1 IN THE SUPREME COURT OF THE UNITED STATES
2 - x
3 SCOTT LOUIS PANETTI, :
4 Petitioner :
5 v. : No. 06-6407
6 NATHANIEL QUARTERMAN, DIRECTOR, :
7 TEXAS DEPARTMENT OF CRIMINAL :
8 JUSTICE, CORRECTIONAL INSTITUTIONS :
9 DIVISION. :
10 - x
11 Washington, D.C.
12 Wednesday, April 18, 2007
13
14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 1:00 p.m.
17 APPEARANCES:
18 GREGORY W. WIERCIOCH, ESQ., San Francisco, Cal; on
19 behalf of the Petitioner.
20 R. TED CRUZ, ESQ., Solicitor General, Austin, Tex.; on
21 behalf of the Respondent.
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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in case 06-6407, Panetti versus Quarterman.

5 Mr. Wiercioch.

6 ORAL ARGUMENT OF GREGORY W. WIERCIOCH

7 ON BEHALF OF THE PETITIONER

8 MR. WIERCIOCH: Mr. Chief Justice, and may

9 it please the Court:

10 The Fifth Circuit found that Scott Panetti

11 suffers from paranoid delusions that cause him to

12 believe that he is being executed because of a

13 conspiracy against him and not as punishment for his

14 crimes. Despite that finding, the Fifth Circuit held

15 that Scott Panetti is competent to be executed because

16 an inmate need not have a rational understanding of the

17 reason for his execution but only be aware of it. This

18 standard is a profound misreading of Ford versus

19 Wainwright. But before I address the merits of that

20 issue, I would like to discuss two preliminary matters

21 first.

22 First, Scott Panetti's petition containing

23 his execution competency claim is not second or

24 successive under the Antiterrorism and Effective Death

25 Penalty Act. And second, the State-court adjudication

1 of that claim resulted in a decision that was an
2 unreasonable application of clearly established Federal
3 law as determined by this Court.
4 The first issue: This is not a second or
5 successive petition.
6 Martinez-Villareal recognized that a
7 numerically second petition is not successive, it's not
8 a mere mathematical computation, it's a term of art.
9 And if you bring the claim the first time it's
10 justiciable, it's not second or successive. Texas law
11 --
12 JUSTICE SCALIA: Wait. I didn't understand
13 that to be what the case said. I thought that the case
14 held that it wasn't successive there because the claim
15 had, in fact, been brought in the first petition, and
16 that first petition was dismissed as premature. And the
17 argument was made that this is just a continuation of
18 that first petition.
19 Now, the difference here is that the claim
20 was not brought in the first petition, even though it
21 was pretty clear after that case of ours that you had a
22 sure route to raising the claim if you raised it
23 prematurely, and then brought the petition later.
24 MR. WIERCIOCH: Your Honor, I think the
25 difference is -- or the central holding, I believe, of

1 Martinez-Villareal -- is that we do not bring these Ford
2 claims until they are justiciable, until they're ripe.
3 It's the unique nature of Ford claims. They are
4 uniquely time specific.
5 JUSTICE GINSBURG: You said if you bring it
6 earlier, it will be unripe. But it did, I think, leave
7 open the precise procedural posture that we're in now.
8 It didn't resolve that.
9 MR. WIERCIOCH: Martinez-Villareal did not
10 resolve that question, Your Honor, that's correct.
11 The other problem with the case, I think, is
12 as you suggest, Justice Scalia, that there is a real
13 danger that these claims could be adjudicated
14 prematurely. And that has happened in the Fifth
15 Circuit, a case that both the State and we have cited in
16 our briefs, Delk versus Cockrell. And that was a
17 post-Martinez-Villareal case.
18 The other thing to keep in mind is that
19 Texas law believes that these claims are premature as
20 well. So it was premature under Martinez-Villareal, but
21 it was also unexhausted and unexhaustible under Texas
22 law. And I think what Martinez-Villareal and Texas
23 recognize together is that these claims are most
24 efficiently litigated at the end of the process, because
25 of the unique nature of these claims.

1 The constitutional violation here is forward
2 looking, unlike most constitutional habeas claims that
3 are backward looking. And it's the State's setting of
4 the date, or making it imminent, that triggers the
5 violation, that it is now going to carry out the
6 execution of someone who is potentially mentally
7 incompetent.
8 JUSTICE SCALIA: The difference is that in
9 Martinez-Villareal, it was plausible to say that this
10 was not a second petition. Now you may be quite right,
11 that there is good reason to say you shouldn't bring
12 something that isn't ripe. But in that earlier case, we
13 were able to get around the language of the statute
14 which says a second or successive petition is not
15 permissible.
16 Here, how do you get around the language
17 other than to say it shouldn't be that way, that you
18 should be able to bring a second or successive petition
19 when you're raising an issue that was not ripe at the
20 time of the first petition?
21 I mean, as a policy matter, that's a very
22 good argument. But what do you do with the language of
23 the statute? And after all, Congress is entitled to
24 say -- to place limits upon our ability to review State
25 court judgments.

1 MR. WIERCIOCH: My answer would be that the
2 Court didn't make a mere mathematical calculation in
3 Martinez-Villareal. That claim actually was raised
4 twice. It was raised in the first petition, and it was
5 raised in a second when it was ripe. We've only brought
6 our Ford claim one time. We brought it when it was
7 ripe, when the execution date was set. And I think
8 that's the difference there.
9 JUSTICE SCALIA: It doesn't say "a second
10 run at the same claim." It says "a second petition."
11 Even if you bring new petitions in your second claim
12 that weren't raised in your first, it's still a second
13 or successive petition, and I find it hard to get over
14 that language.
15 MR. WIERCIOCH: The only thing I can say is
16 that the claim in a sense doesn't even exist until the
17 State is announcing its intention to carry out the
18 execution in the near future by setting the date. And
19 if we adopt the rule that the State wants, it's going to
20 have, as in Martinez-Villareal, perverse and seemingly
21 far-reaching consequences for habeas practice.
22 JUSTICE SOUTER: You're suggesting --
23 JUSTICE KENNEDY: Is it material to your
24 position to show that there was deterioration in his
25 mental condition between the time of the sentence and

1 the time you brought the petition? I.e., the -- during
2 his incarceration, his condition worsened?
3 MR. WIERCIOCH: I think that is definitely
4 part of it, Your Honor, but it also is the fact that we
5 cannot predict with any reliability how severe mental
6 illnesses are going to influence somebody's mental
7 processes. And the nature of delusions themselves that
8 fluctuate in intensity and severity, often influenced by
9 life events, can have an impact on the inmate's ability
10 to understand the reason for his execution.
11 In this case it is -- his delusion is
12 wrapped up, it's central to it, is the reason he's being
13 executed. And the intensity of his delusions or our
14 ability to predict that is -- we can't do it until that
15 event actually occurs, the event that's going to
16 influence him, and that's the setting of the date.
17 CHIEF JUSTICE ROBERTS: Why can't you have
18 sought leave to file a second or successive application
19 and met the requirements, if you're right that the
20 factual predicate for the Ford claim doesn't arise until
21 the execution is imminent?
22 Couldn't you have fit your claim under
23 2244(b)(2)(B), I guess, on that basis? And then we
24 don't have to engage in the fiction that a second
25 petition is actually not a second petition.

