" skills. A forensic neuropsychological examination, such as the one she conducted in this case, also includes "effort testing," or testing designed to rule out malingering and exaggeration of symptoms.

Dr. Rosenstein conducted her evaluation of Panetti in person over the course of six hours on November 27, 2007. Pet.'s Ex. 4. Prior to the evaluation, she reviewed the medical records described above. Pet.'s Ex. 5. She continued to review Panetti's records after conducting her examination. *Id.*

Dr. Rosenstein gave Panetti an "informed consent" document to sign before beginning her evaluation. This document begins, "I understand that the purpose of this evaluation is to provide

information about me for an independent examination, civil, or criminal case and is not for treatment of any type.” Pet.’s Ex. 6. The document goes on to notify the subject that the examination does not create a doctor-patient relationship, he has the right to terminate the interview at any time, and any report developed from the examination will not be confidential and will be forwarded to the organization requesting the examination. *Id.* Dr. Rosenstein testified Panetti understood the form when he signed it: specifically, he was able to paraphrase these disclosures to her and understood she was retained by his defense counsel.

After Panetti signed the form, Dr. Rosenstein conducted an interview interspersed with several standardized tests. She testified she intentionally kept her interaction with Panetti “very structured” because she anticipated from his medical records that he would have a tendency to be tangential and difficult to keep “on track.”

Dr. Rosenstein administered eighteen separate tests over the course of six hours. Pet.’s Ex. 4. She testified she selected these tests because they are “well-standardized and validated in the literature” in the field, and furthermore several of the tests have “internal mechanisms” designed to expose malingering with regard to cognitive dysfunctions.

Dr. Rosenstein’s overall impression regarding Panetti’s cognitive functioning is summarized in her expert report. Pet.’s Ex. 4. She found the likelihood that he was manufacturing symptoms or otherwise malingering regarding his cognitive functioning is low. His basic cognitive skills, such as language skills, visual spatial skills, verbal intellectual skills, academic skills, motor skills, and the ability to learn and retain new material, are “intact.” *Id.* “In contrast to his intact basic motor skills, Mr. Panetti displayed significant impairments in executive functions, including tangentiality, impaired focus of attention, impaired psychomotor speed, and deficient problem-solving skill with

significant cognitive inflexibility.” *Id.* Dr. Rosenstein also noted “a significant discrepancy between verbal and performance-based intellectual skills, which further suggests the presence of abnormal neurocognitive functioning.” *Id.* Specifically, although Panetti’s overall IQ is average, Dr. Rosenstein found a 23-point disparity between Panetti’s verbal and performance IQ scores, which she stated has clinical and statistical significance. Statistically, Dr. Rosenstein testified a very small percentage of the population has such a large gap between their verbal and performance scores. She stated such a gap suggests that while Panetti has strong verbal skills, “there’s something going on with his processing, nonverbal reasoning, problem solving abilities.”

The tests selected by Dr. Rosenstein examine cognitive functioning only; they are not designed to evaluate psychosis or test for malingering with regard to claimed psychotic disorders. Nevertheless, Dr. Rosenstein opined the patterns Panetti exhibited in the testing were “consistent with the frontal-executive deficits that one expects to see in individuals with chronic psychotic disorders such as Schizoaffective disorder and Schizophrenia.” *Id.*

(ii) Dr. David Self

Panetti’s next witness was Dr. David Self, a forensic psychiatrist. Pet.’s Ex. 9. Dr. Self interviewed Panetti for five hours on November 28, 2007. Like Dr. Rosenstein, Dr. Self asked Panetti to sign an informed consent form at the beginning of the interview. Dr. Self testified Panetti was “suspicious at first,” but signed the form after reading it three or four times. Dr. Self testified he believed Panetti understood Dr. Self had been retained by the defense.

