

No. _____

In The
Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

WILLIAM STEPHENS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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**CAPITAL CASE
QUESTION PRESENTED**

Addressing Petitioner's claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), that he is incompetent to be executed, the District Court found Petitioner to have a severe mental illness and suffer from paranoid delusions. The delusions center on Petitioner's belief that his execution is being orchestrated by Satan, working through the State of Texas, to put an end to his preaching the Gospel of Jesus Christ to the condemned. The District Court also found that Petitioner had a rational understanding of the reason for his punishment based on his belief that his execution would be unjust because he was insane at the time of the crime. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's conclusion that Petitioner is competent to be executed.

Does a psychotic inmate have a rational understanding of the reason for his impending execution, within the meaning of *Panetti v. Quarterman*, 551 U.S. 930 (2007), when his putatively rational understanding is intertwined with his paranoid delusions about the reason for his execution?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Scott Louis Panetti asks this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Panetti v. Stephens, 727 F.3d 398 (5th Cir. 2013), the decision of the Court of Appeals affirming the District Court's denial of Mr. Panetti's claim that he is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), is attached as Appendix 1. The memorandum opinion of the District Court denying Mr. Panetti's *Ford* claim, *Panetti v. Quarterman*, 2008 WL 2338498 (W.D. Tex. 2008), is attached as Appendix 2. The District Court's order denying Mr. Panetti's motions for post-judgment relief is attached as Appendix 3. The District Court's 2004 memorandum opinion denying Mr. Panetti's *Ford* claim, *Panetti v. Dretke*, 401 F.Supp.2d 702 (W.D. Tex. 2004), is attached as Appendix 4.

JURISDICTION

The Court of Appeals entered its judgment on August 21, 2013. The Court of Appeals denied Mr. Panetti's timely petition for rehearing *en banc* on October 29, 2013. The order denying rehearing is attached as Appendix 5. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Panetti having asserted below and in this petition the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

INTRODUCTION

Six years after this Court rejected the Fifth Circuit’s unconstitutional standard for assessing execution competency in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Fifth Circuit once again held that Scott Louis Panetti is competent to be executed – despite the District Court’s findings that he has a severe mental illness and suffers from paranoid delusions. It is uncontested that these delusions center on his belief that his execution is being orchestrated by Satan, working through the State of Texas, to put an end to Mr. Panetti’s preaching the Gospel of Jesus Christ to the condemned.

The Fifth Circuit’s new standard takes an inflexible and absolutist view of competency. It holds that any evidence that, in the court’s view, appears to reveal a rational understanding of the reason for the punishment renders the delusions ultimately irrelevant. The Fifth Circuit reconciles conflicting beliefs by simply declaring that the rational prevails over the psychotically irrational. The standard is inconsistent with *Panetti* because it fails to explain how an inmate with psychotic beliefs that prevent him from accurately perceiving the reasons for his execution nonetheless can possess a rational understanding of the causal retributive link between his crime and his punishment.

The Fifth Circuit's standard disregards the diagnostic features and clinical realities of psychotic disorders. It trivializes severe mental illness. It impermissibly narrows the scope of the constitutional guarantee this Court announced in *Ford v. Wainwright*, 477 U.S. 399 (1986). It is in direct conflict with the more coherent approach that the Supreme Court of Pennsylvania developed in *Commonwealth v. Banks*, 29 A.3d 1129 (Pa. 2011), and it will result in the execution of those severely mentally ill prisoners the Eighth Amendment is designed to protect.

This Court has already expended considerable time and resources on Mr. Panetti's case by attempting to correct the Fifth Circuit's parsimonious interpretation of *Ford*. This Court must grant certiorari again to vindicate its objective in granting review the first time, and announce a clear standard for determining execution competency that will provide guidance to the lower courts.

STATEMENT OF THE CASE

Mr. Panetti has suffered from severe mental illness for over 30 years now. It first manifested itself at least a decade before the crime. It has infected every stage of the capital case. While only Mr. Panetti's present competency is before this Court, his lengthy, well-documented medical history and extensive evidence of mental dysfunction from earlier legal proceedings are relevant to the issue. *See Panetti v. Quarterman*, 551 U.S. 930, 936-37, 950 (2007); *Thompson v. Bell*, 580 F.3d 423, 436 (6th Cir. 2009); *Panetti v. Quarterman*, 2008 WL 2338498, at *3 (W.D. Tex. Mar. 26, 2008) (App. 2). A comprehensive recitation of these facts will assist

the Court in addressing the question at the heart of this case: Whether the Fifth Circuit's standard properly considered Mr. Panetti's psychotic beliefs about the reason for his punishment in its assessment of his competency for execution.

A. Pre-Offense Mental Health History

The first time that Mr. Panetti exhibited signs of being afflicted with a psychotic disorder occurred in 1978, over 14 years before the crime. While Mr. Panetti was being treated for extensive electrical burns, a psychiatric evaluation revealed that he might be suffering from "early schizophrenia." *Panetti*, 2008 WL 2338498, at *3. In the decade leading up to the offense, Mr. Panetti was hospitalized nearly a dozen times for mental health problems. *Id.* at *4-9.