1 MR. WIERCIOCH: I don't think we could have
2 fit under that provision, Your Honor, because that
3 provision requires that the evidence, established by
4 clear and convincing evidence but for constitutional
5 error, no reasonable factfinder would have found the
6 applicant guilty of the underlying offense.
7 CHIEF JUSTICE ROBERTS: I suppose it doesn't
8 fit comfortably under there, but I guess the argument
9 would be that -- guilty of -- we've used the concept of
10 being guilty of the death sentence as opposed to guilty
11 of the crime before, and the fact finder -- you wouldn't
12 be sentenced to death if the sentencer had known you
13 were incompetent. I appreciate that it's not the most
14 comfortable fit, but at least the part -- it seems to be
15 addressed to the question of a factual predicate that's
16 not present at the time of the first habeas petition.
17 And that seems to be your justification for not filing
18 it at that time.
19 MR. WIERCIOCH: That's part of the
20 justification, but it's actually I think more than that,
21 that the claim isn't justiciable, that the claim doesn't
22 exist. I think it would be as if trying to force a
23 petitioner to raise -- who's attacking a sentence of a
24 number of years -- to raise in that petition deprivation
25 of good time credits, that there would be no claim at

1 that point for them to raise it. So it's the
2 justiciability, I think, is the key.
3 CHIEF JUSTICE ROBERTS: Right. The point is
4 that (b)(2)(B) is addressed to that precise situation
5 where the facts aren't present when you file the first
6 application.
7 MR. WIERCIOCH: The facts aren't present,
8 but the constitutional violation has already occurred,
9 and I think that's got to be the difference.
10 CHIEF JUSTICE ROBERTS: The constitutional
11 violation won't occur until the execution?
12 MR. WIERCIOCH: Correct.
13 CHIEF JUSTICE ROBERTS: It's prospective, as
14 you said.
15 MR. WIERCIOCH: Right.
16 JUSTICE SOUTER: But your position basically
17 is that "petition" here means petition that could have
18 been brought. This couldn't have because up to this
19 point there was nothing that was justiciable; is that --
20 MR. WIERCIOCH: That's correct, Your Honor.
21 JUSTICE SOUTER: -- the textual argument?
22 MR. WIERCIOCH: Yes, it is.
23 JUSTICE KENNEDY: Then if you get beyond the
24 second or -- and successive question, your next point
25 was whether or not AEDPA applies?

1 MR. WIERCIOCH: That's correct, Your Honor.
2 JUSTICE KENNEDY: In the course of your
3 argument, could you answer this: Suppose we find that
4 the State did not comply with the mandate of Ford
5 because it didn't give adequate procedures to the
6 defendant, it did not give him an adequate opportunity
7 to present his defense. Suppose we find that. I'm
8 going to ask the same question of the State. Does that
9 mean that the district court should then send it back to
10 the State? Or is the district court at that point
11 entitled, and required, to hold a new hearing on the
12 substantive issue of Ford competency?
13 MR. WIERCIOCH: I would think it's the
14 latter, Your Honor. The State would argue --
15 JUSTICE KENNEDY: Would it be within the
16 discretion of the district court to send it back to the
17 State, and say well, now you didn't give the correct
18 procedures and that's an invalidity, so we're sending it
19 back to you? Would the district court have discretion
20 to do that?
21 MR. WIERCIOCH: I -- I would think not. I
22 mean it's the exhaustion remedy or the due process
23 constitutional requirements were not met by the
24 State-court judge, and they had their opportunity. They
25 didn't live up to the Ford procedures, and now we've had

1 a full, constitutionally adequate procedure in Federal
2 court and we developed those facts. The only thing we
3 really need now is a standard from this Court and we can
4 send it back to the district court and apply that legal
5 standard.
6 JUSTICE KENNEDY: It may be much harder for
7 you to get that standard on this Court's review of a
8 collateral proceeding than this Court's review of a
9 state proceeding, because of AEDPA.
10 MR. WIERCIOCH: But our contention is that
11 the AEDPA does not prevent this Court from addressing
12 the merits of the constitutional issue here.
13 JUSTICE KENNEDY: Because?
14 MR. WIERCIOCH: Because the State court did
15 not abide by the minimum due process procedures set out
16 by Justice Powell's opinion in Ford versus Wainwright,
17 and that is the clearly established law. Even though it
18 is a concurring opinion, he does not provide as much due
19 process protections as Justice Marshall's plurality did.
20 JUSTICE SCALIA: Before we get too far into
21 the merits --
22 MR. WIERCIOCH: Yes.
23 JUSTICE SCALIA: -- I -- I'm not done with
24 the jurisdiction yet. I wanted to ask you about the
25 statement you made in response to a question; you said

1 it's not successive and it isn't a second petition if
2 the first one could not have been brought. Right? If
3 the first one was unripe?
4 But we've just decided this term that that's
5 not the rule. In Burton, we -- we -- we said that even
6 though a first, an earlier petition was unripe, the
7 second petition was still a second petition. So that
8 can't be the principle that you're espousing, unless you
9 want us to overrule Burton the same term.
10 MR. WIERCIOCH: You don't have to overrule
11 Burton, Your Honor. Burton is distinguishable; Burton
12 had two or more petitions attacking the same custody of
13 the same judgment. The nature of the Ford claim is not
14 that we are telling the State that they cannot carry out
15 the execution of Mr. Panetti. We are just saying they
16 cannot carry it out under a limited set of
17 circumstances.
18 Mr. Burton, on the other hand, could have
19 raised all of his claims at the same time, but he -- he
20 went ahead and raised his conviction -- claims related
21 to his conviction before he raised his claims related to
22 his sentencing.
23 If we had done that, if we had waited until
24 the Ford claim was ripe, all of our usual type habeas
25 claims would have been lost under the statute of

1 limitations. That would not have been the case in
2 Burton.
3 To get back to your question,
4 Justice Kennedy, the problem here -- let me just say,
5 the essential language of Justice Powell's decision on
6 the minimum due process requirements is that, number
7 one, an impartial decisionmaker is required; and
8 secondly, that decision-maker has to have the ability to
9 hear argument and receive evidence from prisoner's
10 counsel, including expert psychiatric evidence that may
11 differ from the State's own psychiatric examinations.
12 That boils down to exactly what we didn't
13 have here. Now the key point is when the State's, or
14 the court's, appointed experts went to evaluate Mr.
15 Panetti, new issues were raised; and those are the
16 issues, they were determinative issues, that we didn't
17 have an opportunity to respond to. What happened is
18 when they went to see Mr. Panetti, they characterized
19 his behavior as filibustering about the Bible, answering
20 questions with Biblical verses, refusing to answer
21 questions until they told him whether or not they were
22 Christians. They took all of those behaviors to mean
23 that Mr. Panetti was controlling, manipulating and
24 deliberately refusing to answer questions, leading them
25 to the conclusion that Mr. Panetti was competent and he

1 was just malingering.

