IN THE SUPREME COURT OF THE UNITED STATES

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SCOTT LOUIS PANETTI, :

Petitioner :

v. : No. 06-6407

NATHANIEL QUARTERMAN, DIRECTOR, :

TEXAS DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL INSTITUTIONS :

DIVISION. :

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Washington, D.C.

Wednesday, April 18, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

GREGORY W. WIERCIOCH, ESQ., San Francisco, Cal; on behalf of the Petitioner.

R. TED CRUZ, ESQ., Solicitor General, Austin, Tex.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-6407, Panetti versus Quarterman.

Mr. Wiercioch.

ORAL ARGUMENT OF GREGORY W. WIERCIOCH

ON BEHALF OF THE PETITIONER

MR. WIERCIOCH: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit found that Scott Panetti suffers from paranoid delusions that cause him to believe that he is being executed because of a conspiracy against him and not as punishment for his crimes. Despite that finding, the Fifth Circuit held that Scott Panetti is competent to be executed because an inmate need not have a rational understanding of the reason for his execution but only be aware of it. This standard is a profound misreading of Ford versus Wainwright but before I address the merits of that issue, I would like to discuss two preliminary matters first.

First, Scott Panetti's petition containing his execution competency claim is not second or successive under the Antiterrorism and Effective Death Penalty Act. And second, the State court adjudication

of that claim resulted in a decision that was an unreasonable application of clearly established Federal law as determined by this Court.

The first issue: This is not a second or successive petition.

Martinez-Villareal recognized that a numerically second petition is not successive, it's not a mere mathematical computation, it's a term of art. And if you bring the claim the first time it's justiciable, it's not second or successive. Texas law --

JUSTICE SCALIA: Wait. I didn't understand that to be what the case said. I thought that the case held that it wasn't successive there because the claim had, in fact, been brought in the first petition, and that first petition was dismissed as premature. And the argument was made that this is just a continuation of that first petition.

Now, the difference here is that the claim was not brought in the first petition, even though it was pretty clear after that case of ours that you had a sure route to raising the claim if you raised it prematurely, and then brought the petition later.

MR. WIERCIOCH: Your Honor, I think the difference is, or the central holding, I believe, of

Martinez-Villareal is that we do not bring these Ford claims until they are justiciable, until they're ripe. It's the unique nature of Ford claims. They are uniquely time specific.

JUSTICE GINSBURG: If you bring it earlier, it will be unripe. But it did, I think, leave open the precise procedural posture that we're in now. It didn't resolve that.

MR. WIERCIOCH: Martinez-Villareal did not resolve that question, Your Honor, that's correct.

The other problem with the case, I think, is as you suggest, Justice Scalia, that there is a real danger that these claims could be adjudicated prematurely. And that has happened in the Fifth Circuit, a case that both the State and we have cited in our briefs, Valdez versus Cockrell. And that was a post Martinez-Villareal case.

The other thing to keep in mind is that Texas law believes that these claims are premature as well. So it was premature under Martinez-Villareal, but it was also unexhausted and unexhaustible under Texas law. And I think what Martinez-Villareal and Texas recognize together is that these claims are most efficiently litigated at the end of the process, because of the unique nature of these claims.

The constitutional violation here is forward looking, unlike most constitutional habeas claims that are backward looking. And it's the State's setting of the date or making it imminent that triggers the violation, that it is now going to carry out the execution of someone who is potentially mentally incompetent.

JUSTICE SCALIA: The difference is that in Martinez-Villareal, it was plausible to say that this was not a second petition. Now you may be quite right, that there is good reason to say you shouldn't bring something that isn't ripe. But in that earlier case, we were able to get around the language of the statute which says a second or successive petition is not permissible.

Here, how do you get around the language other than to say it shouldn't be that way, that you should be able to bring a second or successive petition when you're raising an issue that was not ripe at the time of the first petition?

I mean, as a policy matter, that's a very good argument. But what do you do with the language in the statute? And after all, Congress is entitled to say -- to place limits upon our ability to review State court judgments.

MR. WIERCIOCH: My answer would be that the Court didn't make the mere mathematical calculation in Martinez-Villareal. That claim actually was raised twice. It was raised in the first petition, and it was raised in a second when it was ripe. We've only brought our Ford claim one time. We brought it when it was ripe, when the execution date was set. And I think that's the difference there.

JUSTICE SCALIA: It doesn't say a second run at the same claim. It says a second petition. Even if you bring new petitions in your second claim that weren't raised in your first, it's still a second or successive petition, and I find it hard to get over that language.

MR. WIERCIOCH: The only thing I can say is that the claim in a sense doesn't even exist until the State is announcing its intention to carry out the execution in the near future by setting the date. And if we adopt the rule that the State wants, it's going to have, as in Martinez-Villareal, perverse and seemingly far-reaching consequences for habeas practice.

JUSTICE KENNEDY: Is it material to your position to show that there was deterioration in his mental condition between the time of the sentence and the time you brought the petition? I.e., the -- during

his incarceration, his condition worsened?

MR. WIERCIOCH: I think that is definitely part of it, Your Honor, but it also is the fact that we cannot predict with any reliability how severe mental illnesses are going to influence somebody's mental processes. And the nature of delusions themselves that fluctuate in intensity and severity, often influenced by life events, can have an impact on the inmate's ability to understand the reason for his execution.

In this case it is, his delusion is wrapped up, it's central to it, as the reason he's being executed. And the intensity of his delusions or our ability to predict that is -- we can't do it until that event actually occurs, the event that's going to influence him, and that's the setting of the date.

CHIEF JUSTICE ROBERTS: Why can't you have sought leave to file a second or successive application and met the requirements, if you're right that the factual predicate for the Ford claim doesn't arise until the execution is imminent?

Couldn't you have fit your claim under 2244(b)(2)(B), I guess, on that basis? And then we don't have to engage in the fiction that a second petition is actually not a second petition.