Treatment professionals repeatedly found him to be paranoid, grandiose, delusional, and hallucinating. He exhibited tangential and circumstantial thinking, severely impaired judgment, and excessive religiosity. These profound disturbances in his thinking and perception consistently led to diagnoses of chronic undifferentiated schizophrenia and schizoaffective disorder. Doctors frequently prescribed antipsychotic medication to alleviate some of his symptoms. Auditory and visual hallucinations exacerbated his delusions of persecution and grandiosity. *Id.*

In 1986, Mr. Panetti first succumbed to the delusion that he was engaged in spiritual warfare with Satan. In an affidavit his first wife provided in support of her request to have Mr. Panetti involuntarily committed, she stated:

My husband . . . has over the last two months been experiencing hallucinations and has been generally out of touch with reality. He became very paranoid and was always thinking that someone was watching him from the creek in our backyard. He would sit on the

porch all day to keep watch. The paranoia has continued to the present. After our baby was born in March, he became obsessed with the idea that the devil was in our house. He finally had a ceremony to get rid of the devil during what he called the “devil’s birthday.” He buried many valuables next to the house and stacked other furnishings and valuables above the ground which he washed with water. He would stay up during the night and “make magic with the lights.” He claims that he saw the devil on a wall and cut the devil with a knife and that blood had run out on him.

Pet. FH (2008) Ex. 4 at 1-2 (Affidavit of Jane Panetti); JA 38-39.¹

Two years before the crime, Mr. Panetti was involuntarily committed for homicidal behavior after he began swinging a sword around the house and threatening to kill his wife, baby, father-in-law, and himself. He was last hospitalized in 1991, and found to be suffering from delusions of grandiosity and psychotic religiosity. *Panetti*, 2008 WL 2338498, at *8-9.

In 1992, Mr. Panetti and his second wife, Sonja, separated. 31 RR 60. Sonja testified that Mr. Panetti had threatened and hit her. 31 RR 62. At that time, Mr. Panetti had not been taking his antipsychotic medication regularly or continuing his follow-up care at the Kerrville V.A. Medical Center. *See* 37 RR 1552. On September 8, 1992, Mr. Panetti shaved his head, dressed in camouflage combat fatigues, armed himself with a sawed-off shotgun and a deer rifle, and went to the home of his parents-in-law, Joe and Amanda Alvarado. In front of his wife and daughter, Mr. Panetti shot them at close range with the rifle. 37 RR 1544-46. He

¹ Citations to the reporter’s record of the capital murder trial and the competency-to-stand-trial proceedings are noted as “[vol.] RR [page].” Citations to the *Ford* hearings held in the federal district court in 2004 and 2008 are noted as “[vol.] FH ([year]) [page].” Citations to the Record on Appeal in the Fifth Circuit are noted as “[vol.] ROA [page].” Citations to the Joint Appendix submitted in *Panetti v. Quarterman*, No. 06-6407, are noted as “JA [page].”

then took his wife and daughter to a bunkhouse where he had been living. 37 RR 1547. He eventually released them unharmed and, after a lengthy standoff with the police, he surrendered. 37 RR 1548-51.

B. Competency-to-Stand-Trial Proceedings

Based on Mr. Panetti's lengthy history of severe mental illness, a competency trial was held in 1994. After the jury deliberated for nearly twelve hours, the judge declared a mistrial. 10 RR 371, 379. A little more than a month later, after the trial court ordered a change of venue, a new jury heard nearly identical evidence and found Mr. Panetti competent to stand trial. 13 RR 206-07.

At the second competency trial, a defense expert conducted an evaluation and found that Mr. Panetti suffered from schizophrenia. The expert testified that Mr. Panetti decompensated under stress, causing his thinking to become tangential, circumstantial, and inefficient. The expert concluded that Mr. Panetti could not consult with his attorneys with a reasonable degree of rational understanding, and that Mr. Panetti did not have a rational understanding of the proceedings. 13 RR 59-85. Dr. E. Lee Simes, a court-appointed psychiatrist, testified that Mr. Panetti most likely suffered from schizophrenia. Although Dr. Simes concluded that Mr. Panetti was competent to stand trial, JA 9-14, he noted Mr. Panetti's delusional thinking about "gold dust coming down and spiritually filling him," "the demons Dagon and Beelzebub," and "the tinglies." 13 RR 153-54. As the capital murder

trial progressed and the stress increased, Dr. Simes said that it was “quite possible” that Mr. Panetti would decompensate. 13 RR 174.²

C. Waiving Counsel and Invoking *Faretta*

On April 1, 1995, seven months after he had been found competent to stand trial, Mr. Panetti had a “revelation” that he was a “born-again April fool” whose schizophrenia had been cured by God. 15 RR 9. He stopped taking his antipsychotic medication. Less than three months later, Mr. Panetti asked the judge to allow him to fire his attorneys and represent himself. 15 RR 14-16, 26. His attorneys told the judge that they did not believe Mr. Panetti was competent to stand trial. 15 RR 26. The State also objected to allowing defense counsel to withdraw. 15 RR 23-24. However, based on the jury’s finding that Mr. Panetti was competent to stand trial, the judge concluded that he had no choice but to grant Mr. Panetti’s request to represent himself. *See* 15 RR 25, 29-30; 18 RR 16; 23 RR 173.

D. The Trial

Wearing a television-western cowboy costume³, Mr. Panetti told the jury in his opening statement that only an insane person could prove insanity. 31 RR 29.

² Mr. Panetti was given “heavy doses” of antipsychotic medication in advance of his competency hearings. *Panetti*, 2008 WL 2338498, at *35. *see* 1 FH (2004) 124 (“The fact that he could function after getting that medication speaks to the fact that he has a severe mental illness.”); *see also Perez v. Cain*, 529 F.3d 588, 597 (5th Cir. 2008) (noting that “[a] defendant’s responsiveness to medication . . . is an accepted indicator of insanity”).