2 That is exactly the type of evidence that we

3 were not able to respond to. We asked in a number of

4 ways throughout the State court proceedings to the trial

5 judge, please, give us an opportunity of some sort to

6 address the issues, to make this proceeding fair. And

7 these -- these procedures that we asked for included

8 cross-examination at a hearing and also funds to hire

9 our own defense expert.

10 It's important to point out that our pro

11 bono attorney who -- I'm sorry, our pro bono expert who

12 did an emergency evaluation two days before the

13 execution, was not a constitutionally adequate

14 procedure. The reason is clear. The State-court

15 appointed attorneys -- I'm sorry, experts -- had not yet

16 been appointed, and they had not yet done their

17 evaluation.

18 JUSTICE SCALIA: These -- these were not

19 appointed by the prosecutor; they were appointed by the

20 court?

21 MR. WIERCIOCH: That's correct.

22 JUSTICE SCALIA: Am I right?

23 MR. WIERCIOCH: Yes.

24 JUSTICE SCALIA: And you say that's

25 inadequate. We have to have a full adversarial trial of

1 psychiatric experts in every case where a prisoner
2 claims that he's not mentally competent to be executed.
3 MR. WIERCIOCH: I respectfully disagree,
4 Your Honor. We do not have to have that. What we do
5 have to have in a situation like ours where there is a
6 new issue that is brought up by the charges of,
7 basically malingering, that we have got to have an
8 opportunity to respond to those charges, and engage that
9 issue; and we were not able to engage that issue; and we
10 asked for intermediate steps.
11 The other thing to keep in mind, Your Honor,
12 is that the Texas procedure itself allows for a hearing.
13 That's how they comport with Ford. So we're not asking
14 the Court to overrule Texas's procedures. What happened
15 here is a maverick judge decided not to follow the
16 statute. And so it was specifically to our case.
17 JUSTICE SCALIA: It doesn't seem to me, and
18 there's nothing in our history that requires, that you
19 need a full dress trial to decide this issue. And it
20 seems to me perfectly reasonable for the trial court to
21 appoint experts, not selected by the prosecutor but
22 selected by the judge, and have them conduct the -- the
23 examination of the individual.
24 I -- I certainly don't want to -- you know
25 -- a full dress trial on this issue in every case. And

1 I -- I don't know anything in our -- in our tradition of
2 due process that requires it.
3 MR. WIERCIOCH: And we're not asking for
4 that, Your Honor. We're asking for something
5 intermediate to that. It could have, like I said, it
6 could have been resolved by having the opportunity to
7 have our own expert, and especially in a situation where
8 new issues are raised.
9 I would contrast that with, say, a situation
10 where our pro bono expert had set out a report; we
11 overcame the threshold showing that was necessary; two
12 mental health experts are appointed under the statute,
13 and those experts addressed our experts' report and
14 didn't raise any new issues, didn't bring anything new
15 into the mix, but what was brought into the mix here is
16 the malingering charge.
17 And I should add that our position --
18 JUSTICE SCALIA: You -- you -- you did have
19 your own expert, though? You had one expert of your
20 own, right? No?
21 MR. WIERCIOCH: We had a pro bono expert --
22 JUSTICE SCALIA: Well.
23 MR. WIERCIOCH: -- who --
24 JUSTICE SCALIA: Who was --
25 MR. WIERCIOCH: -- allowed us, but we -- we

1 went back to the well and he was not able to help us
2 anymore after that initial threshold showing that we
3 made. And I'd like to point out that our position was
4 vindicated when we finally did get constitutionally
5 adequate procedures. Because what happened is this
6 Federal district court judge found that Scott Panetti
7 does suffer from a mental illness and it is
8 significantly characterized by a delusional belief
9 system in which he believes himself to be persecuted for
10 his religious activities and beliefs. So --
11 JUSTICE KENNEDY: Your position is that the
12 affidavit submitted to the district court by the
13 psychiatrists are sufficient to vindicate your
14 substantive position that he cannot be executed under
15 Ford?
16 MR. WIERCIOCH: That's right. We had a full
17 hearing. So we did more than just submit affidavits
18 from our experts. But that did vindicate our position,
19 Your Honor, yes.
20 I'd like to turn now to the merits. The
21 test for competency that we have proposed is derived
22 directly from Justice Powell's test that he set out in
23 his concurrence in Ford versus Wainwright.
24 JUSTICE SCALIA: This very important matter
25 is going to be decided on the basis of the opinion of

1 one -- one justice, what, 30 years ago?
2 MR. WIERCIOCH: Your Honor --
3 JUSTICE SCALIA: You have no other appeal to
4 a long tradition of how we determine this matter, but
5 just one opinion by one justice because he was the
6 lowest common denominator on the Court at the time.
7 That seems to me very peculiar.
8 MR. WIERCIOCH: That's not what Justice
9 Powell did. I mean, what happened in Ford is that the
10 Court did look at all of the common law rationales for
11 the ban, the common law ban on executing the
12 incompetent. And those rationales were also set out in
13 Justice Powell's opinion, and they -- the Court -- a
14 majority of this Court agreed with certain of those
15 rationales.
16 The two rationales being that execution of
17 the mentally incompetent does not further the
18 retributive goal of capital punishment, and secondly,
19 that it's simply cruel to execute someone who does not
20 have the ability to take comfort of understanding, to
21 prepare spiritually and mentally for his passing.
22 So the basis for this standard --
23 CHIEF JUSTICE ROBERTS: Could you maybe
24 elaborate on that? I mean, if you have someone who is
25 competent at the time they're convicted, competent at

1 the time they're sentenced, and you say they're walking
2 to the gurney to be executed, you know, they fall and
3 they hit their head and then they don't understand it,
4 it's somehow very cruel to go forward with the execution
5 at that point, while it wouldn't have been before?
6 I -- it seems to me -- I mean, obviously
7 competence at the trial and sentencing is important. I
8 just don't understand the concept that it has to
9 continue to the point of execution.
10 MR. WIERCIOCH: I think that's the very
11 nature of the Ford right, that it is something that
12 intervenes. We're not saying that Scott Panetti was not
13 fully culpable, found guilty, sentenced to death; we're
14 not attacking that at all. Something happened. And
15 what happened is he did lose the ability to understand
16 rationally the connection between his crime --
17 CHIEF JUSTICE ROBERTS: Well does he
18 understand why he's being imprisoned? I mean, does
19 this, the Ford right extend to prison? Is it cruel to
20 keep someone locked up for life when they don't
21 understand why they're being locked up for life?
22 MR. WIERCIOCH: I think that would be a
23 different situation, Your Honor, because number one, we
24 don't have a common law heritage stretching back a
25 thousand years to prevent the incapacitation or the