MR. WIERCIOCH: I don't think we could have

fit under that provision, Your Honor, because that provision requires that the evidence, established by clear and convincing evidence but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

CHIEF JUSTICE ROBERTS: I suppose it doesn't fit comfortably under there, but I guess the argument would be that -- guilty of -- we've used the concept of being guilty of the death sentence as opposed to guilty of the crime before, and the fact finder -- you wouldn't be sentenced to death if the sentencer had known you were incompetent. I appreciate that it's not the most comfortable fit, but at least the part -- it seems to be addressed to the question of a factual predicate that's not present at the time of the first habeas petition. And that seems to be your justification for not filing it at that time.

MR. WIERCIOCH: That's part of the justification, but it's actually I think more than that, that the claim isn't justiciable, that the claim doesn't exist. I think it would be as if trying to force a petitioner to raise, who's attacking a sentence of a number of years, to raise in that petition deprivation of good time credits, that there would be no claim at that point for them to raise it. So it's the

justiciability, I think, is --

CHIEF JUSTICE ROBERTS: Right. The point is that (b)(2)(B) is addressed to that precise situation where the facts aren't present when you file the first application.

MR. WIERCIOCH: The facts aren't present, but the constitutional violation has already occurred, and I think that's got to be the difference.

CHIEF JUSTICE ROBERTS: The constitutional violation won't occur until the execution?

MR. WIERCIOCH: Correct.

CHIEF JUSTICE ROBERTS: It's prospective, as you said?

MR. WIERCIOCH: Right.

JUSTICE SOUTER: So your position basically is that "petition" hear means petition that could have been brought. This couldn't have because up to this point there was nothing that was justiciable; is that --

MR. WIERCIOCH: That's correct, Your Honor.

JUSTICE SOUTER: -- the textual argument?

MR. WIERCIOCH: Yes, it is.

JUSTICE KENNEDY: Then if you get beyond the second or successive question, your next point was whether or not AEDPA applies?

MR. WIERCIOCH: That's correct, Your Honor.

JUSTICE KENNEDY: In the course of your argument, could you answer this: Suppose we find that the State did not comply with the mandate of Ford because it didn't give adequate procedures to the defendant, it did not give him an adequate opportunity to present his defense. Suppose we find that. I'm going to ask the same question of the State. Does that mean that the district court should then send it back to the State? Or is the district court at that point entitled and required to hold a new hearing on the substantive issue of Ford competency?

MR. WIERCIOCH: I would think it's the latter, Your Honor. The State would argue --

JUSTICE KENNEDY: Would it be within the discretion of the district court to send it back to the State? And say well, now you didn't give the correct procedures and that's -- an invalidity. So we're sending it back to you. Would the district court have discretion to do that?

MR. WIERCIOCH: I -- I would think not. I mean it's, the exhaustion remedy or the due process constitutional requirements were not met by the state court judge, and they had their opportunity. They didn't live up to the Ford procedures, and now we've had a full, constitutionally adequate procedure in Federal

court and we developed those facts. The only thing we really need now is a standard from this Court and we can send it back to the district court and apply that legal standard.

JUSTICE KENNEDY: It may be much harder for you to get that standard on this Court's review of a collateral proceeding than this Court's review of a state proceeding, because of AEDPA.

MR. WIERCIOCH: But our contention is that the AEDPA does not prevent this Court from addressing the merits of the constitutional issue here.

JUSTICE KENNEDY: Because?

MR. WIERCIOCH: Because the State court did not abide by the minimum due process procedures set out by Justice Powell's opinion in Ford versus Wainwright, and that is the clearly established law even though it is a concurring opinion. He does not provide as much due process protections as Justice Marshall's plurality did.

JUSTICE SCALIA: Before we get too far into the merits --

MR. WIERCIOCH: Yes.

JUSTICE SCALIA: -- I, I'm not done about the jurisdiction yet. I wanted to ask you about the statement you made in response to a question; you said

it's not successive and it isn't a second petition if the first one could not have been brought. Right? If the first one was unripe?

But we've just decided this term that that's not the rule. In Burden, we -- we -- we said that even though a first, an earlier petition was unripe, the second petition was still a second petition. So that can't be the principle that you're espousing, unless you want us to overrule Burton the same term.

MR. WIERCIOCH: You don't have to overrule Burton, Your Honor. Burton is distinguishable; Burton had two or more petitions attacking the same custody of the same judgment. The nature of the Ford claim is not that we are telling the State that they cannot carry out the execution of Mr. Panetti. We are just saying they cannot carry it out under a limited set of circumstances.

Mr. Burton, on the other hand, could have raised all of his claims at the same time, but he -- he went ahead and raised his conviction -- claims related to his conviction before he raised his claims related to his sentencing.

If we had done that, if we had waited until the Ford claim was ripe, all of our usual type habeas claims would have been lost under the statute of

limitations. That would not have been the case in Burton.

To get back to your question, Justice Kennedy, the problem here -- let me just say, the essential language of Justice Powell's decision on the minimum due process requirements is that, number one, an impartial decision-maker is required; and secondly, that decision-maker has to have the ability to hear argument and receive evidence from prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examinations.

That boils down to exactly what we didn't have here. Now the key point is when the State's or the court's appointed experts went to evaluate Mr. Panetti, new issues were raised; and those are the issues, they were determinative issues, that we didn't have an opportunity to respond to. What happened is when they went to see Mr. Panetti, they characterized his behavior as filibustering about the Bible, answering questions with Biblical verses, refusing to answer questions until they told him whether or not they were Christians. They took all of those behaviors to mean that Mr. Panetti was controlling, manipulating and deliberately refusing to answer questions, leading them to the conclusion that Mr. Panetti was competent and he was just malingering.

That is exactly the type of evidence that we were not able to respond to. We asked in a number of ways throughout the State court proceedings to the trial judge, please, give us an opportunity of some sort to address the issues, to make this proceeding fair. And these -- these procedures that we asked for included cross-examination at a hearing and also funds to hire our own defense expert.