Dr. Self testified he did try to determine Panetti’s understanding as to why he is on Death Row. Specifically, he asked Panetti “Why are you here on Death Row?” and Panetti responded “To preach the Gospel of Jesus Christ.” Pet.’s Ex. 8. Dr. Self asked, “How does it relate to the fact

you've been convicted of Capital Murder?" *Id.* Panetti responded "It's all part of the plan, before I was in the womb this mission was planned. God chose me not because I'm qualified, He took someone not qualified and made me qualified. I'm a fool, but a fool can bring in some of the lost." *Id.* Self asked, "What would most people say about why you are here and why you are sentenced to die?" *Id.* Panetti responded "They have strong delusions." *Id.* Self asked "if the state was in league with the devil in his [Panetti's] estimation," and Panetti "explained that the state was simply being duped by the devil," saying "the devil hates 'soul savers,' that's why the guards and inmates hate me." *Id.* Panetti then "went on to describe the torment he'd experienced at the hands of inmates who are evil and demon possessed." *Id.*

Dr. Self asked Panetti about the alternate personalities that appear in his medical records immediately following the murders: Sergeant Iron Horse, Wounded Sun Bird, Ranahan, and Will James. Panetti told him:

Will James was 'king of the cowboys' and had written 24 books, and was a boyhood hero and fantasy object of his. He described Sergeant Iron Horse ["Sarge"] as having begun as a childhood fantasy of 'the eternal mercenary' but later in life having been a manifestation of mental illness, and that the mental illness was a manifestation of spiritual wickedness. . . . He claims that command type hallucinations from Sergeant Iron Horse were partially responsible for his having murdered his in-laws. He also reported that he heard 'demons cackling' after the murders, and that those same demons cackled at Jesus' crucifixion.

Id. Panetti denied having any current hallucinations or alternate personalities, and claimed to have been healed of his mental illness in his April Fool's conversion. *Id.* Panetti did claim to have seen angels who appeared in the form of TDCJ corrections officers on several occasions since then. *Id.*

Dr. Self also noted that Panetti expressed some "magical thinking" regarding the State's expert, Dr. Waldeman, who had interviewed him shortly before Dr. Self's visit. Panetti expressed

the belief that Dr. Waldeman was a reincarnation of a Dr. Grigson, who had given competence evaluations supposedly biased in favor of the prosecution, and whom Panetti called "Dr. Death." He was aware Dr. Grigson had passed away, and "wondered aloud" if Dr. Waldeman were Dr. Grigson "in some type of 'changed form.'" *Id.*

Dr. Self noted it was "nearly impossible to get a chronologically ordered biographic history of Mr. Panetti" because "he would skip from topic to topic in response to abnormal associations or linkages between the ideas." *Id.* Dr. Self characterized this pattern as "flight of ideas." *Id.* He also noted Panetti spoke very rapidly, with what he characterized as "pressured speech." *Id.*

It was Dr. Self's opinion that Panetti was likely expressing a genuine delusion and not malingering, because he "didn't go over the top, go for obvious stuff like 'hearing voices.'" Dr. Self noted that Panetti's medical history contains references to delusions and hallucinations as far back as the late 1970's, which predate any motive to malingering. He further noted Panetti did not claim any current hallucinations, though he has had them in the past; Dr. Self stated this is consistent with the cyclical, "waxing and waning" nature of schizophrenia.

In Dr. Self's opinion, Panetti is more coherent now than he was in the reports created by experts in 2004. This does not mean Panetti's delusion is less potent, he testified. He stated that "good prognosis schizophrenia" tends to wax and wane in terms of how intensely the symptoms (such as hallucinations, pressured speech, and disorganized thinking) are expressed, but that a fixed delusion tends to remain constant even in periods of relatively good functioning.

Dr. Self stated he believes Panetti's schizophrenia has been relatively constant, within this waxing and waning presentation, since at least the mid-1980's, "when he started burying furniture."

When asked if he believed Panetti should not have been found competent in his original trial, Dr. Self responded “no, I really don’t think he was competent to stand trial.”

(iii) Dr. Mary Alice Conroy

Panetti’s next witness was Dr. Mary Alice Conroy, the forensic psychologist who evaluated Panetti in 2004. Pet.’s Ex. 10. Dr. Conroy examined Panetti on December 13, 2007 for a little less than 4 hours. Pet.’s Ex. 11. Panetti recognized her from her prior visits but was still concerned about who she was and why she was there. Dr. Conroy, like Panetti’s other experts, obtained his informed consent to the interview and testified she believed he knew she was retained by the defense.

Dr. Conroy concurred with Dr. Self that Panetti’s demeanor in December was calmer, less pressured, and with a more appropriate affect than he presented in 2004. She testified she was surprised at the degree of affective improvement he showed, but noted that he still appeared to be delusional and exhibited “loose associations, tangential thinking, and flight of ideas consistent with psychotic disorders.” She testified one factor that commonly distinguishes “schizoaffective disorder” from “bipolar disorder with psychotic aspects” is that, in a schizoaffective patient, “the psychotic thinking remains constant although the mood (affect) may change.”