1 incarceration of the mentally incompetent. And I think
2 the difference also is --
3 JUSTICE SCALIA: We didn't have
4 incarceration.
5 MR. WIERCIOCH: Excuse me?
6 JUSTICE SCALIA: We didn't have
7 incarceration extending back a thousand years. We -- we
8 had misdemeanors and felonies, all of which were
9 punishable by death.
10 MR. WIERCIOCH: The -- the difference,
11 though, I think, is if you're going to incarcerate
12 somebody or incapacitate them, we're not concerned with
13 their mental state. All we are trying to do at that
14 point is deter them from committing other crimes. So I
15 don't think it's the same situation here.
16 CHIEF JUSTICE ROBERTS: No. There's an
17 element of retribution to imprisonment, just as there is
18 to capital punishment. Both deterrence and retribution
19 in both instances, I would have thought.
20 MR. WIERCIOCH: In capital punishment, yes,
21 but I guess I'm responding to your hypothetical, a
22 person who is sentenced to life in prison who is
23 mentally incompetent, and I would think that the main
24 goal there is incapacitation, deterrence.
25 JUSTICE ALITO: How far does your argument

1 go? If the defendant thinks that the State or the jury
2 had some ulterior motive for his sentence, is that
3 sufficient to -- to -- mean -- does that mean the person
4 doesn't have a rational understanding of the reason for
5 the death sentence?
6 MR. WIERCIOCH: No, Your Honor, it doesn't.
7 I think the key point here is that the
8 person must be suffering from a mental illness; and it
9 is that mental illness that has to deprive the person of
10 his capacity to understand the connection between his
11 crime and his punishment.
12 JUSTICE SOUTER: All right. Let me ask you
13 this specific question. Let's assume that the
14 individual understands that both the necessary and the
15 sufficient condition for his execution was his
16 conviction of the crime. He also believes that they
17 probably wouldn't actually execute him except that they
18 are persecuting him, in this case for his Christian
19 advocacy.
20 Does that person who understands the
21 necessary and sufficient condition for execution, but
22 believes something else is afoot in the motivations of
23 those who are going to execute him, does that person
24 have a -- what you call a rational understanding such
25 that he may be executed?

1 MR. WIERCIOCH: I would say that person does
2 not. And the reason being if the person in your
3 hypothetical is suffering from a mental illness, and
4 these mental illnesses are a very small fraction of the
5 type that include delusions, distortions in thought
6 content, distortions in perception, distortions in
7 thinking, that those very things prevent them from being
8 reasoned out of their delusion by the facts that you've
9 suggested.
10 If they take those facts, such as Scott
11 Panetti, that he knows the State's purported reason for
12 his execution, but that's not good enough.
13 JUSTICE SOUTER: But it's more than -- in my
14 hypothetical, it's more than a purported reason. He
15 understands what the law is. The law is if you're
16 convicted of this crime, that enough -- is that -- that
17 will -- and sentenced to death at the penalty phase,
18 that is alone sufficient and in fact a required
19 condition for your execution.
20 Why can't that person, even though he thinks
21 some ulterior motivation is what's really driving the
22 executioner, why can't that person prepare for death
23 just as well as the -- I won't say just as well -- but
24 why can that person not prepare for death just as he
25 would prepare for death if he were not suffering from

1 the persecution delusion?

2 MR. WIERCIOCH: I think the difference in

3 your hypothetical then has to be, Your Honor, that it's

4 the crime itself. It's not the conviction. It's the

5 crime, that this person has a rational understanding to

6 connect his crime to his punishment. That he is being

7 punished --

8 JUSTICE SOUTER: Well, do you claim in this

9 case that he does not understand that he was convicted

10 of committing a crime or that he thinks he didn't commit

11 a crime?

12 MR. WIERCIOCH: No, not that he does not --

13 JUSTICE SOUTER: If that's the case, then

14 every person who believes he's innocent of the crime is

15 at least a candidate for the rule that you're asking

16 for.

17 MR. WIERCIOCH: I would disagree, Your

18 Honor. The difference is that again it has to be the

19 product of a mental illness, and then that mental

20 illness has to deprive the person of that capacity. So

21 if it's somebody who just thinks they've been --

22 JUSTICE GINSBURG: One problem with a mental

23 illness that is a peculiar feature of this case, in

24 other cases something different is introduced late. It

25 wasn't ripe. It wasn't there before. But here you have

1 an individual who has a severe mental impairment. He
2 had it before he committed these murders. He had it
3 when he was -- there was original competency to see if
4 he could stand trial.
5 He had it all along. It may have manifested
6 itself with different delusions at different times. And
7 yet at every stage he says he's incompetent to stand
8 trial. They hold he is competent to stand trial. Then
9 he says, well, I'm competent, so I want to represent
10 myself. The judge says, yes, you're able to represent
11 yourself, you're competent.
12 Every -- this is not anything new that has
13 happened to him. He has been in this delusional state
14 all along. And now to say at this point it counts, but
15 at other points it didn't?
16 MR. WIERCIOCH: I think the difference has
17 to be, Your Honor, that, yes, he has suffered from a
18 delusion for 20 years and that's the spiritual warfare
19 between himself and the devil. But the delusion takes
20 on a different form in the sense of when his execution
21 date was approaching. It's now the culmination of this
22 battle between himself and Satan, and that is something
23 that we can't predict with any sort of reliability years
24 in advance of the date. He didn't get his first date
25 until four years after his first Federal petition was

1 filed.

2 If there are no more questions --

3 JUSTICE SOUTER: You mean we can't predict

4 that the delusion today is the same delusion yesterday?

5 Is that what you're saying?

6 MR. WIERCIOCH: I wouldn't say that the

7 delusion itself is changing. I mean, the delusion is

8 there, but it's taken a specific form of --

9 JUSTICE SOUTER: Well, it's taken a specific

10 form because the circumstance is different. He was

11 being tried yesterday. He's going to be executed today.

12 But it's the same delusion, and it seems to me that

13 Justice Ginsburg's issue is a kind of a proper issue

14 even though the event on which he focuses has changed.

15 MR. WIERCIOCH: That's true, Your Honor.

16 But again, I don't think we can predict that with any

17 reliability because of the nature of delusions, the

18 severity, the intensity fluctuating; that until that

19 event, until that execution date is set and is imminent,

20 there is no reliable way of predicting how it's going to

21 affect his thinking, how it's going to affect his

22 ability.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. WIERCIOCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Cruz.

1 ORAL ARGUMENT OF R. TED CRUZ
2 ON BEHALF OF THE RESPONDENT
3 MR. CRUZ: Mr. Chief Justice, and may it
4 please the Court:
5 For centuries courts have struggled with how
6 to reconcile mental illness with criminal justice. In
7 this case, however, the Court should not reach the
8 merits of that issue because the AEDPA presents two
9 independent jurisdictional bars to reaching the merits.
10 First, section 2254 bars relief because the State court
11 proceedings complied with clearly established law under
12 Ford; and second, the plain text of section 2244 bars
13 relief because Panetti's claim was a second or
14 successive habeas application.
15 CHIEF JUSTICE ROBERTS: How should he have
16 raised the claim to avoid the second or successive bar?
17 MR. CRUZ: He could have raised it in
18 precisely the same way the petitioner did in
19 Martinez-Villareal. He could have raised it his first
20 Federal habeas application. It would have been
21 dismissed as unripe. And given -- following the Court's
22 majority opinion in Martinez-Villareal, that claim could
23 then be reopened at what time it did become ripe.
24 JUSTICE SOUTER: Yes, but that's a silly
25 fiction. You're not reopening a claim. We can use any