It's important to point out that our pro bono attorney who -- I'm sorry, our pro bono expert who did an emergency evaluation two days before the execution, was not a constitutionally adequate procedure. The reason is clear. The State court-appointed attorneys -- I'm sorry, experts, had not yet been appointed, and they had not yet done their evaluation.

JUSTICE SCALIA: These -- these were not appointed by the prosecutor; they were appointed by the court?

MR. WIERCIOCH: That's correct.

JUSTICE SCALIA: Am I right?

MR. WIERCIOCH: Yes.

JUSTICE SCALIA: And you say that's inadequate. We have to have a full adversarial trial of psychiatric experts in every case where a prisoner

claims that he's not mentally competent to be executed.

MR. WIERCIOCH: I respectfully disagree, Your Honor. We do not have to have that. What we do have to have in a situation like ours where there is a new issue that is brought up by the charges of, basically malingering, that we have got to have an opportunity to respond to those charges, and engage that issue; and we were not able to engage that issue; and we asked for intermediate steps.

The other thing to keep in mind, Your Honor, is that the Texas procedure itself allows for a hearing. That's how they comport with Ford. So we're not asking the Court to overrule Texas's procedures. What happened here is a maverick judge decided not to follow the statute. And so it was specifically to our case.

JUSTICE SCALIA: It doesn't seem to me, and there's nothing in our history that requires, that you need a full dress trial to decide this issue. And it seems to me perfectly reasonable for the trial court to appoint experts, not selected by the prosecutor but selected by the judge, and have them conduct the -- the examination of the individual.

I, I certainly don't want to -- you know -- a full dress trial on this issue in every case. And I, I don't know anything in our, in our tradition of due

process that requires it.

MR. WIERCIOCH: And we're not asking for that, Your Honor. We're asking for something intermediate to that. It could have, like I said, it could have been resolved by having the opportunity to have our own expert especially in a situation where new issues are raised.

I would contrast that with a situation where our pro bono expert had sent out a report; we overcame the threshold showing that was necessary; two mental health experts are appointed under the statute, and those experts addressed our experts' report and didn't raise any new issues, didn't bring anything new into the mix, but what was brought into the mix here is the malingering charge.

And I should add --

JUSTICE SCALIA: You -- you -- you did have your own expert, though? You had one expert of your own, right? No?

MR. WIERCIOCH: We had a pro bono expert --

JUSTICE SCALIA: Well.

MR. WIERCIOCH: -- who --

JUSTICE SCALIA: Who was --

MR. WIERCIOCH: -- allowed us, but we, we went back to the well and he was not able to help us

anymore after that initial threshold showing that we made. And I'd like to point out that our position was vindicated when we finally did get constitutionally adequate procedures. Because what happened was this Federal district court judge found that Scott Panetti does suffer from a mental illness and it is significantly characterized by a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs. So --

JUSTICE KENNEDY: Your position is that the affidavit submitted to the district court by the psychiatrists are sufficient to vindicate your substantive position that he cannot be executed under Ford?

MR. WIERCIOCH: That's right. We had a full hearing. So we did more than just submit affidavits from our experts. But that did vindicate our position, Your Honor, yes.

I'd like to turn now to the merits. The test for competency that we have proposed is derived directly from Justice Powell's test that he set out in his concurrence in Ford versus Wainwright.

JUSTICE SCALIA: This very important matter is going to be decided on the basis of the opinion of one, one justice, what, 30 years ago?

MR. WIERCIOCH: Your Honor --

JUSTICE SCALIA: You have no other appeal to a long tradition of how we determine this matter, but just one opinion by one justice because he was the lowest common denominator on the Court at that time. That seems to me very peculiar.

MR. WIERCIOCH: That's not what Justice Powell did. I mean, what happened in Ford is that the Court did look at all of the common law rationales for the ban, the common law ban on executing the incompetent. And those rationales were also set out in Justice Powell's opinion, and they -- the Court -- a majority of this Court agreed with certain of those rationales.

The two rationales being that execution of the mentally incompetent does not further the retributive goal of capital punishment, and secondly, that it's simply cruel to execute someone who does not have the ability to take comfort of understanding, to prepare spiritually and mentally for his passing.

So the basis for this standard --

CHIEF JUSTICE ROBERTS: Could you maybe elaborate on that? And mean if you have someone who is competent at the time they're convicted, competent at the time they're sentenced, and you say they're walking

to the gurney to be executed, you know, they fall and hit their head and they don't understand it, it's somehow very cruel to go forward with the execution at that point, while it wouldn't have been before?

I -- it seems to me, I mean, obviously competence at the trial and sentencing is important. I just don't understand the concept that it has to continue to the point of execution.

MR. WIERCIOCH: I think that's the very nature of the Ford right, that it is something that intervenes. We're not saying that Scott Panetti was not fully culpable, found guilty, sentenced to death; we're not attacking that at all. Something happened. And what happened was he did lose the ability to understand rationally the connection between his crime --

CHIEF JUSTICE ROBERTS: Well does he understand why he's being imprisoned? I mean, does this, the Ford right extend to prison? Is it cruel to keep someone locked up for life when they don't understand why they're being locked up for life?

MR. WIERCIOCH: I think that would be a different situation, Your Honor, because number one, we don't have a common law heritage stretching back a thousand years to prevent the incapacitation or the incarceration of the mentally incompetent. And I think

the difference also is --

JUSTICE SCALIA: We didn't have incarceration.

MR. WIERCIOCH: Excuse me?

JUSTICE SCALIA: We didn't have incarceration extending back a thousand years. We -- we had misdemeanors and felonies, all of which were punishable by death.

MR. WIERCIOCH: The -- the difference, though, I think, is if you're going to incarcerate somebody or incapacitate them, we're not concerned with their mental state. All we are trying to do at that point is deter them from committing other crimes. So I don't think it's the same situation here.

CHIEF JUSTICE ROBERTS: No. There's an element of retribution to imprisonment, just as there is to capital punishment. Both deterrence and retribution in both instances, I would have thought.