Dr. Conroy testified Panetti was “more direct about his delusion in 2004 than in 2007,” but in the 2007 interview, Panetti “continued to assert that his being on Death Row was all part of a divine plan and that his mission there was winning souls. He made reference to conspiracies, such as big corporations and the Bush family being in league with the devil. He described two instances in which angels visited him in the form of correctional officers. When asked about his impending execution, he said that God had told him he would be a very old preacher.” Pet.’s Ex. 11 at 4.

In addition to her interview of Panetti, Dr. Conroy administered a psychometric instrument known as the Structured Interview of Reported Symptoms (SIRS). This test is “specifically aimed to identify functional malingering, that is, feigned positive symptoms (such as delusional beliefs) rather than cognitive malingering which would be pretending to lack certain abilities (e.g., memory, intelligence).” Pet.’s Ex. 11 at 5. According to Dr. Conroy, Panetti scored in the “honest” range on seven of the eight primary scales of the SIRS, which, according to published norms, yields a 95% probability that he was responding honestly overall. *Id.*

It should be noted that the State’s expert, Dr. Allen, had attempted to administer the SIRS test about a month earlier, but was unable to report reliable scores because of Panetti’s refusal to cooperate with him.

Dr. Conroy’s opinion in 2007 is that due to Panetti’s “severe psychotic condition, he lacks the ability to rationally understand the reasons for his current situation. Rather he believes that he is on a mission from God and that evil forces are pursuing his death in order to silence him. He appears to further believe that he is on some level invulnerable to execution and that God will see to it that he becomes a very old preacher.” Pet.’s Ex. 11 at 6.

On cross examination, however, Dr. Conroy also testified that Panetti made statements both in 2004 and 2007 that indicate he understands the nature of the death penalty, but believes it should not be applied to him. Running throughout his 2004 and 2007 interviews are Panetti’s descriptions of his court proceedings and his allegations that Judge Ables was corrupt and the witnesses against him “flip flopped.” In 2004, he stated “executions are not right. The laws are perverted.” In 2007, Dr. Conroy’s notes (which she testified are not verbatim recordings) include the statement Panetti believes “the Supremes would be angry if they put him back on death watch.” She testified Panetti

does not feel he should be punished for the murders because he now believes he was insane at the time he committed them.

Dr. Conroy further testified she believes Panetti's psychotic illness was present in 1992, when he committed the murders. She stated she could not offer an opinion on whether Panetti was properly found competent to stand trial in 1994, but did state she believes he was affected by the same schizoaffective disorder in 1994 that affects him presently.

b) State's Experts

The State called its own expert witnesses to establish Panetti's competence to be executed.

(i) Dr. Tom Allen

The State called Dr. Tom Allen, a forensic psychologist. Resp.'s Ex. 2. Dr. Allen was hired to assess Panetti's psychological functioning generally, but not to render an opinion on his competence to be executed. Resp.'s Ex. 1. Dr. Allen, like Panetti's experts, began his interview by explaining his role and asking Panetti to sign an informed consent form. He testified that Panetti refused to sign the form because Dr. Allen was "on the wrong side," which Dr. Allen interpreted as "working for the State."

Dr. Allen's report describes his interview with Panetti as follows:

During the interview Mr. Panetti presented in a fashion I find difficult to describe, and his presentation was dissimilar to my experiences with schizophrenics. His presentation is permeated with religiosity, which is not uncommon in that diagnostic group. But there were multiple occasions where his religious thought content ceased and he carried on a normal conversation about events such as sports and hunting. However, any time I attempted to structure the interview he launched into his religiosity and appeared more avoidant than tangential or circumstantial. He made numerous rational, parenthetical statements during the interview. . . . What initially appeared to be pressured speech seemed only to occur when he was attempting to control the examination, especially when I started to administer anything that was structured in nature. When I backed off the structure, he seemed to take a breather

from his symptoms and talked rationally and coherently about sports, hunting, the female Corrections officers watching over us, what car I drove, did I have children, how he was in great shape because of the exercise he did while I was overweight and had a gut on me. He did say he would pray about my gut.