³ Standby counsel described Mr. Panetti’s appearance:

Scott dressed in a “Tom Mix” style costume like an old TV western. Scott wore his hat in Court. He had pants that looked like leather suede tucked into his cowboy boots. He wore a cowboy style shirt with

Mr. Panetti made bizarre and inappropriate statements to the jury; went on irrelevant, irrational, and illogical reveries; exhibited sudden flights of ideas; asked questions that were incomprehensible or burdened with excessive and extraneous detail; rambled incessantly; perseverated; recited senseless, fragmented aphorisms and anecdotes; badgered the judge, the prosecuting attorney, and witnesses; and was unable to control his behavior despite the judge's repeated efforts. *See Panetti v. Thaler*, 2012 WL 290115, at *11 (W.D. Tex. Jan. 31, 2012) (“[I]t is an undeniable fact that evidence of Panetti’s mental illness permeates the trial record.”); *id.* at *79 (“The record is replete with examples of Panetti’s loose associations, unfocused narratives, and seeming lack of appreciation for the potential impact of his conduct on the jury.”); *Panetti*, 2008 WL 2338498, at *35 (noting that the record of Mr. Panetti’s performance at trial “is not pretty”).

Several excerpts from the trial record reveal the depth of Mr. Panetti’s psychosis:

- Mr. Panetti sought over 200 subpoenas, including ones for John F. Kennedy, the Pope, and Jesus. *See* 36 RR 1207 (“I didn’t want to go subpoena crazy and I turned the Pope loose and J.F.K. and I never subpoenaed them, but Jesus Christ, he doesn’t need a subpoena. He’s right here with me, and we’ll get into that.”); 3 Supp. ROA 831 (Subpoena of Jesus); Ralph Winingham, *Jesus Subpoena Dropped at Trial*, San Antonio Express News, Aug. 24, 1995. The judge later joked to a reporter, “I did not have to quash (a subpoena) for Jesus.” *Id.*

a bandana. The shirt was the double fold over type western shirt. One shirt was green, the other was burgundy. Scott wore a big cowboy hat that hung on a string over his back. It was a joke. It was like out of a dime store novel.

3 Supp. ROA 822 (Affidavit of Scott Monroe).

- Mr. Panetti’s disjointed and unfocused opening statements and closing arguments at both phases of the capital murder trial rendered his remarks substantially unintelligible. *See, e.g.*, 39 RR 20 (“Political comprehension and conflict with medical evidence or nonevidence, personas, personalities. The ominous auras, acts of law and reference with conflicts, with truth, truth that’s overly blatant, acceptance of calder (ph), unknowingly for convenience not danger not.”); *see Panetti*, 2012 WL 290115, at *32 (“Panetti’s opening statement was, to put it simply, not good. In addition to being delivered in a pronounced stream-of-consciousness manner, it also rambled between topics without regard for their relevancy, and was so long that the court eventually cut it short.”)
- For five hours (comprising 124 transcript pages), Mr. Panetti aggressively cross-examined his former wife, Sonja Alvarado, who had witnessed the murder of her parents. 31 RR 103-233; 3 Supp. ROA 828. Throughout his lengthy cross-examination, Mr. Panetti appeared remorseless, repeatedly arguing with Ms. Alvarado and relentlessly pursuing the same line of questions to the point of perseveration. In particular, he returned again and again to quibble with her over the gruesome details of the crime. *See Panetti*, 2012 WL 290115, at *38 (characterizing his cross-examination of Ms. Alvarado as “an unmitigated disaster”).
- After taking the witness stand and testifying about his life in excessive and irrelevant detail (covering over 100 transcript pages, *see* 37 RR 1447-1542), Mr. Panetti announced that he would assume the personality of “Sarge.” 37 RR 1543-44. Speaking in the third person, Mr. Panetti recounted the tragic details of the murders of his parents-in-law. He gestured as if pointing a rifle toward the jury box (visibly upsetting the jurors, 3 Supp. ROA 821), and matter-of-factly imitated the sound of shots being fired: “Sarge, boom, boom. Sarge, boom, boom, boom, boom. Sarge, boom, boom.” 37 RR 1545. The State did not cross-examine Mr. Panetti. 37 RR 1556.

E. 2004 Evidentiary Hearing

In September 2004, the District Court held an evidentiary hearing on Mr. Panetti’s claim that he was incompetent to be executed. Counsel for Mr. Panetti first called Mary Alice Conroy, a forensic psychologist, to the stand. JA136-98. Dr. Conroy had worked for twenty years with the Federal Bureau of Prisons evaluating

and treating prisoners with severe mental illness. 1 FH (2004) 9-11. Dr. Conroy testified that Mr. Panetti suffers from a form of schizophrenia called schizoaffective disorder. 1 FH (2004) 20. She said that “his thinking does not fit together in any kind of logical, rational way,” and that his symptoms include pressured speech, flight of ideas, loose associations, and inappropriate affect. 1 FH 14, 21-22. Dr. Conroy testified that Mr. Panetti knows he is on death row and that the State intends to execute him. 1 FH (2004) 23. She said that he is aware that the State wants to put him to death for murdering his parents-in-law, but that he believes “that’s really a sham.” 1 FH (2004) 25. According to Dr. Conroy, Mr. Panetti told her that:

His understanding of why he is to be executed is a part of spiritual warfare, and that spiritual warfare is war between the demons and the forces of the darkness, and God and the angels and the forces of light, which he said there are angels but they do not have wings. He pointed that out several times. And the reason that the State wants to kill him is not what they’re saying.

1 FH (2004) 25.

Counsel for Mr. Panetti also introduced the testimony of Susana A. Rosin, a psychologist. JA 198-218. Dr. Rosin testified that Mr. Panetti suffers from schizophrenia, characterized by paranoid delusions. 1 FH (2004) 86. She said that his fixed psychotic beliefs center around grandiose ideas that he must save others by preaching the word of God. 1 FH (2004) 83. Dr. Rosin testified that Mr. Panetti could hold a normal conversation if the topic of discussion did not involve his delusional belief system. 1 FH (2004) 84. She believed that he knows he is on death row and that he is going to be executed. 1 FH (2004) 88. Dr. Rosin also

testified that Mr. Panetti knows he killed his parents-in-law. 1 FH (2004) 88.