MR. WIERCIOCH: In capital punishment, yes, but I guess I'm responding to your hypothetical, a person who is sentenced to life in prison who is mentally incompetent, and I would think that the main goal there is incapacitation, deterrence.

JUSTICE ALITO: How far does your argument go? If the defendant thinks the State or the jury had

some ulterior motive for his sentence, is that sufficient to -- to -- mean -- does that mean the person doesn't have a rational understanding of the reason for the death sentence?

MR. WIERCIOCH: No, Your Honor, it doesn't.

I think the key point here is that the person must be suffering from a mental illness; and it is that mental illness that has to deprive the person of his capacity to understand the connection between his crime and his punishment.

JUSTICE SOUTER: All right. Let me ask you this specific question. Let's assume that the individual understands that both the necessary and the sufficient condition for his execution was his conviction of the crime. He also believes that they probably wouldn't actually execute him except that they are persecuting him, in this case for his Christian advocacy.

Does that person who understands the necessary and sufficient condition for execution, but believes something else is afoot in the motivations of those who are going to execute him, does that person have a -- what you call a rational understanding such that he may be executed?

MR. WIERCIOCH: I would say that person does

not. And the reason being if the person in your hypothetical is suffering from a mental illness, and these mental illnesses are very small fraction of the type that include delusions, distortions in thought content, distortions in perception, distortions in thinking, that those very things prevent them from being reasoned out of their delusion by the facts that you've suggested.

If they take those facts, such as Scott Panetti, that he knows the State's purported reason for his execution, but that's not good enough.

JUSTICE SOUTER: It's more than -- in my hypothetical, it's more than a purported reason. He understands what the law is. The law is if you're convicted of this crime, that enough -- is that -- that will -- and sentenced to death at the penalty phase, that is alone sufficient and in fact a required condition for your execution.

Why can't that person, even though he thinks some ulterior motivation is what's really driving the executioner, why can't that person prepare for death just as well as the -- I won't say just as well, but why can that person not prepare for death just as he would prepare for death if he were not suffering from the persecution delusion?

MR. WIERCIOCH: I think the difference in your hypothetical has to be, Your Honor, that it's the crime itself. It's not the conviction. It's the crime, that this person has a rational understanding to connect his crime to his punishment.

JUSTICE SOUTER: Well, do you claim in this case that he does not understand that he was convicted of committing a crime or that he thinks he didn't commit a crime?

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

JUSTICE SOUTER: If that's the case, then every person who believes he's innocent of the crime is at least a candidate for the rule that you're asking for.

MR. WIERCIOCH: I would disagree, Your Honor. The difference is that again it has to be the product of a mental illness, and then that mental illness has to deprive the person of that capacity. So if it's somebody who just thinks they've been --

JUSTICE GINSBURG: One problem with a mental illness that is a peculiar feature of this case, in other cases something different is introduced late. It wasn't ripe. It wasn't there before. But here you have an individual who has a severe mental impairment. He had it before he committed these murders. He's had it

when he was -- when there was the original competency to see if he could stand trial.

He had it all along. It may have manifested itself with different delusions at different times. And yet at every stage he says he's incompetent to stand trial. They hold he is competent to stand trial. Then he says, well, I'm competent, so I want to represent myself. The judge says, yeah, you're able to represent yourself, you're competent.

Every -- this is not anything new that has happened to him. He has been in this delusional state all along. And now to say at this point it counts, but at other points it didn't?

MR. WIERCIOCH: I think the difference has to be, Your Honor, that, yes, he has suffered from a delusion for 20 years and that's the spiritual warfare between himself and the devil. But the delusion takes on a different form in the sense of when his execution date was approaching it's now the culmination of this battle between himself and Satan, and that is something that we can't predict with any sort of reliability years in advance of the date. He didn't get his first date until four years after his first Federal petition was filed.

If there are no more questions --

JUSTICE SOUTER: You mean we can't predict that the delusion today is the same delusion yesterday? Is that what you're saying?

MR. WIERCIOCH: I wouldn't say that the delusion itself is changing. I mean, the delusion is there, but it's taken a specific form of --

JUSTICE SOUTER: Well, it's taken a specific form because the circumstance is different. He was being tried yesterday. He's going to be executed today. But it's the same delusion, and it seems to me that Justice Ginsburg's issue is a kind of a proper issue even though the event on which he focuses has changed.

MR. WIERCIOCH: That's true, Your Honor. But again, I don't think we can predict that with any reliability because of the nature of delusions, the severity, the intensity fluctuating; that until that event, until that execution date is set and is imminent there is no reliable way of predicting how it's going to affect his thinking, how it's going to affect his ability.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. WIERCIOCH: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Cruz?

ORAL ARGUMENT OF R. TED CRUZ

ON BEHALF OF THE RESPONDENT

MR. CRUZ: Mr. Chief Justice, and may it please the Court:

For centuries courts have struggled with how to reconcile mental illness with criminal justice. In this case, however, the court should not reach the merits of that issue because the AEDPA presents two independent jurisdictional bars to reaching the merits. First, Section 2254 bars relief because the State court proceedings complied with clearly established law under Ford; and second, the plain text of Section 2244 bars relief because Panetti's claim was a second or successive habeas application.

CHIEF JUSTICE ROBERTS: How should he have raised the claim to avoid the second or successive bar?

MR. CRUZ: He could have raised it in precisely the same way the petitioner did in Martinez-Villareal. He could have raised it in the first Federal habeas application. It would have been dismissed as unripe. And given -- following the Court's majority opinion in Martinez-Villareal, that claim could then be reopened at what time it did become ripe.

JUSTICE SOUTER: Yes, but that's a silly fiction. You're not reopening a claim. We can use any kind of language we want. The fact is that when he first raised it he didn't have a claim which bore a

close enough relationship to the time of execution. When he was able to raise the claim that bore enough of a relationship, it was a freestanding claim itself. It seems to me that to say, well, he's simply reopening something that he reopened before is just playing with words.