Resp.'s Ex. 1. Dr. Allen attempted to administer several standardized tests, including the SIRS, but "it appeared that Mr. Panetti went out of his way to avoid that sort of assessment. Indeed, he made it clear that he would not cooperate in submitting to these sorts of assessment devices." *Id.* In refusing to take a test called the Personality Assessment Inventory (PAI), Panetti stated Dr Allen was "in the camp with the Attorney General, Dr. Grigson, and part of the devilish conspiracy." *Id.* He looked at the standardized test booklet and "said, in a near whisper, 'hurt my case.'" *Id.* In refusing to take the Structured Inventory of Malingered Symptoms (SIMS), Panetti stated "you're a hired gun for the prosecutor, they want to execute me. I don't want to take away the healing power of Jesus." *Id.*

Dr. Allen was able to administer the SIRS (the test later given by Dr. Conroy), but felt the results were invalid. "Mr. Panetti consistently avoided any straightforward answer to a direct question, and this made a valid result highly unlikely." *Id.*

Finally, Dr. Allen administered the Green's Word Memory Test (WMT), which his report describes as the "gold standard" to assess cognitive malingering. *Id.* Dr. Allen reports "the results of the test indicated poor effort. . . . His overall pattern of effort and memory scores were not consistent with the cognitive disorganization expected with schizophrenia or the clinical picture he was portraying. Graphically, his scores were most similar to experimental groups of simulators and patients asked to fake impairment." *Id.*

Dr. Allen thought the probability of malingering was high not only because of Panetti's scores on the WMT but also because of the presence of alcohol and substance abuse in his medical history. Dr. Allen testified that cocaine and methamphetamine in particular may cause schizophrenic-like states and can aggravate actual schizophrenia. He stated he had some concern over how much of Panetti's past behaviors claimed as schizophrenia were actually substance-abuse related, and noted violent behaviors are often triggered by substance abuse. In Dr. Allen's opinion, Panetti's medical records while incarcerated are particularly relevant because they were made at a time when Panetti was "presumably substance free." Those records note malingering concerns several times.

(ii) Dr. Alan Waldeman

The State sought an opinion on Panetti's competence to be executed from Dr. Alan Waldeman, a board certified psychiatrist and neurologist. Resp.'s Ex. 4. Dr. Waldeman interviewed Panetti twice, on November 14, 2007 and November 15, 2007, for a total of approximately three and a half hours. Resp.'s Ex. 3. Panetti initially refused to see Dr. Waldeman, but when told the doctor was under a court order to evaluate his competence to be executed, Panetti agreed to come to the interview room. *Id.*

Panetti immediately greeted Dr. Waldeman by saying "Hello, Dr. Grigson." *Id.* at 2. Dr. Waldeman told Panetti he was not Dr. Grigson, but Panetti continued, asking "Dr. Grigson, was it hard for you to quit smoking those Benson & Hedges?" *Id.* Panetti cited several biblical passages in response to Dr. Waldeman's attempts to explain the purpose of the interview. *Id.* Panetti refused to sign an informed consent form. *Id.*

Dr. Waldeman is of the opinion Panetti was “clearly citing the biblical passages in order to avoid attending to the issues regarding my presence and purpose.” *Id.* Dr. Waldeman states Panetti is not disorganized in his thinking: “Unlike the disorganization seen in Schizophrenia where three or four words are spoken, then three or four more words that have nothing to do with the previous statement are spoken, Mr. Panetti makes complete coherent statements . . . then will follow it with another complete coherent statement that may have nothing to do with the first statement This is not the disorganization seen in Schizophrenia, this is Mr. Panetti attempting to imitate disorganization and avoid a process, which is virtually impossible to imitate.” *Id.* at 13.

Dr. Waldeman is similarly skeptical regarding Panetti’s “pressured speech,” noting Panetti “would take breaks in his verbiage and wait for me to ask another question on numerous occasions. At times these breaks were minutes long.” *Id.* Dr. Waldeman is of the opinion that an individual who is truly experiencing pressured speech would not be willing or able to maintain silence for that amount of time. *Id.* at 5.

Panetti made several statements Dr. Waldeman noted as indicative of a rational understanding of his situation. At the end of his first interview, Panetti stated “everyone knew I was insane during that kangaroo court.” *Id.* at 6. The next day, Dr. Waldeman asked what he meant by “kangaroo court” and Panetti responded “I was clearly insane but I chose to be my own attorney in trial because of the competency hearing.” *Id.* He refused to elaborate further.