However, he told her that he did not believe these murders are the real reason the State seeks his execution. 1 FH (2004) 95. Mr. Panetti told Dr. Rosin that “he was going to be executed for preaching the gospel,” 1 FH (2004) 82, and that “the forces of evil, demons, devils are basically set against him.” 1 FH (2004) 89-90.

The last witness counsel for Mr. Panetti called during its case-in-chief was Seth Silverman, a psychiatrist. JA 219-37. Dr. Silverman testified that Mr. Panetti knows the State wants to execute him, but not for the crime. 1 FH (2004) 120, 123. Mr. Panetti told Dr. Silverman that the real reason is “[b]ecause he preaches the word of the gospel.” 1 FH (2004) 109-10.

Dr. George Parker, the court-appointed psychologist in the state-court *Ford* proceedings, testified that he attempted, along with Dr. Mary Anderson, a forensic psychiatrist, to evaluate Mr. Panetti. JA 237-75. According to Dr. Parker, Mr. Panetti refused to cooperate with the evaluation, because Dr. Parker and Dr. Anderson would not answer his question about their religious preferences. 1 FH (2004) 132-33. Dr. Parker admitted that Mr. Panetti suffered from “serious psychological problems.” 1 FH (2004) 134. He also testified that Mr. Panetti had the ability at times to function in a coherent manner. 1 FH (2004) 140. On cross-examination, Dr. Parker testified that Mr. Panetti said he was on death row, because “they don’t want me to preach the word of God.” 1 FH (2004) 150.

Dr. Anderson also testified for the State about her evaluation of Mr. Panetti. JA 298-323. She explained that Mr. Panetti would not answer her and Dr. Parker’s

questions, because they had refused to answer his question whether they believed in Jesus. 2 FH (2004) 27-28. Mr. Panetti told Dr. Anderson that he is going to be executed for preaching the Gospel. 2 FH (2004) 30. She testified that Mr. Panetti's refusal to cooperate with the evaluation was the result of deliberate, conscious choice rather than the product of mental illness. 2 FH (2004) 30-31.

Counsel for Mr. Panetti called Mark Cunningham, a clinical and forensic psychologist, as a rebuttal witness. JA 323-36. Dr. Cunningham testified that the conclusions of Dr. Parker and Dr. Anderson that Mr. Panetti was deliberately uncooperative were not a fair characterization of his behavior, because Mr. Panetti has a lengthy history of responding to questions with religiosity rather than concrete answers. 2 FH (2004) 59-60. Dr. Cunningham said that Mr. Panetti did not behave in a fundamentally different way with Dr. Parker and Dr. Anderson than he has with numerous other persons throughout the criminal proceedings. 2 FH (2004) 60-62. Emphasizing that Mr. Panetti's behavior is entirely consistent with his diagnosis, Dr. Cunningham explained that schizophrenia "doesn't diminish . . . cognitive ability." 2 FH (2004) 63. Dr. Cunningham testified that Mr. Panetti believes the State of Texas is not acting as a lawfully constituted authority in seeking his execution. 2 FH (2004) 69. Instead, according to Dr. Cunningham, Mr. Panetti thinks that the State "is in league with the forces of evil to prevent him from preaching the gospel." 2 FH (2004) 70. Dr. Cunningham identified this as a "specific delusional belief," consistent with Mr. Panetti's "long-standing delusions of

religiosity” and diagnoses of schizophrenia and schizoaffective disorder. 2 FH (2004) 70.

F. 2008 Evidentiary Competency

After this Court’s remand in *Panetti*, 551 U.S. at 962, the District Court held a second competency hearing in 2008. Over the course of two days, the District Court heard testimony from a number of lay and expert witnesses, and received voluminous exhibits detailing Mr. Panetti’s extensive mental health history. Mr. Panetti’s counsel presented the testimony of two expert witnesses who evaluated Mr. Panetti’s competency for execution: Mary Alice Conroy, Ph.D., a forensic psychologist who had previously examined Mr. Panetti and testified at the 2004 hearing; and David Self, M.D., a forensic psychiatrist. Two expert witnesses for the State examined Mr. Panetti: Thomas Allen, Ph.D., a forensic psychologist; and Alan Waldman, M.D., a forensic psychiatrist.

Dr. Conroy testified that, compared with the symptoms she noted in 2004, Mr. Panetti’s psychotic thinking remained consistent. 1 FH (2008) 122. Although Mr. Panetti was more tangential in describing his beliefs, 1 FH (2008) 123, Dr. Conroy testified that:

[H]e continued to assert that his being on Death Row was all part of a divine plan and that his mission there was winning souls. He made references to conspiracies, such as big corporations and the Bush family being in league with the devil. He described two instances in which angels visited him in the form of correctional officers. When asked about his impending execution, he said that God told him he would be a very old preacher.