MR. CRUZ: Justice Souter, I don't disagree with you that as a policy matter it's not the most satisfactory outcome. The difficulty -- and it's the difficulty this Court wrestled with in Martinez-Villareal -- is the plain text of the statute suggests a clear outcome, an outcome that is not necessarily the most practical or efficient.

JUSTICE SOUTER: Yes, but you can deal with the text of this. I mean, given the fact that there's no neat satisfactory solution to this no matter where we turn, the -- at least the text of the statute can be read to say that second successive petition at least means a petition when it raises -- refers to a petition in which a claim could previously have been brought. And if we say, look, unripe claims can't be brought at an earlier time, then it's not a second and successive petition in that sense. That's one way to you know -- admittedly, it's interpretive, but it's one way to deal with the text. It's kind of a -- it seems to me more

forthright than saying, well, he's just continuing or reviving the claim that he raised the first time around.

MR. CRUZ: In our judgment that reading is not consistent with the plain text of the statute.

The only two bases that Petitioner could legitimately advance for disregarding the plain text are that doing so would be absurd following the plain text or unconstitutional. He has attempted to advance neither. He's simply arguing it would be more efficient.

JUSTICE SCALIA: More than that, the section goes on to make an exception from the bar of second or successive. The exception itself is a situation in which he could not have raised it earlier, namely he can get out of the bar if he shows that the claim relies on a new rule of constitutional law, which he couldn't have raised before, or the factual predicate didn't exist before, which he couldn't have raised before.

All of those exceptions would be unnecessary if we interpret the provision itself to contain within it an exception for anything that couldn't have been raised before.

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

JUSTICE SOUTER: Then what do you say to the

indication from those two exceptions that Congress simply wasn't adverting to this problem?

MR. CRUZ: Congress may not have been -- I don't doubt that there is a real possibility Congress in drafting this statute was not specifically considering Ford claims. But what Congress was doing was writing into law a general principle that every claim a habeas petitioner has that petition must include in his first petition.

JUSTICE SOUTER: Has. Has. He doesn't have the claim at that first point.

MR. CRUZ: Well, but given the exceptions, also every claim he intends to raise at any point in the proceeding. In this case, Panetti was on full notice. He had been arguing about competency from day one and he had not only Martinez-Villareal which gave him a direct path to preserve this, but he had Fifth Circuit precedent that required him to raise this and he disregarded the Fifth Circuit --

JUSTICE SOUTER: You in effect are telling us that we've got to read this to mean that any claim that he could conceivably have under any set of conceivable circumstances has got to be raised on the first petition with these two exceptions, and that in effect is a formula for frivolous pleading and, I mean,

Congress couldn't have intended that.

MR. CRUZ: Congress intended that this statute be followed in order to have Federal district court jurisdiction over claims.

JUSTICE GINSBURG: This would mean that in every first Federal habeas, no matter how farfetched, every single Federal petitioner has to bring a Ford claim. Otherwise he won't have it at the end of the road. Has to burden the district judge with this that is frivolous because it's so far premature. But that's what you're saying, Congress -- the statute can be read only that way, to say that the Ford claim has to be made even when there's no basis for it, even though it couldn't be handled by the district judge.

MR. CRUZ: Justice Ginsburg, I believe that is the way the Court found in Martinez-Villareal, to harmonize Ford claims with 2244.

JUSTICE BREYER: What's your opinion, then, how this is supposed to work? A person has been on death row for ten years, perfectly sane, no problem. He's going to be executed next month. Tomorrow he becomes catatonic, absolutely insane, no doubt about it, and now it is unconstitutional to execute such a person. Nobody denies that. All right, now what's supposed to happen?

MR. CRUZ: Justice Breyer, I agree with you. That is the heart of --

JUSTICE BREYER: I don't want you to agree with me. I want to know what you think should happen.

MR. CRUZ: That hypothetical we discussed in our brief, precisely the one you raised.

JUSTICE BREYER: And what's your opinion, because I didn't memorize every page. I read it. So what's your opinion how that works?

MR. CRUZ: Under the plain text of the statute, that individual would be barred access to Federal district court.

JUSTICE BREYER: So your opinion is -- and then is that constitutional, if in fact Congress passes a statute and says there will be no court review of a person who clearly the Constitution forbids to execute, the State to execute him. Nobody doubts that. Nobody doubts this is an unconstitutional execution, but there will be no court review of a decision to the contrary. Is that constitutional?

MR. CRUZ: Respectfully, Justice Breyer, that's not our position, because Texas State law --

JUSTICE BREYER: I know that's not --

MR. CRUZ: -- provides court review, and so that individual could raise a claim in State court, and

the State proceeding does not require that it had been raised previously, and this Court would have certiorari jurisdiction over any decision from Federal -- from State Court rejecting that claim. So there is court review in addition to original habeas actions filed before this Court.

JUSTICE SCALIA: The Constitution doesn't require Federal district court review.

MR. CRUZ: That's correct. The Constitution doesn't require Federal district courts.

JUSTICE SCALIA: Okay, I got that. So should we treat this petition as if it's one for original habeas here?

MR. CRUZ: The Court court do see.

JUSTICE BREYER: Well, why not? Why not? Because we have, after all, a claim that the Fifth Circuit has as a general matter misapplied the standard of this Court's cases as to what counts as insanity for purposes of the Constitution. Now, you say this blocks it, but it doesn't block a direct writ for habeas, so why not? It's an important general question. Someone may be executed whom the Constitution forbids to have executed. Why not?

MR. CRUZ: The Court could do so --

JUSTICE BREYER: Would you object if we do

that?

MR. CRUZ: Yes, we would.

JUSTICE BREYER: Because?

MR. CRUZ: Because the Court has made clear that the standards for an original habeas corpus are particularly exacting and are informed by the legislation Congress has passed governing habeas, and in particular Section 2254. Section 2254 in our judgment provides the simplest and clearest path to resolve this case, and it doesn't resolve dealing with legislation that admittedly is in some tension with the most practical and efficient course.