When asked what happens to people leaving the “unit he is on,” Panetti stated they go on “the horrendous ride,” and went on to say “They’re trying to rub me out, it’s unjust.” *Id.* When asked why it was unjust, Panetti stated “You treat mental illness.” *Id.* When asked “Why are you saying they are going to rub you out?” Panetti stated “It is a conspiracy” but refused to answer who was

involved in the conspiracy, what the conspiracy is, or why there would be a conspiracy against him. *Id.* at 7. Dr. Waldeman states Panetti gave a “nonsensical personalized religious answer” to these questions, but Dr. Waldeman insists this religious comment was not indicative of a religious conspiracy delusion. *Id.* His report does not attempt to paraphrase Panetti’s “nonsensical personalized religious answer.” *Id.*

In addition to interviewing Panetti, Dr. Waldeman interviewed several members of TDCJ staff who have interacted with Panetti on Death Row. According to Dr. Waldeman, the staff are consistent in their evaluation of Panetti: “Mr. Panetti is about as normal as he wants to be at any given time.” *Id.* at 9.

Dr. Waldeman is emphatic in his opinion that Panetti has a rational understanding of his crime, the fact that he is to be executed, and the connection between the crime and the execution. *Id.* at 18. He is in fact skeptical that Panetti has any psychotic disorder at all. *Id.* Among other things, he notes:

Mr. Panetti’s dramatic presentation of Schizophrenia has evolved over time. His initial presentation [between the murders and his trial] where he discusses being other people is akin to what television and movies confuse as Schizophrenia and Dissociative Identity Disorder. His going into trances and becoming Wounded Sunbird, Sergeant Ranahan, and Sergeant Iron Horse are all inconsistent with a Schizophrenia Spectrum Disorder and reflect an individual naive to the disorder except for what is seen in television and movies. . . .

Multiple defense experts use Mr. Panetti’s history of mental illness in an attempt to validate his current presentation. In reality, the admissions to the hospital [prior to the murders] were based on court motions, Mr. Panetti being in trouble, issues regarding alcohol and drug abuse, and threats of violence towards his estranged family.

Id. at 14.

Dr. Waldeman is the only expert who testified he believes Panetti is not affected by some type of psychotic disorder.

(iii) Dr. Priscilla Ray

The State's final expert was Dr. Priscilla Ray, a certified forensic psychiatrist and neurologist. Resp.'s Ex. 6. She was not asked to give an opinion on Panetti's competence to be executed or on his mental functioning in general. Resp.'s Ex. 5. Rather, Dr. Ray was asked to give an expert opinion on the extent to which psychiatric science can assist the Court in assessing competence to be executed, particularly with regard to the concept of rational understanding. *Id.*

Dr. Ray's recommendations are summarized in her report:

1. Understanding exists along a continuum.
2. Assessment of understanding is most reliable in a person who has understanding, is willing to communicate it, and is able to do so.
3. Because there is yet no reliable objective test to assess what one believes, in the absence of demonstrated understanding, assessment of the capacity to understand may be more feasible than an assessment of understanding.
4. This assessment [of capacity to understand] should include evaluation of a number of factors, including conditions which may interfere with the ability to understand or to communicate understanding as well as factors suggesting unwillingness to demonstrate understanding.
5. Psychiatric science can provide assistance to the Court in knowledge of psychiatric (mental) conditions and in assessment of the ability to understand, but there are limitations [psychiatry cannot identify actual understanding].

Id. at "Summary."

In addition to these expert witnesses, both sides called a number of fact witnesses who testified regarding their interactions with Panetti on Death Row.

c) Inmates

Panetti called two of his fellow Death Row inmates. Willie Poindexter testified he has been on Death Row for thirteen years. Panetti has been on death row with Poindexter this whole time,

and Poindexter has been housed in Panetti's immediate area for about two years. Poindexter testified talking to Panetti was strange because "one minute everything's good, the next minute he's ranting and raving fire and brimstone again, like flipping a switch."

Poindexter testified each of the prisoners on Death Row has time to use the day room in the center of the unit. Panetti works out in the day room: "jogs around, pull ups, push ups, a whole routine." He carries a small Bible with him, and when he's not working out, he's reading it, "screaming at the top of his lungs what's in there." Poindexter testified the other inmates will yell at Panetti and throw hot water and shoot "spears"—improvised darts—at him, but "it doesn't phase him." Poindexter testified Panetti also preaches loudly from his cell, often for up to seven hours a day.