Pet. FH (2008) Ex. 11 at 4 (Report of Dr. Conroy); *see* 1 FH (2008) 137 (testifying that Mr. Panetti had delusions “about the Bushes and the corporations being with the devil and engaging in spiritual warfare seeking to kill him”). Even though Mr. Panetti said that he should not be punished because he was insane at the time of the crime, 1 FH (2008) 172, Dr. Conroy nonetheless concluded that Mr. Panetti’s severe psychotic condition deprives him of the ability to rationally understand the reasons for his execution. Pet. FH (2008) Ex. 11 at 6. “Rather, he believes that he is on a mission from God and that evil forces are pursuing his death in order to silence him.” *Id.*

Dr. Self recounted his clinical interview of Mr. Panetti:

When I asked, “Why are you here on Death Row?” [h]e responded “To preach the Gospel of Jesus Christ.” I asked, “How does it relate to the fact you’ve been convicted of Capital Murder?” “[I]t’s all part of the plan, before I was in the womb this mission was planned. God chose me not because I’m qualified, He took someone not qualified and made me qualified. I’m a fool, but a fool can bring in some of the lost.” I asked, “What would most people say about why you are here and why you are sentenced to die?” He answered, “They have strong delusions.” I asked if the state was in league with the devil in his estimation, and he explained that the state was simply being duped by the devil. “The devil hates ‘soul savers,’ that’s why the guards and inmates hate me.” He went on to describe the torment he’d experienced at the hands of inmates who are evil and demon possessed.

Pet. FH (2008) Ex. 8 at 5-6 (Report of Dr. Self); *see* 1 FH (2008) 83-85, 91. Dr. Self concluded that Mr. Panetti’s “hyperreligious delusional thought” prevents him from having a rational understanding of the connection between his crime and his punishment. Pet. FH (2008) Ex. 8 at 6; *see* 1 FH (2008) 83-84.

Dr. Allen, the State's expert, described in his report his interaction with Mr.

Panetti:

Mr. Panetti was . . . intent from the beginning to control the interview and keep it on his terms rather than mine. Much of the time, especially early in the interview and during structured questioning, he rambled on with religiosity and I could not keep up with what he was saying. . . . At other times during the exam there was no hurried rambling and no religiosity. When I attempted to begin my exam he put me through some sort of Christianity litmus test, which I passed, according to him. However, by the end of the interview I had become "the devil" and had failed. . . .

His presentation was permeated primarily with religiosity, which is not uncommon in that diagnostic group [*i.e.*, schizophrenics]. But there were multiple occasions where his religious thought content ceased However, any time I attempted to structure the interview he launched into his religiosity and appeared more avoidant than tangential or circumstantial. . . . What initially appeared to be pressured speech seemed only to occur when he was attempting to control the examination, especially when I started to administer anything that was structured in nature.

Resp. FH (2008) Ex. 1 at 2, 4 (Report of Dr. Allen); *see* 2 FH (2008) 19 (testifying that Mr. Panetti's constant religiosity was not a symptom of mental illness but "an effort to control and dominate the interview"). Based on Mr. Panetti's purported lack of cooperation, Dr. Allen concluded that there is a "high probability" that Mr. Panetti is malingering. Resp. FH (2008) Ex. 1 at 6; 2 FH (2008) 53. Dr. Allen did not render an opinion about Mr. Panetti's competency to be executed. 2 FH (2008) 14-15, 61.

Mr. Panetti made several statements demonstrating that he believes Dr. Allen is "part of the devilish conspiracy." Resp. FH (2008) Ex. 1 at 5. He said that Dr. Allen's role as a "hired gun" for the State seeking his execution would "take

away the healing power of Jesus.” *Id.*; 2 FH (2008) 25-26. Mr. Panetti also said that Dr. Allen “didn’t flunk the blasphemy test,” Resp. FH (2008) Ex. 1 at 7, but by the end of the interview, he had concluded that his efforts to bring Dr. Allen to Jesus had failed: He said Dr. Allen “was the devil.” 2 FH (2008) 77.

Dr. Waldman, the State’s expert psychiatrist, reported on Mr. Panetti’s understanding of the reason he is on death row:

[Mr. Panetti] goes on to state, “They’re trying to rub me out, it’s unjust.” I asked Mr. Panetti why it was unjust. He stated, “You treat people with mental illnesses.” I asked Mr. Panetti “Why are you saying they are going to rub you out?” Mr. Panetti goes on to state vaguely that “it is a conspiracy.” I asked Mr. Panetti who was involved with the conspiracy, what is the conspiracy and why there would be a conspiracy against him. He refuses to answer why he is being persecuted in this conspiracy. I asked him again and he gives a nonsensical personalized religious answer. By personalized religious answer, he does not come out and say he is being persecuted for preaching the gospel; it more or less validated what I had heard from the employees of the Polunsky Unit, that Mr. Panetti is not well liked because he is frequently hollering the gospel and disturbing the unit population. . . .

I asked Mr. Panetti “Why would anybody pick on you, why is there no connection between the murder of your in-laws and you being here?” His response is pure nonsense and filled with religious quotes, which is what he does repeatedly when he chooses not to answer a question. . . .

I then asked Mr. Panetti “Don’t you think that any of this has something to do with murdering your in-laws?” to which he responds, “All my guilt has been washed away. When a man is in Christ he is just a new creation. I pray that you have been given in to Christ.”

Resp. FH (2008) Ex. 3 at 6-7 (Report of Dr. Waldman); *see* 2 FH (2008) 85-86. Dr. Waldman dismissed Mr. Panetti’s delusion about a satanic conspiracy as the “almost pat answer that he has given everybody.” Resp. FH (2008) Ex. 3 at 16. He

concluded that Mr. Panetti does not suffer from any psychotic disorder, *id.* at 12, and that he is competent to be executed. *Id.* at 18; 2 FH (2008) 94.