Section 2254 requires that in 2004, at the time of the State court proceedings, that the only way that the judgment can be set aside is if it was contrary to clearly established law by this Court. In our judgment, no fair reading of Ford can yield such an outcome.

Panetti points to two aspects of the State court hearing that he finds fault with: First, that it was not a live evidentiary hearing; and second that the State did not appoint a psychiatrist for him and pay for it. Neither of those are consistent with the holdings of Ford. With respect to the first point, no evidentiary hearing, Justice Powell's controlling

concurrence was explicit. Ordinary adversarial procedures complete with live testimony, cross-examination, and oral argument by counsel are not necessarily the best means.

JUSTICE SOUTER: And I don't know that he's disputing that. I thought his dispute was there's got to be some means for us to respond to what was a new issue as a result of the reports of the two court-appointed experts, the issue of malingering.

And I don't know that he's saying it's got to come in one way or another way, but there's got to be a means at least to respond to that new issue. What's your answer to that?

MR. CRUZ: Justice Souter, there was a means. In fact, the State court explicitly invited him to respond. He did in fact respond. He filed a 20-page objection, a detailed objection.

JUSTICE KENNEDY: You gave him one week and there were no funds for his own psychiatrist.

MR. CRUZ: Justice Kennedy, that's correct, but that leads to the second argument that the State should have paid for a psychiatrist. That may perhaps make sense as a prospective rule, but to do so would require extending the rule of eight to habeas, to which it has never been extended, and extending it in

particular to competency hearing on execution. That would be a new rule under Teague, and the plurality in Ford explicitly suggested extending Ake to these circumstances, and Justice Powell did not join that proposition. And so in my judgment, there is no fair way to read Ford to say a plurality that didn't control clearly established a holding that Ake extended to the circumstances.

JUSTICE KENNEDY: You do agree that Ford stands for the proposition that there must be a hearing that meets the essentials of fairness so that the defendant can contradict the hearings that -- the conclusions of the State-appointed psychiatrist?

MR. CRUZ: Justice Kennedy, I would frame the holding a little more narrowly, and I would use Justice Powell's words because his was the controlling concurrence. And what he said is, "The State should provide an impartial officer aboard that can receive evidence and argument from the prisoner's counsel." And so "receive," I would suggest is the critical word there.

The Ford situation was very strange. In Florida the governor had refused to accept any submissions from counsel, said I won't read anything your psychiatrist submits. That was the principal

failing Ford focused on. In this case the district court asked for a response, received a 20-page written response, received an expert psychiatric report that was obtained by counsel. On any level, it satisfied the holding of Ford.

JUSTICE BREYER: There's also the substantive part, that is, I think there's also an argument that the district court here, and the court of appeals, applied not just Justice Powell, but Marshall's even stronger, and they took -- they say about the same thing in Ford, I didn't see much of a difference, but if there is, take Powell.

And it seems to say, the Fifth Circuit following, that if you can answer the question yes, prisoner, are you being executed? Yes. What does that mean? I'll die. And why are you? Because I committed a murder. That that's the end of it. And they say explicitly, it doesn't matter if the next thing the prisoner says and the reason that's going to happen is because of the wild dogs. You say, what do you mean? The wild dogs are manipulating the minds of all of the State officials, all the witnesses, because I'm a victim of the wild dogs forever. And you have 15 psychiatrists and they absolutely prove that's what he thinks, and he thinks that this is all about dogs.

Now should he have that delusional system, as I read the Fifth Circuit and the district court, that happens to be irrelevant as to whether he is insane and can't be executed. Now I can't read Powell and Marshall as saying that, so they're saying it's clearly contrary to Powell and Marshall, that sounds like a substantive claim, and they say correct the Fifth Circuit please.

What about that one?

MR. CRUZ: Justice Breyer, the argument that you suggest, Panetti has at no point made an argument that substantively the State court decision violated clearly established law. And there's a reason for that. Because there is no clearly established law on what the standard is for competency. In Ford, there was one justice writing alone, because Justice Powell was not joined by anyone, and his opinion was not controlling on the standard for incompetency. It was solely --

JUSTICE KENNEDY: But I did understand counsel's argument to say that relief must be given, he cannot be executed, if he lacks the capacity to form a rational understanding of the nature and justification for the punishment. You, I take it, would agree that if we can just use the lay term, you cannot execute an insane person if he is grossly psychotic, and you can't execute a comatose person?

MR. CRUZ: Justice Kennedy, we agree with the proposition that executing the insane is unconstitutional. That was a holding of Ford.

JUSTICE KENNEDY: So we're talking about what insane means, and that's a lay term. So suppose there's a gross psychosis which is a severe disorientation from reality and from rationality, and he cannot understand, and he lacks the capacity to understand the nature and the justification for his punishment.

MR. CRUZ: That test is very close to the test the State proposes. What Panetti is endeavoring to do is to incorporate into the test rational understanding, which is deliberately borrowed from the Fifth and Sixth Amendment jurisprudence concerning competency to waive counsel and to stand trial, and we would suggest is a standard wholly inappropriate to this circumstance.

JUSTICE BREYER: But suppose you went back. You see, you say it's just Justice Powell. But Marshall said for the Court, today we explicitly recognize that it has been, for centuries, is abhorrent to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.

So that sounds like a stronger statement than Powell. So you add Marshall to Powell, and you get a court. It isn't just Powell. And I agree with you that I don't know that that standard you just enunciated about the rational one is the right test. Maybe the right test is just to repeat these words from Powell or some others. But I think their claim is whatever that is, the Fifth Circuit's been using the wrong test.

MR. CRUZ: In this case, Panetti satisfies that test.

JUSTICE BREYER: That may be. So maybe the thing to do is to send the case back to the Fifth Circuit and say you've been using the wrong test, this is the right test. Do it again.