Randy Halprin, another fellow inmate, testified he has been on death row four and a half years, and has known Scott Panetti that whole time. He has been housed in Panetti's pod five or six times during his incarceration on death row. Halprin testified Panetti wants to be called "Ranahan," but has not told Halprin why. Halprin, like Poindexter, testified Panetti does a lot of "fire and brimstone type preaching from the day room" in spite of the other inmates' throwing water on him and shouting at him.

d) Guards and Staff

The State called several Death Row guards to testify regarding their experiences with Panetti. Captain Steven Bryant testified he worked on Death Row from 2003 until November of 2007. His contact with Panetti was sporadic and superficial; he spoke briefly with Panetti on "rounds." Captain Bryant testified staff are instructed to keep conversations on rounds limited to one thing: does the inmate want recreation time/a shower/a meal? He testified Panetti was never a problem offender in

his experience, and could have these brief conversations normally. He often “would have some religious statement to make,” but did not jump from topic to topic in an unusual way and was not combative.

The State next called Jose Vitela, a Catholic deacon who ministers to Death Row inmates. Vitela testified he met Panetti seven years ago. In his first visits with Panetti, they talked about not only Christianity, but also about druidism. Vitela felt Panetti wanted to debate his religion with him, and that Panetti was “very much against our [Catholic] beliefs,” so he stopped calling on Panetti for about four years.

Panetti at some point called Vitela’s assistant, Jim, and told him he wanted to become a Catholic. Vitela didn’t believe the conversion at first, but when he went to see Panetti again, Vitela found him “very learned about our beliefs.” Vitela has since administered two tests on Catholic theology to prepare Panetti for confirmation. He testified Panetti did very well on both of them. Vitela has not discussed Panetti’s crime with him or asked him to undergo confession.

The State’s next witness was William Cook, III, who has been an investigator on Death Row for the past two years and who was a guard on Death Row for two years before that. Cook testified he had contact with Panetti during his time as a guard. Like Bryant, Cook’s contact with Panetti consisted of asking him about showers, rec, and meals. Recently, he has helped out with “escort duty” and has encountered Panetti going to and from visitation.

Cook testified he saw Panetti preaching, both from his cell and in the day room, but stated it was “the same type of thing you’d hear at Church.” Cook describes himself as a religious man, and thought Panetti’s preaching was “well thought out; what you’d hear at a Baptist church.” Sometimes it was tailored to a specific inmate, and sometimes it was “general preaching.”

Cook testified he remembers Panetti “saying the Supreme Court had thrown out his sentence and he was going to be getting off Death Row soon.”

The State also called Wilson Coker, another Death Row guard. Coker stated he has only seen Panetti a few times in the last few months, because he is usually assigned to the two “worst pods,” and Panetti is generally well behaved. Like Cook and Bryant, Coker’s contact with Panetti has been limited to “pleasantries” during the course of Cook’s rounds. Cook has observed Panetti getting “on his religious soapbox” and “preaching to the heathens in the dayroom when they get him mad,” but he testified Panetti also has a few inmates and guards he gets along with. “If he’s talking to the heathens, he sounds like a Southern Baptist, fire and brimstone. If he’s just talking to you, he sounds like maybe a Methodist minister.”

Coker testified Panetti has occasionally warned him when another inmate is “mad and wants to get a boss.” Coker also testified some guards will assign Panetti to a pod with a prisoner when they want “a little revenge” because they know Panetti will irritate the inmate with his constant preaching.

e) Deposition Testimony

In addition to the witnesses who appeared in person, the state presented the deposition testimony of three psychotherapists assigned to evaluate Death Row inmates at 90-day intervals.

The first psychotherapist, Janet Barger, testified regarding mental health screening and counseling procedures on Death Row. With regard to Panetti specifically, Barger testified “I’ve reviewed his chart some. According to the chart, I’ve seen him on one occasion. I couldn’t recognize him in a crowd and I do not recall seeing him . . .” Resp.’s Ex. 21 at 31. The report of

her visit with Panetti on April 5, 2007, which was a routine assessment rather than a referral for any specific problem, records normal behavior and affect. *Id.* at 31–40.

The state also presented the deposition testimony of LaShondra Ford, another psychotherapist responsible for Death Row inmates. Ford, like Barger, has a record of conducting routine assessments on Panetti but does not have any independent recollection of him. Resp.’s Ex. 22 at 24. Ford conducted an assessment on December 29, 2006, that was essentially normal and presented no “red flags, . . . mental health-wise.” *Id.* at 27. She conducted another routine assessment on September 4, 2007 in which “by his appearance or his affect, nothing jumped out to say that there may be a problem.” *Id.* at 28.