During the clinical interview, Mr. Panetti addressed Dr. Waldman as “Dr. Grigson,” Resp. FH (2008) Ex. 3 at 6, and said that Dr. Waldman is “writing for the execution brand.” *Id.* at 4. Demonstrating the strength and constancy of his psychosis, Mr. Panetti attempted to bring Dr. Waldman to Jesus and believed he had succeeded by the end of the second day’s interview. *See* Tape 49A (6 Supp. ROA) at 48 (“That doctor from Florida, that lieutenant commander [Dr. Waldman], that I think actually came to the Lord, wouldn’t surprise me if he showed up almost on our side and lost 60 pounds and that – something bothered. I lit a fire in him.”); Pet. FH (2008) Ex. 8 at 4 (Report of Dr. Self) (noting that Mr. Panetti had told him that: “[O]n the second day of his visit, Dr. Waldman was remarkably changed, and that he seemed to have been ‘led to Christ’”); Resp. FH (2008) Ex. 1 at 3 (Report of Dr. Allen) (noting that Mr. Panetti began talking “about a visit from ‘Dr. Grigson who became Dr. Walderman [sic] on his last visit and we were two brothers in Christ’”). Dr. Waldman played along with Mr. Panetti’s proselytizing, testifying that he had established a good rapport with Mr. Panetti by talking about the Bible and religion. Resp. FH (2008) Ex. 3 at 4. Dr. Waldman ultimately convinced Mr. Panetti that “I am a man of deep religious faith.” 2 FH (2008) 83.

In addition to testimony from its experts, the State introduced approximately eleven hours’ worth of secretly-recorded audiotapes of Mr. Panetti speaking with his parents and with a spiritual advisor. Although the audiotapes record Mr. Panetti

speaking about the death penalty and the legal proceedings in his case, *Panetti*, 727 F.3d at 411-12, the tapes also record Mr. Panetti describing his constant efforts to root out the devil and bring the souls of his fellow death row inmates to Jesus Christ. *See* n.5, *infra* (setting out examples). Moreover, the audiotapes reveal that Mr. Panetti believes God miraculously saved him from poisoning by Satanist inmates who hate him for preaching the Gospel and for his “victory” in the Supreme Court:

[W]hen I think they poisoned my – my food, they are amazed to see that I’m still alive or not affected by it. See, I get the bottom – I’m on the – the bottom trays, and a lot of times, you know, with this victory and the hatred for the Gospel . . . they will try to give me the bottom, last tray or kick on my food or just one shenanigan – little devilish shenanigans. But God always steps up and takes care of it, changes things.

Tape 56A (11 Supp. ROA) at 41.

HOW THE ISSUES WERE DECIDED BELOW

On June 28, 2007, this Court decided *Panetti v. Quarterman*, 551 U.S. 930 (2007). This Court concluded that the Fifth Circuit used an unconstitutionally restrictive test in assessing competency for execution. *Id.* at 935, 954-62. Holding that the Fifth Circuit’s standard improperly treated a prisoner’s delusional beliefs as relevant “only with respect to the State’s announced reason for a punishment,” *id.* at 959, this Court remanded the case so that the District Court could hear from “physicians, psychiatrists, and other experts in the field” to “clarify the extent to which severe delusions may render a subject’s perception of reality so distorted that he should be deemed incompetent.” *Id.* at 962.

After holding an evidentiary hearing on remand, the District Court denied Mr. Panetti's *Ford* claim. *Panetti v. Quarterman*, 2008 WL 2338498 (W.D. Tex. 2008) (App. 2). The District Court found that Mr. Panetti is seriously mentally ill and suffers from paranoid delusions. *Id.* at *36. However, the court held that Mr. Panetti is competent to be executed because he has a rational understanding of the causal connection between his crime and his punishment. *Id.* The District Court based its conclusion on three pieces of evidence: (1) Mr. Panetti's statements on the audiotapes that showed he had a "fairly sophisticated understanding" of the legal intricacies of his case, *id.* at *35; (2) Mr. Panetti's refusal to cooperate with the State's experts, *id.* at *36; and, most important, (3) Mr. Panetti's belief that his execution would be unjust because he was mentally ill when he committed the crime. *Id.*

The Fifth Circuit affirmed the District Court's decision. *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013) (App. 1). First, the Fifth Circuit held that the lower court had applied the correct legal test based on this Court's decision in *Panetti*: whether the inmate has a rational understanding of the "causal retributive connection" between his crime and his punishment. *Id.* at 410. Second, the Fifth Circuit concluded that the District Court's finding of competency was not clearly erroneous. *Id.* at 410-13.

REASONS FOR GRANTING THE WRIT

I. BY TREATING DELUSIONAL BELIEFS AS IRRELEVANT IF A COURT CAN IDENTIFY ANY PART OF AN INMATE'S IDEATION ABOUT HIS EXECUTION AS "RATIONAL," THE FIFTH CIRCUIT'S STANDARD IGNORES THE DIAGNOSTIC FEATURES AND CLINICAL REALITIES OF PSYCHOTIC DISORDERS AND FAILS TO PROTECT THE TRULY INSANE FROM EXECUTION.

This Court ordered the District Court to determine whether severe delusions render Mr. Panetti's perception of reality so distorted that capital punishment can serve no proper purpose and, therefore, that he should be found incompetent for execution. *Panetti*, 551 U.S. at 960, 962. On remand, however, neither the District Court nor the Fifth Circuit answered the critical question: *How* can a severely mentally ill person who genuinely believes that Satan, working through the State of Texas, is seeking to execute him for preaching the Gospel nonetheless possess a rational understanding of the retributive link between his crime and his punishment? The District Court and the Fifth Circuit satisfied themselves that Mr. Panetti had a rational understanding of the reason for his punishment primarily based on his statement that it would be unjust to execute him because he was insane at the time of the crime. The Fifth Circuit and the District Court implicitly concluded that Mr. Panetti's delusion about a Satan-State conspiracy was not "fixed" because it could not co-exist with this purportedly rational statement. In effect, the Fifth Circuit and the District Court determined that logic must ultimately overwhelm Mr. Panetti's delusional belief system.