MR. CRUZ: There's no reason to do so. Because the district court's factual findings demonstrate conclusively that Panetti meets the appropriate test for competency to be executed. The district court found that Panetti understands he committed these two murders. He knows that he murdered two people. He understand that he is going to be put to death.

JUSTICE KENNEDY: But that's different from having a rational capacity to understand the nature and justification for the punishment. I think it is. I

would conclude it's a fair conclusion from the psychiatrist's affidavits and from their testimony, that he knows he committed a crime, he knows he's being punished, and he's going to be executed for that crime. But it stops there. The delusions prevent his understanding.

MR. CRUZ: Well, it extends a little further than there in that the test that Panetti possess rational understanding is found nowhere in any holding from this Court.

JUSTICE BREYER: What about just repeating -- see, what is worrying me is that the district court said precisely what the Fifth Circuit said, indeed stronger. It says, "Despite the fact that petitioner's understanding of the reason was impaired by delusions," the Fifth Circuit concluded that that didn't matter. Now, that means he is applying the same test in the district court that then the Fifth Circuit applied.

What would you think about our just quoting the language from the Supreme Court opinions and say this is the language of the test. We can't do better than that. Go apply it.

MR. CRUZ: As an initial matter, I do not believe the Court has jurisdiction to reach it because of 2254, because of the proceedings that on any level

comply with clearly established holdings from Ford. The only way Panetti gets there is by extending Ake to these proceeding, and no court holding has ever so done.

JUSTICE KENNEDY: I really do need your help on a procedural part of AEDPA. Let's assume -- I know that you don't agree with it -- let's assume that the State erred because it gave inadequate procedures to the defendant with reference to the adjudication of competency to be executed. Let's assume that.

Would the district court have had discretion, if it made that finding, to send the case back to the State court to have new proceedings?

MR. CRUZ: Yes. And Justice Kennedy, I agree with you. And in fact, under AEDPA --

JUSTICE KENNEDY: I was asking the question. So don't agree with me.

MR. CRUZ: I agree with you that the better course if the district court had concluded that would have been to send it back to the State court.

JUSTICE KENNEDY: And it had discretion to do that?

MR. CRUZ: I don't believe the district court had discretion --

JUSTICE KENNEDY: No, no. Assuming he made that finding.

MR. CRUZ: I believe he had to do that. I don't believe he had discretion. I believe that's what the district court had to do, because Section (e)(2)(B) of AEDPA, which is the proceedings, the rules governing when the district court can hold an evidentiary hearing, require the exact same thing that 2244 requires, namely that the claim go to the underlying guilt of the offense.

So I don't believe the district court had the authority under AEDPA to hold an evidentiary hearing. If the district court concludes the proceedings didn't satisfy Ford, the remedy would to be send that back.

JUSTICE KENNEDY: What do you do if there's incompetency of counsel in a routine, not a death case, incompetency of counsel, and the district court finds incompetency of counsel? It then goes ahead and he hears all of the issues that a competent counsel would have addressed, or it sends back to the State court?

MR. CRUZ: In that circumstance, if the underlying failure, the unconstitutional action, is a failure to provide enough proceedings in a State court, I agree with your suggestion that the better course of action, the course consistent with AEDPA, is to send it back to the State court to provide that procedure.

But even if this Court thinks prospectively that extending Ake to these circumstances is a good rule, there is not a word in Ford that so holds.

JUSTICE SOUTER: Mr. Cruz, may I just go back to the suggestion that there be, in effect, a remand to the State court. If we accept that proposition, then we are turning the United States district court in effect into an appellate court reviewing the State judgment and the State action, and that certainly is not what habeas is.

MR. CRUZ: That is not the case, and in fact AEDPA provides the Federal district court can hold an evidentiary hearing and consider new facts if the claim goes to the underlying guilt of the offense.

This particular --

JUSTICE SOUTER: No, but it's acting, it's acting in its own right. Some of the factual record that it must be concerned with is determined by what happened in the State courts; but it's not reviewing the State court as an appellate court would do. But if it can remand and say, you didn't do enough for whatever reason, it seems to me it's exercising the equivalent of appellate jurisdiction.

MR. CRUZ: Technically speaking, the way Federal district courts do this is they issue the writ

conditioned, conditional upon the district court holding, or the State court holding the hearing.

JUSTICE SOUTER: Sure.

MR. CRUZ: And so I don't disagree with you that it's functioning not that different from an appellate court, but through the formalism of issuing a conditional writ.

Turning to the merits or returning to the merits, there was a square factual finding that Panetti knows that he's been sentenced to death for committing these murders, and an additional factual finding that he has the capacity to understand the reason for that. The district court didn't resolve whether he, in fact, understands the reason for it, although the State court did. The State court explicitly concluded that he in fact understands the reason.

The circumstance we have here is exactly the circumstance suggested by Justice Souter's hypothetical. You have an individual who knows he committed a crime, knows he's going to die, knows that he is -- the State is going to execute him because he committed the crime, but he doesn't believe that reason. He at least asserts he believes something else is going on.

But nothing in this Court's precedents or nothing in the principles behind the Eighth Amendment

require a prisoner to believe the State's motivation. It is enough that he is able to prepare to die, and the central focus Justice Powell focused on was the ability to prepare oneself to die. Panetti knows he's going to be put to death.

There's an exchange in the record with respect to one of his experts where he was talking about other executions. And in particular he goes through with Dr. Mary Alice Conroy on page 148 of the joint appendix, he's talking about what happens when other people are executed. And he says, you know, well, they go to be executed and then sometimes they get a stay, and when they get a stay they come back, and when they don't get a stay, well, then they go on either to be with the lord or someplace too horrible to talk about.

And his understanding of that is in marked contrast to Alvin Ford's. Alvin Ford is the simplest and clearest metric to compare an individual defendant. Alvin Ford didn't know he was going to be executed. He was unaware of what was going on. And this Court concluded in Ford that it was cruel and irrational to subject someone who had no idea what was coming to the death penalty.