Finally, the State presented the deposition testimony of psychotherapist Julia Roy. Like Barger and Ford, Roy has no independent recollection of Panetti. Resp.’s Ex. 23 at 19. Roy has records of routine evaluations of Panetti she conducted on June 26, 2006, *id.* at 9, October 6, 2006, *id.* at 19, and June 12, 2007, *id.* at 22. None of the routine assessments notes any behavior that is out of the ordinary.

f) Recorded Visitation

Panetti did not testify at the hearing, but the State presented several hours of audio recordings of Panetti’s visits with his parents and with Sister Kathryn Cox between December 4, 2007 and January 4, 2008. Resp.’s Ex. 24a– 30a. These recordings amount to some eleven hours of conversation. In all that time, Panetti’s speech remains normal, even slow, in pace. His statements are generally responsive to the conversation, though he does show remarkable self-centeredness, often turning the conversation to himself instead of following up on a topics related to friends,

family, or the other speaker. He often quotes scripture or makes religious comments, but does not “rant” or “preach.”

Notably, several of the conversations between Panetti and his mother involve extended discussion regarding Judge Ables (the trial judge) and his corruptness and ineptitude with regard to Panetti’s trial proceedings. *See, e.g.*, Resp’s. Ex. 25a, 27a. In these discussions Panetti talks about the “kangaroo court,” ex. 25a, “Ables’ screwups,” ex. 27a, and “corrupt Texas politics,” *id.*. He makes statements such as “Fredericksburg had to have a hanging,” ex. 25a, and “Ables was trying to cover his ass,” *id.*. At no time does he become irrational, tangential, or pressured in his speech. His statements all have to do with Judge Ables’ alleged political corruptness, not with any spiritual corruption or action by devils or supernatural forces.

The conversation between Panetti and his parents often turns to Panetti’s habeas case. Panetti’s comments about his legal proceedings demonstrate a fairly sophisticated understanding of his circumstances. For example, on December 4, 2007, Panetti tells his parents to tell Maury Levin, whom he identifies as a member of his defense team, about a “character witness” that he “knew from years ago that saw me run and preach and may not be here any more.” Resp.’s Ex. 24a. He seems to be aware he may be on tape, stating “I don’t want to be too overt about it. . . . I hope they don’t know what I’m talking about. . . . If they are taping it, I did not tell that character witness anything, there’s no in cahoots, no planning.” *Id.*

On December 10, 2007, Panetti initiates a very rational, organized conversation with his parents about various states abolishing the death penalty pending the outcome of the “lethal injection case” currently before the Supreme Court. Panetti notes “I’ve got a feeling they’re in for a surprise like they were in my case.” Resp.’s Ex. 25a. There are several other recorded conversations

concerning the abolition of the death penalty generally; Panetti expresses his moral opposition to the death penalty without becoming noticeably tangential or pressured in his speech, and without attributing the death penalty to any kind of supernatural or demonic conspiracy. *See, e.g.* Resp.'s Ex. 27a, 30a.

On December 17, 2007, Panetti asks his parents (regarding one of the experts sent to evaluate him): "that lady or man you sent last week, was that for us or them?" His mother responds, "us," and Panetti replies "Well, that's the way I treated her, then." Resp.'s Ex. 27a.

Also on December 17, 2007, Panetti tells his parents not to worry about the outcome of the evidentiary hearing: "the clerks, the Supreme Court, dug deep down into that, and at the end of the opinion they said that Sparks would come up with a decision in agreement with our decision. So if they want to pull a shenanigan and send it back through there again, now don't be afraid if this hearing goes, because it's just gonna— it's just gonna be better in the end, because it's gonna go back there again and they're not gonna like it. They've done that with other cases, and the Supreme Court gets angry with Texas for doing that." *Id.*

Analysis

The question presented by the Supreme Court's remand order is twofold: (1) What standard should be applied to determine competence to be executed? (2) Is Scott Panetti competent to be executed under that standard?