By identifying a fragment of an inmate's beliefs that appears tethered to reality, the Fifth Circuit's standard disregards clinicians' understanding of psychotic disorders, trivializing delusions and ultimately deeming them irrelevant by disregarding their iron-grip persistence. Such a standard fails to identify those whom *Ford* and *Panetti* intended to protect: prisoners who may possess some cognitive understanding of the reasons for their execution but who also exhibit delusional thinking that irredeemably distorts the retributive link between their wrongdoing and the punishment they are about to suffer.

A. The essential element of a delusion is that it is entrenched and immutable, even in the face of incontrovertible logic or proof.

This Court held that “the beginning of doubt about competence” for execution is a “psychotic disorder.” *Panetti*, 551 U.S. at 960. One of the hallmarks of schizophrenia and related psychotic disorders is delusional thinking.⁴ Over 200 years ago, Matthew Hale recognized that the presence of delusion is the true test of insanity:

“The most difficult cases,” said Erskine in Hadfield’s trial, “are where reason is not wholly driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety. Such patients are victim to delusion of the most alarming description, which so overpowers the faculties and usurps so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense. Delusion, therefore, where there is no phrenzy or raving madness, is the true character of insanity, and

⁴ Use of the term “psychotic” is generally meant to signify those individuals who exhibit symptoms that include delusions, prominent hallucinations, disorganized speech, or disorganized or catatonic behavior. American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 297, 827 (4th ed. text rev. 2000) [hereinafter “DSM-IV-TR”].

where it cannot be predicted of a man standing for life or death for a crime, he ought not to be acquitted.”

1 Matthew Hale, *THE HISTORY OF THE PLEAS OF THE CROWN* 37 n.5 (1736).

Hale’s insight still has resonance today in the diagnosis of schizophrenia:

Disturbances of thinking and conceptualization are one of the most characteristic features of schizophrenia. The feature common to all manifestations of schizophreni[c] thought disorder is that patients think and reason . . . according to their own intricate private rules of logic. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But their thought processes are strange and do not lead to conclusions based on reality or universal logic.

Robert Cancro & Heinz E. Lehmann, *Schizophrenia: Clinical Features*, in 1 KAPLAN & SADOCK’S *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 1189 (7th ed. 2000).

The essential feature of a delusion is not only its falsity but that it is immutable and entrenched, impervious to logic or reason. *See* DSM-IV-TR 821 (defining a delusion as “a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary”); *see* Hale, *supra*, at 37 n.5 (“[D]elusion exists whenever an individual once conceives something extravagant to exist which has no existence, and when he is incapable of being reasoned out of that absurd conception.”).

Paradoxically, persons suffering from psychotic disorders like schizophrenia may be delusional, yet simultaneously possess relatively intact cognitive functioning. DSM-IV-TR 313; *see* Brief for *Amici Curiae* American Psychological Association *et al.* at 9, *Panetti v. Quarterman*, No. 06-6407 [hereinafter “APA

Amicus Brief’]. As forensic psychologist Mark Cunningham explained at the 2004

Ford hearing:

[Y]ou have to understand that when somebody is schizophrenic, it doesn’t diminish their cognitive ability. . . .

Instead, you have a situation where – and why we call schizophrenia thought disorder [–] the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and comes out in a tangential, circumstantial, symbolic . . . not really relevant kind of way. That’s the essence of somebody being schizophrenic. . . .

Now, it may be that if they’re dealing with someone who’s more familiar . . . [in] what may feel like a safer, more enclosed environment . . . those sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.

Panetti, 551 U.S. at 955; JA 328-29; see 1 FH (2008) 33-34 (testimony of neuropsychologist Leslie Rosenstein stating that, despite deficits in executive functioning, Mr. Panetti possesses basic language, reading, visual-spatial, and intellectual skills consistent with individuals with a psychotic disorder).

Despite a relative preservation of cognitive functioning, persons suffering from psychotic symptoms associated with severe mental illness may be unable to test the veracity of their delusions or recognize the meaning and significance of their behavior and the motivation for the behavior of others. See APA *Amicus Brief* at 7-12, *Panetti v. Quarterman*, No. 06-6407; Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 Ohio St. J. of Crim. L. 257, 270-71 (2007). Such persons may accurately perceive much of the world around them yet their delusional thinking compels them to irrational and

illogical conclusions. Eugen Bleuler, who created the term “schizophrenia,” used the phrase “double awareness” to describe this phenomenon. Bleuler noted that “[n]ot only do delusion and reality exist consecutively, but they can also exist simultaneously in conditions of full consciousness where one would expect they would be mutually exclusive.” Bleuler, *DEMENTIA PRAECOX OR THE GROUP OF SCHIZOPHRENIAS* 126 (1950). Louis Sass called this concept “double bookkeeping,” writing that:

It is remarkable to what extent even the most disturbed schizophrenics may retain, even at the height of their psychotic periods, a quite accurate sense of what would generally be considered to be their objective or actual circumstances. Rather than mistaking the imaginary for the real, they often seem to live in two parallel but separate worlds: consensual reality and the realm of their hallucinations and delusions.

Sass, *THE PARADOXES OF DELUSION: WITTGENSTEIN, SCHREBER, AND THE SCHIZOPHRENIC MIND* 21 (1994); *see, e.g.*, Milton Rokeach, *THE THREE CHRISTS OF YPSILANTI* 50-74 (1964); APA *Amicus* Brief at 10-12. In short, the diagnostic features and clinical realities of psychotic disorders confirm that delusion and reason can exist simultaneously in the mind of a severely mentally ill individual.

B. The District Court and Fifth Circuit’s fundamental misunderstanding of the nature of psychotic disorders explains the dissonance between the District Court’s findings of fact and its conclusion that Mr. Panetti is competent.