1 kind of language we want to. The fact is that when he
2 first raised it he didn't have a claim which bore a
3 close enough relationship to the time of execution.
4 When he was able to raise a claim that bore enough of a
5 relationship, it was a freestanding claim itself. It
6 seems to me that to say, well, he's simply reopening
7 something that he reopened before is just playing with
8 words.
9 MR. CRUZ: Justice Souter, I don't disagree
10 with you that as a policy matter it's not the most
11 satisfactory outcome. The difficulty -- and it's the
12 difficulty this Court wrestled with in
13 Martinez-Villareal -- is the plain text of the statute
14 suggests a clear outcome, an outcome that is not
15 necessarily the most practical or efficient.
16 JUSTICE SOUTER: Yes, but you can deal with
17 the text of this. I mean, given the fact that there's
18 no neat, satisfactory solution to this no matter where
19 we turn, the -- at least the text of the statute can be
20 read to say that "second and successive petition" at
21 least means a petition when it raises a claim -- when --
22 refers to a petition in which a claim could previously
23 have been brought.
24 And if we say, look, unripe claims can't be
25 brought at an earlier time, then it's not a second and

1 successive petition in that sense. That's one way to
2 you know -- admittedly, it's interpretive, but it's one
3 way to deal with the text. It's kind of a -- it seems
4 to me more forthright than saying, well, he's just
5 continuing or reviving a claim that he raised the first
6 time around.
7 MR. CRUZ: In our judgment that reading is
8 not consistent with the plain text of the statute.
9 The only two bases that Petitioner could
10 legitimately advance for disregarding the plain text are
11 that doing so would be absurd following the plain text
12 or unconstitutional. He has attempted to advance
13 neither. He's simply arguing it would be more
14 efficient.
15 JUSTICE SCALIA: More than that, the section
16 goes on to make an exception from the bar of second or
17 successive. The exception itself is a situation in
18 which he could not have raised it earlier, namely he can
19 get out of the bar if he shows that the claim relies on
20 a new rule of constitutional law, which he couldn't have
21 raised before, or the factual predicate didn't exist
22 before, which he couldn't have raised before.
23 All of those exceptions would be unnecessary
24 if we interpret the provision itself to contain within
25 it an exception for anything that couldn't have been

1 raised before.

2 MR. CRUZ: Justice Scalia, I think that's

3 exactly correct.

4 JUSTICE SOUTER: Then what do you say to the

5 indication from those two exceptions that Congress

6 simply wasn't adverting to this problem?

7 MR. CRUZ: Congress may not have been -- I

8 don't doubt that there is a real possibility Congress in

9 drafting this statute was not specifically considering

10 Ford claims. But what Congress was doing was writing

11 into law a general principle that every claim a habeas

12 petitioner has that petitioner must include in his first

13 Federal habeas --

14 JUSTICE SOUTER: Has. Has. He doesn't have

15 the claim at that first point.

16 MR. CRUZ: Well, but given the exceptions,

17 also every claim he intends to raise at any point in the

18 proceeding. In this case, Panetti was on full notice.

19 He had been arguing about competency from day one and he

20 had not only Martinez-Villareal which gave him a direct

21 path to preserve this, but he had Fifth Circuit

22 precedent that required him to raise it and he

23 disregarded the Fifth Circuit --

24 JUSTICE BREYER: How do you think --

25 JUSTICE SOUTER: But you in effect are

1 telling us that we've got to read this to mean that any
2 claim that he could conceivably have under any set
3 of conceivable circumstances have got to be raised on
4 the first petition with these two exceptions, and that
5 in effect is a formula for frivolous pleading. And I
6 mean, Congress couldn't have intended that.
7 MR. CRUZ: Congress intended that this
8 statute be followed in order to have Federal
9 district-court jurisdiction over claims.
10 JUSTICE GINSBURG: Which would mean that in
11 every first Federal habeas, no matter how farfetched,
12 every single Federal petitioner has to bring a Ford
13 claim. Otherwise he won't have it at the end of the
14 road. Has to burden the district judge with this that
15 is frivolous because it's so far premature. But that's
16 what you're saying, Congress -- the statute can be read
17 only that way, to say that the Ford claim has to be made
18 even when there's no basis for it, even though it
19 couldn't be handled by the district judge.
20 MR. CRUZ: Justice Ginsburg, I believe that
21 is the way the Court found in Martinez-Villareal, to
22 harmonize Ford claims with 2244.
23 JUSTICE BREYER: What's your opinion, then,
24 how this is supposed to work? A person has been on
25 death row for ten years, perfectly sane, no problem.

1 He's going to be executed next month. Tomorrow he
2 becomes catatonic, absolutely insane, no doubt about it,
3 and now it is unconstitutional to execute such a person.
4 Nobody denies that. All right, now what's supposed to
5 happen?
6 MR. CRUZ: Justice Breyer, I agree with you.
7 That is the hardest of --
8 JUSTICE BREYER: I don't want you to agree
9 with me. I want to know what you think should happen.
10 MR. CRUZ: That hypothetical we discussed in
11 our brief, precisely the one you raised.
12 JUSTICE BREYER: And what's your opinion,
13 because I didn't memorize every page. I read it. So
14 what's your opinion how that works?
15 MR. CRUZ: Under the plain text of the
16 statute, that individual would be barred access to
17 Federal district court.
18 JUSTICE BREYER: So your opinion is -- and
19 then is that constitutional, if in fact Congress passes
20 a statute and says there will be no court review of a
21 person who clearly the Constitution forbids to
22 execute -- the State to execute him. Nobody doubts
23 that. Nobody doubts this is an unconstitutional
24 execution, but there will be no court review of a
25 decision to the contrary.

1 Is that constitutional?

2 MR. CRUZ: Respectfully, Justice Breyer,

3 that's not our position, because Texas State law --

4 JUSTICE BREYER: I know that's not --

5 MR. CRUZ: -- provides court review, and so

6 that individual could raise a claim in State court, and

7 the State proceeding does not require that it had been

8 raised previously, and this Court would have certiorari

9 jurisdiction over any decision from Federal -- from

10 State court rejecting that claim. So there is court

11 review in addition to original habeas actions filed

12 before this Court.

13 JUSTICE SCALIA: The Constitution doesn't

14 require Federal district court review.

15 MR. CRUZ: That's correct. The Constitution

16 doesn't require Federal district courts.

17 JUSTICE SCALIA: Okay, I got that. So

18 should we treat this petition as if it's one for

19 original habeas here?