I. Eighth Amendment Analysis

The Supreme Court directed the District Court to evaluate Panetti's ability to "reach a rational understanding of the reason for the execution" with reference to its Eighth Amendment analysis in *Roper*, 543 U.S. at 560-564; *Atkins*, 536 U.S. at 311-314; and *Ford*, 477 U.S., at

406-410. *Panetti*, 127 S.Ct at 2861-62. These three cases all found the death penalty violated the Eighth Amendment with regard to certain classes of offenders (juveniles, the mentally retarded, and the insane) in light of “evolving standards of decency.”

“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislators.” *Atkins*, 536 U.S. 304 at 312. As the Supreme Court acknowledged in *Ford*, no state permits the execution of an insane prisoner, even if he or she was previously competent to stand trial and be sentenced for the crime. However, most state statutes prohibiting the execution of the insane do not define “insanity,” “sanity,” or related terms in any way. *See, e.g.* Alabama: CODE OF ALA. § 15-16-23; California: CAL PEN CODE § 3701; Connecticut: CONN. GEN. STAT. § 54-101; Delaware: 11 DEL. C. § 406; Indiana: BURNS IND. CODE ANN. § 11-10-4-2; Kansas: K.S.A. § 22-4006; Louisiana: *State v. Allen*, 204 La. 513, 517 (La. 1943); Massachusetts: ALM GL ch. 279, § 62; Nebraska: R.R.S. Neb. § 29-2537; Nevada: NEV. REV. STAT. ANN. § 176.425; New Mexico: N.M. STAT. ANN. § 31-14-4; South Carolina: S.C. CODE ANN. § 44-23-220; South Dakota: S.D. CODIFIED LAWS § 23A-27A-22; Virginia: VA. CODE ANN. § 19.2-177.1.

Those states that do have a statutory definition of competence to be executed require that a defendant “understand” or be “aware” of his crime and the punishment he faces, but none of these statutes further defines understanding or awareness. *See, e.g.* Arizona: A.R.S. § 13-4021 (“As used in this article, ‘mentally incompetent to be executed’ means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death.); Florida: FLA. STAT. § 922.07 (“The Governor shall notify the psychiatrists in writing that they are to examine the

convicted person to determine whether he or she understands the nature and effect of the death penalty and why it is to be imposed upon him or her.”); Georgia: O.C.G.A. § 17-10-60 (“As used in this article, the term ‘mentally incompetent to be executed’ means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment.”); Kentucky: KRS § 431.213 (2) (“‘Insane’ means the condemned person does not have the ability to understand: (a) That the person is about to be executed; and (b) Why the person is to be executed.”); Mississippi: MISS. CODE ANN. § 99-19-57 (“For the purposes of this subsection, a person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court.”); Missouri: R.S.Mo. § 552.060 (“No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.”) Montana: MONT. CODE ANNO., § 46-14-101 (2) (“(a) As used in this chapter, ‘mental disease or defect’ means an organic, mental, or emotional disorder that is manifested by a substantial disturbance in behavior, feeling, thinking, or judgment to such an extent that the person requires care, treatment, and rehabilitation. (b) The term ‘mental disease or defect’ does not include: (i) an abnormality manifested only by repeated criminal or other antisocial behavior; (ii) a developmental disability, as defined in 53-20-102; (iii) drug or alcohol intoxication; or (iv) drug or alcohol addiction.”); North Carolina: N.C. GEN. STAT. § 15A-1001 (“No person may

be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as ‘incapacity to proceed.’”); Ohio: O.R.C. ANN. 2949.28 (“As used in this section and section 2949.29 of the Revised Code, ‘insane’ means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict.”); Utah: UTAH CODE ANN. § 77-19-201 (“As used in this part, ‘incompetent to be executed’ means that, due to mental condition, an inmate is unaware of either the punishment he is about to suffer or why he is to suffer it.”); Wyoming: WYO. STAT. § 7-13-901(v) (“‘Requisite mental capacity’ means the ability to understand the nature of the death penalty and the reasons it was imposed.”)

Recently, in *Clark v. Arizona*, 548 U.S. 735 (2006), the Supreme Court surveyed the “varied background” of criminal insanity in the United States in the context of the Due Process Clause, and held that “no particular formulation has evolved into a baseline for due process.” The Court recognized the limits of modern psychology and psychiatry in informing the debate on legal competence, and specifically noted that, “[t]here being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.” *Id.*

a) Standard for “rational understanding”

Nevertheless, the *Panetti* Court has made it clear that, in the Eighth Amendment context, “insanity” does have a baseline definition: the test for competence to be executed involves not only a prisoner’s factual awareness of the crime, the impending execution, and the state’s reason for