Here Panetti knows he's going to die and he also knows he's guilty. So in terms of preparing for

death, he can make his peace with the lord, he can make his peace with the victim's family, he can prepare for death. He may in fact not believe the State's reasons, although it's worth noting that no court has ever so held. What the Federal district court said is that his experts state that he doesn't believe the reasons. But on the other side, no fewer than six different professional psychiatrists have concluded that Panetti is deliberately exaggerating his symptoms, that he is malingering, that he's acting bizarre in order to appear more insane.

And that presents a very difficult factual question. What do you do with someone who plainly has some mental illness, but at the same time whom six psychiatrists who have studied him, in some cases for years, who have treated him for years, six professional psychiatrists come in and tell the district court this individual is exaggerating? That is an incredibly difficult factual matter. The only way our system can deal with it is to let the factfinder hear the competing experts and make a judgment.

In this case, the Federal district court concluded that the evidence of malingering, quote, "casts doubt on the extent of Panetti's mental illness and symptoms." And that's at page 363 of the joint

appendix.

Rather than resolve the question whether he in fact doesn't believe the State's reasons, what the district court said is the Constitution doesn't require that he believe the State's reasons. The Constitution simply requires that he know what is happening, that he understand what is happening.

The test we have proposed focusing on two things. One, capacity, which Panetti now agrees; and the second thing we suggest is the test should be whether a defendant can recognize he's going to die and the reason. And "recognize," we submit is consistent with the words Justice Powell used, Justice Powell used the words "understand," "aware of," and "perceive."

And so recognize was our attempt to capture what Justice Powell was talking about. It is less than rational understanding, it is less than the full panoply of being able to make all the litigation decisions one is required, say, to waive counsel; because as Panetti concedes in his reply brief, there are no strategic decisions remaining to be made. At the time of execution, all that remains is for him to make peace and move on so that the State may execute a justly entered sentence.

That test, we submit, is entirely consistent

with this Court's precedents. It furthers both retribution and deterrence. One point on deterrence. The test Panetti points out really invites abuse. Because rational understanding is -- is a standard that, particularly when you think about mental illness and the ability through medications of an individual to affirmatively decide to stop taking medications and exacerbate his symptom, it invites real abuse. Because rational standard we would -- or rational understanding we would suggest is too high of a standard.

In our prisons there are unfortunately a great many people suffering from some degree of mental illness. At some level that's unsurprising. If you look at the DSM-IV definition of sociopathy --

JUSTICE KENNEDY: In your experience and in your present position, have you seen many condemned people with the symptoms as severe as this defendant?

MR. CRUZ: We -- we have litigated cases where people have raised Ford claims. In fact one of the ones we recently litigated involved an individual who was convinced he was on death row and being executed because there was a conspiracy of Jews and homosexuals that was out to get them -- out to get him. That sort of delusion unfortunately is not uncommon on death row and it is not uncommon in prisons for paranoia -- the

testimony of one of Panetti's experts, Doctor Conroy said, quote, "The major portion of our population in our in-patient units are diagnosed with some form of schizophrenia."

If you think of sociopathy, which is defined as -- quote -- under the DSM-IV, "a lack of regard for moral or legal standards in the local culture." It is unsurprising that people that have a lack of regard for right and wrong, a lack of regard for others' lives, frequently commit crimes in which they murder and injure other people.

And yet our criminal justice system is predicated upon holding people to account unless they meet the standards for legal insanity.

JUSTICE KENNEDY: I don't suppose you have statistics of how many have been sentenced to death and have later been found incompetent?

MR. CRUZ: We have endeavored to compile those statistics and that has been -- we don't have any for the court. One difficulty is in practice sometimes the State will not seek death. Often these are unreported decisions across the State. So unfortunately we don't have those statistics, although we did endeavor to compile them.

If there are no further questions?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.

Mr. Wiercioch, your rebuttal time was used up but not primarily by you. If you want to take two minutes for rebuttal?

REBUTTAL ARGUMENT OF GREGORY W. WIERCIOCH

ON BEHALF OF PETITIONER

MR. WIERCIOCH: Thank you, Your Honor.

Thank you.

The, the only point I'd like to make is we're talking about a very narrow fraction of serious mental illnesses here. We're talking about people who have distortions in thought content, distortions in perception, distortions in their thinking processes. This is not the vast majority of people on death row, and it is, certainly, I have seen no one as mentally ill as Scott Panetti. There are very few people that would be compared to him.

JUSTICE ALITO: How would you phrase the test to determine how severe the mental illness has to be?

MR. WIERCIOCH: I think it has to be a mental illness -- again I would come back to the fact that the mental illness has to deprive the person of the capacity to make that rational understanding, and that's why delusional behavior is crucial in most of these

cases to depriving that person of the capacity. Because even if you tell the person they're being executed for the crimes they've committed, that is not enough to talk them out of their delusion. It is not enough to reason them out of their delusion.

JUSTICE SCALIA: Rational understanding of what? That's -- that's the problem. Rational understanding of what. The State says he has rational understanding of the fact that he is going to die, and the reason he is going to die.

Now, what -- what beyond that do you insist he have a rational understanding of?

MR. WIERCIOCH: He has to have a rational understanding that he is being executed precisely because of the crime that he committed. He -- the district court never found that he had that. That he had an understanding or that he was aware of the State's it's stated reason for his execution, and that stated reason becomes --

CHIEF JUSTICE ROBERTS: So -- so if he, if he firmly believes for whatever reason that he's innocent, then he can't be executed under your test.

MR. WIERCIOCH: I would disagree Your Honor. What it is is if he is suffering from a mental illness that deprives him of that capacity. So someone with

antisocial personality disorder, something of that nature, where none of the features of that disorder implicate distortions in thought process, thought content or perceptions, it's not -- it's going to have that capacity but they just refuse to accept the State's reasons.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. The case is submitted.

(Whereupon the case in the above-titled matter was submitted at 2:02 p.m.)