20 MR. CRUZ: The Court could do so.

21 JUSTICE BREYER: Well, why not? Why not?

22 Because we have, after all, a claim that the Fifth

23 Circuit has as a general matter misapplied the standard

24 of this Court's cases as to what counts as insanity for

25 purposes of the Constitution. Now, you say this blocks

1 it, but it doesn't block a direct writ for habeas, so
2 why not? It's an important general question. Someone
3 may be executed whom the Constitution forbids to have
4 executed. Why not?
5 MR. CRUZ: The Court could do so --
6 JUSTICE BREYER: Would you object if we do
7 that?
8 MR. CRUZ: Yes, we would.
9 JUSTICE BREYER: Because?
10 MR. CRUZ: Because the Court has made clear
11 that the standards for an original writ of habeas corpus
12 are particularly exacting and are informed by the
13 legislation Congress has passed governing habeas, and in
14 particular section 2254. Section 2254 in our judgment
15 provides the simplest and clearest path to resolve this
16 case, and it doesn't resolve dealing with legislation
17 that admittedly is in some tension with the most
18 practical and efficient course.
19 Section 2254 requires that in 2004, at the
20 time of the State court proceeding, that the only way
21 that the judgment can be set aside is if it was contrary
22 to clearly established law by this Court. In our
23 judgment, no fair reading of Ford can yield such an
24 outcome.
25 Panetti points to two aspects of the State

1 court hearing that he finds fault with: First, that it
2 was not a live evidentiary hearing; and second, that the
3 State did not appoint a psychiatrist for him and pay for
4 it. Neither of those are consistent with the holdings
5 of Ford. With respect to the first point, no
6 evidentiary hearing, Justice Powell's controlling
7 concurrence was explicit. Ordinary adversarial
8 procedures complete with live testimony,
9 cross-examination, and oral argument by counsel are not
10 necessarily the best means.
11 JUSTICE SOUTER: And I don't know that he's
12 disputing that. I thought his dispute was there's got
13 to be some means for us to respond to what was a new
14 issue as a result of the reports of the two
15 court-appointed experts, the issue of malingering.
16 And I don't know that he's saying it's got
17 to come in one way or another way, but there's got to be
18 a means at least to respond to that new issue. What's
19 your answer to that?
20 MR. CRUZ: Justice Souter, there was a
21 means. In fact, the State court explicitly invited him
22 to respond. He did in fact respond. He filed a 20-page
23 objection, a detailed objection.
24 JUSTICE KENNEDY: You gave him one week and
25 there were no funds for his own psychiatrist.

1 MR. CRUZ: Justice Kennedy, that's correct,
2 but that leads to the second argument that the State
3 should have paid for a psychiatrist. That may perhaps
4 make sense as a prospective rule, but to do so would
5 require extending the rule of Ake to habeas, which it
6 has never been extended, and extending it in particular
7 to competency hearing on execution. That would be a new
8 rule under Teague, and the plurality in Ford explicitly
9 suggested extending Ake to these circumstances, and
10 Justice Powell did not join that proposition. And so in
11 my judgment, there is no fair way to read Ford to say a
12 plurality that didn't control clearly established a
13 holding that Ake extended to the circumstances.
14 JUSTICE KENNEDY: You do agree that Ford
15 stands for the proposition that there must be a hearing
16 that meets the essentials of fairness so that the
17 defendant can contradict the hearing -- the conclusions
18 of the State-appointed psychiatrist?
19 MR. CRUZ: Justice Kennedy, I would frame
20 the holding a little more narrowly, and I would use
21 Justice Powell's words because his was the controlling
22 concurrence. And what he said is, "The State should
23 provide an impartial officer or board that can receive
24 evidence and argument from the prisoner's counsel." And
25 so "receive," I would suggest, is the critical word

1 there.

2 The Ford situation was very strange. In

3 Florida, the Governor had refused to accept any

4 submissions from counsel, said I won't read anything

5 your psychiatrists submit. That was the principal

6 failing Ford focused on. In this case the district

7 court asked for a response, received a 20-page written

8 response, received an expert psychiatric report that was

9 obtained by counsel. On any level, it satisfied the

10 holding of Ford.

11 JUSTICE BREYER: There's also the

12 substantive part, that is, I think there's also an

13 argument that the district court here, and the court of

14 appeals, applied not just Justice Powell, but Marshall's

15 even stronger, and they took -- they say about the same

16 thing in Ford, I didn't see much of a difference, but if

17 there is, take Powell.

18 And it seems to say, the Fifth Circuit

19 following, that if you can answer the question yes,

20 prisoner, are you being executed? Yes. What does that

21 mean? I'll die. And why are you? Because I committed

22 a murder. That that's the end of it. And they say

23 explicitly, it doesn't matter if the next thing the

24 prisoner says and the reason that's going to happen is

25 because of the wild dogs. You say, what do you mean?

1 The wild dogs are manipulating the minds of all of the
2 State officials, all the witnesses, because I'm a victim
3 of the wild dogs forever. And you have 15 psychiatrists
4 and they absolutely prove that's what he thinks, and he
5 thinks that this is all about dogs.
6 Now should he have that delusional system,
7 as I read the Fifth Circuit and the district court, that
8 happens to be irrelevant as to whether he is insane and
9 can't be executed. Now I can't read Powell and Marshall
10 as saying that, so they're saying it's clearly contrary
11 to Powell and Marshall, that sounds like a substantive
12 claim, and they say correct the Fifth Circuit please.
13 What about that one?
14 MR. CRUZ: Justice Breyer, the argument you
15 suggest -- Panetti has at no point made an argument that
16 substantively the State court decision violated clearly
17 established law. And there's a reason for that. Because
18 there is no clearly established law on what the standard
19 is for competency. In Ford, there was one justice
20 writing alone, because Justice Powell was not joined by
21 anyone, and his opinion was not controlling on the
22 standard for incompetency. It was controlling --
23 JUSTICE KENNEDY: But I did understand
24 counsel's argument to say that relief must be given, he
25 cannot be executed, if he lacks the capacity to form a

1 rational understanding of the nature and justification
2 for the punishment. You -- I take it you would agree
3 that if we can just use the lay term, you cannot execute
4 an insane person if he is grossly psychotic, and you
5 can't execute a comatose person?
6 MR. CRUZ: Justice Kennedy, we agree with
7 the proposition that executing the insane is
8 unconstitutional. That was a holding of Ford. But the
9 plurality said --
10 JUSTICE KENNEDY: So we're talking about
11 what "insane" means, and that's a lay term. So suppose
12 there's a gross psychosis which is a severe
13 disorientation from reality and from rationality, and he
14 cannot understand, and he lacks the capacity to
15 understand the nature and the justification for his
16 punishment.
17 MR. CRUZ: That test is very close to the
18 test the State proposes. What Panetti is endeavoring to
19 do is to incorporate into the test "rational
20 understanding," which is deliberately borrowed from the
21 Fifth and Sixth Amendment jurisprudence concerning
22 competency to waive counsel and to stand trial, and we
23 would suggest is a standard wholly inappropriate to this
24 circumstance.
25 JUSTICE BREYER: But suppose you went back.

1 You see, you say it's just Justice Powell. But Marshall
2 said for the Court, today we explicitly recognize that
3 it has been, for centuries, is abhorrent "to exact in
4 penance the life of one whose mental illness prevents
5 him from comprehending the reasons for the penalty or
6 its implications."
7 So that sounds like a stronger statement
8 than Powell. So you add Marshall to Powell, and you get
9 a court. It isn't just Powell. And I agree with you
10 that I don't know that that standard you just enunciated
11 about the rational one is the right test. Maybe the
12 right test is just to repeat these words from Powell or
13 some others. But I think their claim is whatever that
14 is, the Fifth Circuit's been using the wrong test.
15 MR. CRUZ: In this case, Panetti satisfies
16 that test.
17 JUSTICE BREYER: That may be. So maybe the
18 thing to do is to send the case back to the Fifth
19 Circuit and say you've been using the wrong test, this
20 is the right test. Do it again.
21 MR. CRUZ: There's no reason to do so.
22 Because the district court's factual findings
23 demonstrate conclusively that Panetti meets the
24 appropriate test for competency to be executed. The
25 district court found that Panetti understands he

1 committed these two murders. He knows that he murdered
2 two people. He understand that he is going to be put to
3 death.
4 JUSTICE KENNEDY: But that's different from
5 having a rational capacity to understand the nature and
6 justification for the punishment. I think it is. I
7 would conclude it's a fair conclusion from the
8 psychiatrists' affidavits and from their testimony, that
9 he knows he committed a crime, he knows he's being
10 punished, and he's going to be executed for that crime.
11 But it stops there. The delusions prevent his
12 understanding.
13 MR. CRUZ: Well, it extends a little further
14 than there in that the test that Panetti has proposed,
15 rational understanding, is found nowhere in any holding
16 from this Court.
17 JUSTICE BREYER: What about just
18 repeating -- see, what is worrying me is that the
19 district court said precisely what the Fifth Circuit
20 said, indeed stronger. It says, "Despite the fact that
21 petitioner's understanding of the reason was impaired by
22 delusions," the Fifth Circuit concluded that that didn't
23 matter. Now, that means he is applying the same test in
24 the district court that then the Fifth Circuit applied.
25 What would you think about our just quoting

1 the language from the Supreme Court opinions and say
2 this is the language of the test? We can't do better
3 than that. Go apply it.
4 MR. CRUZ: As an initial matter, I do not
5 believe the Court has jurisdiction to reach it because
6 of 2254, because of the proceedings that on any level
7 comply with clearly established holdings from Ford. The
8 only way Panetti gets there is by extending Ake to these
9 proceedings, and no court holding has ever so done.
10 JUSTICE KENNEDY: I really do need your help
11 on a procedural part of AEDPA. Let's assume -- I know
12 that you don't agree with it -- let's assume that the
13 State erred because it gave inadequate procedures to the
14 defendant with reference to the adjudication of
15 competency to be executed. Let's assume that.
16 Would the district court have had
17 discretion, if it made that finding, to send the case
18 back to the State court to have new proceedings?
19 MR. CRUZ: Yes. And Justice Kennedy, I
20 agree with you. And in fact, under AEDPA --
21 JUSTICE KENNEDY: I was asking the question.
22 So don't agree with me.
23 MR. CRUZ: I agree with you that the better
24 course, if the district court had concluded that, would
25 have been to send it back to the State court.

1 JUSTICE KENNEDY: And it had discretion to
2 do that?
3 MR. CRUZ: I don't believe the district
4 court had discretion --
5 JUSTICE KENNEDY: No, no. Assuming he made
6 that finding.
7 MR. CRUZ: I believe he had to do that. I
8 don't believe he had discretion. I believe that's what
9 the district court had to do, because section (e)(2)(B)
10 of AEDPA, which is the proceedings, the rules governing
11 when the district court can hold an evidentiary hearing,
12 require the exact same thing that 2244 requires, namely
13 that the claim go to the underlying guilt of the
14 offense.
15 So I don't believe the district court had
16 the authority under AEDPA to hold an evidentiary
17 hearing. If the district court concludes the
18 proceedings didn't satisfy Ford, the remedy would to be
19 send that back.
20 JUSTICE KENNEDY: What do you do if there's
21 incompetency of counsel in a routine, not a death case,
22 incompetency of counsel, and the district court finds
23 incompetency of counsel? It then goes ahead and he
24 hears all of the issues that a competent counsel would
25 have addressed, or it sends back to the State court?

1 MR. CRUZ: In that circumstance, if the
2 underlying failure, the unconstitutional action, is a
3 failure to provide enough proceedings in a State court,
4 I agree with your suggestion that the better course of
5 action, the course consistent with AEDPA, is to send it
6 back to the State court to provide that procedure.
7 But even if this Court thinks prospectively
8 that extending Ake to these circumstances is a good
9 rule, there is not a word in Ford that so holds.
10 JUSTICE SOUTER: Mr. Cruz, may I just go
11 back to the suggestion that there be, in effect, a
12 remand to the State court. If we accept that
13 proposition, then we are turning the United States
14 district court in effect into an appellate court
15 reviewing the State judgment and the State action, and
16 that certainly is not what habeas is.
17 MR. CRUZ: That is not the case, and in fact
18 AEDPA provides the Federal district court can hold an
19 evidentiary hearing and consider new facts if the claim
20 goes to the underlying guilt of the offense.
21 This particular --
22 JUSTICE SOUTER: No, but it's acting -- it's
23 acting in its own right. Some of the factual record
24 that it must be concerned with is determined by what
25 happened in the State courts; but it's not reviewing the

1 State court as an appellate court would do. But if it
2 can remand and say, you didn't do enough for whatever
3 reason, it seems to me it's exercising the equivalent of
4 appellate jurisdiction.
5 MR. CRUZ: Technically speaking, the way
6 Federal district courts do this is they issue the writ
7 conditioned -- conditional upon the district court
8 holding, or the State court holding the hearing.
9 JUSTICE SOUTER: Sure.
10 MR. CRUZ: And so I don't disagree with you
11 that it's functioning not that different from an
12 appellate court, but through the formalism of issuing a
13 conditional writ.
14 Turning to the merits or returning to the
15 merits, there was a square factual finding that Panetti
16 knows that he's been sentenced to death for committing
17 these murders, and an additional factual finding that he
18 has the capacity to understand the reason for that. The
19 district court didn't resolve whether he, in fact,
20 understands the reason for it, although the State court
21 did. The State court explicitly concluded that he in
22 fact understands the reason.
23 The circumstance we have here is exactly the
24 circumstance suggested by Justice Souter's hypothetical.
25 You have an individual who knows he committed a crime,

1 knows he's going to die, knows that he is -- the State
2 is going to execute him because he committed the crime,
3 but he doesn't believe that reason. He at least asserts
4 he believes something else is going on.
5 But nothing in this Court's precedents or
6 nothing in the principles behind the Eighth Amendment
7 require a prisoner to believe the State's motivations.
8 It is enough that he is able to prepare to die, and the
9 central focus Justice Powell focused on was the ability
10 to prepare oneself to die. Panetti knows he's going to
11 be put to death.
12 There's an exchange in the record with
13 respect to one of his experts where he was talking about
14 other executions. And in particular he goes through
15 with Dr. Mary Alice Conroy on page 148 of the joint
16 appendix, he's talking about what happens when other
17 people are executed. And he says, you know, well, they
18 go to be executed and then sometimes they get a stay,
19 and when they get a stay they come back, and when they
20 don't get a stay, well, then they go on either to be
21 with the lord or someplace too horrible to talk about.
22 And his understanding of that is in marked
23 contrast to Alvin Ford's. Alvin Ford is the simplest
24 and clearest metric to compare an individual defendant.
25 Alvin Ford didn't know he was going to be executed. He

1 was unaware of what was going on. And this Court
2 concluded in Ford that it was cruel and irrational to
3 subject someone who had no idea what was coming to the
4 death penalty.
5 Here Panetti knows he's going to die and he
6 also knows he's guilty. So in terms of preparing for
7 death, he can make his peace with the lord, he can make
8 his peace with the victim's family, he can prepare for
9 death. He may in fact not believe the State's reasons,
10 although it's worth noting that no court has ever so
11 held. What the Federal district court said is that his
12 experts state that he doesn't believe the reasons. But
13 on the other side, no fewer than six different
14 professional psychiatrists have concluded that Panetti
15 is deliberately exaggerating his symptoms, that he is
16 malingering, that he's acting bizarre in order to appear
17 more insane.
18 And that presents a very difficult factual
19 question. What do you do with someone who plainly has
20 some mental illness, but at the same time whom six
21 psychiatrists who have studied him, in some cases for
22 years, who have treated him for years, six professional
23 psychiatrists come in and tell the district court this
24 individual is exaggerating? That is an incredibly
25 difficult factual matter. The only way our system can

1 deal with it is to let the factfinder hear the competing
2 experts and make a judgment.
3 In this case, the Federal district court
4 concluded that the evidence of malingering, quote,
5 "casts doubt on the extent of Panetti's mental illness
6 and symptoms." And that's at page 363 of the joint
7 appendix.
8 Rather than resolve the question whether he
9 in fact doesn't believe the State's reasons, what the
10 district court said is the Constitution doesn't require
11 that he believe the State's reasons. The Constitution
12 simply requires that he know what is happening, that he
13 understand what is happening.
14 The test we have proposed focuses on two
15 things. One, capacity, which Panetti now agrees; and
16 the second thing we suggest is the test should be
17 whether a defendant can recognize he's going to die and
18 the reason. And "recognize," we submit is consistent
19 with the words Justice Powell used. Justice Powell used
20 the words "understand," "aware of," and "perceive."
21 And so "recognize" was our attempt to
22 capture what Justice Powell was talking about. It is
23 less than rational understanding, it is less than the
24 full panoply of being able to make all the litigation
25 decisions one is required, say, to waive counsel;

1 because as Panetti concedes in his reply brief, there
2 are no strategic decisions remaining to be made. At the
3 time of execution, all that remains is for him to make
4 peace and move on so that the State may execute a justly
5 entered sentence.
6 That test, we submit, is entirely consistent
7 with this Court's precedents. It furthers both
8 retribution and deterrence. One point on deterrence.
9 The test Panetti points out really invites abuse.
10 Because rational understanding is -- is a standard that,
11 particularly when you think about mental illness and the
12 ability through medications of an individual to
13 affirmatively decide to stop taking medications and
14 exacerbate his symptom, it invites real abuse. Because
15 rational standard we would -- or rational understanding
16 we would suggest is too high of a standard.
17 In our prisons there are unfortunately a
18 great many people suffering from some degree of mental
19 illness. At some level that's unsurprising. If you
20 look at the DSM-IV definition of "sociopathy" --
21 JUSTICE KENNEDY: In your experience and
22 your present position, have you seen many condemned
23 people with the symptoms as severe as this defendant?
24 MR. CRUZ: We -- we have litigated cases
25 where people have raised Ford claims. In fact one of

1 the ones we recently litigated involved an individual
2 who was convinced he was on death row and being executed
3 because there was a conspiracy of Jews and homosexuals
4 that was out to get them -- out to get him. That sort
5 of delusion unfortunately is not uncommon on death row
6 and it is not uncommon in prisons for paranoia -- the
7 testimony of one of Panetti's experts, Doctor Conroy
8 said, quote, "The major portion of our population in our
9 in-patient units are diagnosed with some form of
10 schizophrenia."
11 If you think of sociopathy, which is defined
12 as -- quote -- under the DSM-IV, "a lack of regard for
13 moral or legal standards in the local culture." It is
14 unsurprising that people that have a lack of regard for
15 right and wrong, a lack of regard for others' lives,
16 frequently commit crimes in which they murder and injure
17 other people.
18 And yet our criminal justice system is
19 predicated upon holding people to account unless they
20 meet the standards for legal insanity.
21 JUSTICE KENNEDY: I don't suppose you have
22 statistics of how many have been sentenced to death and
23 have later been found incompetent?
24 MR. CRUZ: We have endeavored to compile
25 those statistics and that has been a -- we don't have

1 any for the Court. One difficulty is in practice
2 sometimes the State will not seek death. Often these
3 are unreported decisions across the State. So
4 unfortunately we don't have those statistics, although
5 we did endeavor to compile them.
6 If there are no further questions?
7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.
8 Mr. Wiercioch, your rebuttal time was used
9 up but not primarily by you. If you want to take two
10 minutes for rebuttal?
11 REBUTTAL ARGUMENT OF GREGORY W. WIERCIOCH
12 ON BEHALF OF PETITIONER
13 MR. WIERCIOCH: Thank you, Your Honor.
14 Thank you.
15 The -- the only point I'd like to make is
16 we're talking about a very narrow fraction of serious
17 mental illnesses here. We're talking about people who
18 have distortions in thought content, distortions in
19 perception, distortions in their thinking processes.
20 This is not the vast majority of people on death row,
21 and it is, certainly, I have seen no one as mentally ill
22 as Scott Panetti. There are very few people that would
23 be compared to him.
24 JUSTICE ALITO: How would you phrase the
25 test to determine how severe the mental illness has to

1 be?

2 MR. WIERCIOCH: I think it's got to be a

3 mental illness -- again I would come back to the fact

4 that the mental illness has to deprive the person of the

5 capacity to make that rational understanding, and that's

6 why delusional behavior is crucial in most of these

7 cases to depriving that person of the capacity. Because

8 even if you tell the person they're being executed for

9 the crimes they've committed, that is not enough to talk

10 them out of their delusion. It is not enough to reason

11 them out of their delusion.

12 JUSTICE SCALIA: Rational understanding of

13 what? That's -- that's the problem. Rational

14 understanding of what? The State says he has rational

15 understanding of the fact that he is going to die, and

16 the reason he is going to die.

17 Now, what -- what beyond that do you insist

18 he have a rational understanding of?

19 MR. WIERCIOCH: He has to have a rational

20 understanding that he is being executed precisely

21 because of the crime that he committed. He -- the

22 district court never found that he had that. That he

23 had an understanding or that he was aware of the State's

24 stated reason for his execution, and that stated reason

25 then becomes --

1 CHIEF JUSTICE ROBERTS: So -- so if he -- if
2 he firmly believes for whatever reason that he's
3 innocent, then he can't be executed under your test.
4 MR. WIERCIOCH: I would disagree Your Honor.
5 What it is is if he is suffering from a mental illness
6 that deprives him of that capacity. So someone with
7 antisocial personality disorder, something of that
8 nature, where none of the features of that disorder
9 implicate distortions in thought processes, thought
10 content or perceptions, it's not -- it's going to have
11 that capacity but they just refuse to accept the State's
12 reasons.
13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.
15 (Whereupon the case in the above-entitled
16 matter was submitted at 2:02 p.m.)
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