After the 2004 *Ford* hearing, the District Court found that:

Mr. Panetti suffers from some form of mental illness, which some have diagnosed as a schizoaffective disorder. His illness is significantly characterized, first, by tangentiality and loose association, which means his cognitive processes are impaired in such

a way that, when he speaks, he often jumps from topic to topic for no apparent reason, and second, by grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs. Although [the State's experts] concluded that some portion of Panetti's behavior could be attributed to malingering, their testimony merely casts doubt on the extent of Panetti's mental illness and symptoms, as they too concluded that his illness was at least, to some degree, genuine.

Panetti v. Dretke, 401 F.Supp.2d 702, 707 (W.D. Tex. 2004) (App. 4).

After this Court's remand, the District Court found that:

- Mr. Panetti is seriously mentally ill.
- Mr. Panetti has suffered from severe mental illness since well before the crime.
- Mr. Panetti was under the influence of this severe mental illness when he committed the crime, and when he represented himself at trial.
- The severity of Mr. Panetti's mental state may "wax and wane," but it has continued to a significant degree throughout his incarceration and continues today.
- Mr. Panetti suffers from paranoid delusions.

Panetti, 2008 WL 2338498, at *36.

Despite these findings, the District Court concluded that Mr. Panetti's paranoid delusions do not prevent him from having a rational understanding of the causal connection between his crime and his punishment, "most clearly demonstrated by his rationally articulated position that the punishment is unjustified: He believes the State should not execute him because he was mentally ill when he committed the murders." *Id.*

The dissonance between the District Court’s findings and its conclusion demonstrates its fundamental misunderstanding of the nature of delusions and its disregard of their relevance in resolving the “complex[]” and “difficult” question this Court identified in *Panetti*. 551 U.S. at 961. A putatively “rational” belief or logical explanation simply cannot overwhelm an irrational, psychotic delusion. Moreover, neither the District Court nor the Fifth Circuit considered the abundant evidence that Mr. Panetti’s seemingly “rational” belief was inextricably intertwined with his delusional belief system. Finally, the lower courts’ reliance on the absence of any discussion of his delusions on the secretly-recorded audiotapes as conclusive evidence of their evanescent nature is particularly troubling. In short, the District Court and the Fifth Circuit failed to recognize that Mr. Panetti’s delusional belief system is like a warped lens that distorts everything that passes through it: He perceives the world as something other than it is and interacts with people based on an agenda dictated by his delusional system.

First, the District Court’s attempt to isolate a strand of Mr. Panetti’s thinking and examine it is contrary to clinicians’ understanding of the nature of delusions. The lower courts myopically focused on a fragment of Mr. Panetti’s beliefs that appears tethered to reality and concluded that it unequivocally established his rational understanding of the reason for his execution. His statement, however logical and cognitively aware it might initially seem in a vacuum, cannot dislodge his entrenched delusional belief system. If that remark had the power to convince him of the irrationality of his delusions, then his belief

about Satan's desire to put an end to his preaching would not be a delusion but merely a mistaken understanding capable of correction through logic and reason. The District Court made no such finding. On the contrary, it found his paranoid beliefs to be delusions. *Panetti*, 2008 WL 2338498, at *36. That the delusional belief can co-exist with cognitive awareness is a long-accepted phenomenon of psychotic disorders. Cognitive awareness does not undermine the "fixedness" of the delusions.

Second, the District Court and the Fifth Circuit failed to consider that Mr. Panetti's belief that his execution would be unjust because he was insane at the time of the crime is itself an inextricable part of his delusional belief system. Mr. Panetti believes that God cured him of his insanity in 1995, shortly before his trial, and he became a "born-again April Fool" for Jesus. 15 RR 9. At that moment, his destiny became clear: "[H]e became a preacher that night, and realized his central purpose was to lead others to Christ." Pet. FH (2008) Ex. 8 at 4-5. Moreover, he believes that "God had wiped the slate clean" and forgiven him for the crime, and that "it would actually be sinful to talk about that because it's no longer an issue; it's over." 1 FH (2004) 24; *see* Resp. FH (2008) Ex. 3 at 7. Within his delusional belief system, Mr. Panetti knows now that he was insane when he killed his wife's parents, *because he is no longer mentally ill*. Within his delusional belief system, Texas's lawless, pretextual persistence in executing him – even though he was insane at the time of the crime – is wholly reconcilable with a Satanic conspiracy where he is targeted for elimination because of his effective preaching of the

Gospels. *See* Resp. FH (2008) Ex. 3 at 6-7 (Report of Dr. Waldman). Similarly, Mr. Panetti's refusal to cooperate with the State's experts, which the District Court viewed as compelling evidence of a rational understanding, *Panetti*, 2008 WL 2338498, at *36, is consistent with his persecutory delusion that Satan is working through the State of Texas to silence him for his religious faith. Dr. Allen, the State's expert, conceded this point. 2 FH (2008) 62; *see* 2 FH (2008) 161-62 (State's forensic psychiatrist, Priscilla Ray, M.D., testifying that she would not be surprised if someone suffering from a delusion about a Satan-State conspiracy would view government experts through the prism of that delusion).

Third, the District Court and the Fifth Circuit relied on Mr. Panetti's secretly-recorded conversations with his parents as evidence of a rational understanding because he never explicitly mentions his Satanic-conspiracy delusion. *See Panetti*, 727 F.3d at 412; *Panetti*, 2008 WL 2338498, at *28-29; App. 3 at 9. The District Court again revealed its fundamental misunderstanding about the nature of delusions when it explained that Mr. Panetti's delusional system did not remain "constant" because it was not "revealed whenever a subject that is tied into his delusional beliefs is broached." *Id.* at 10. This Court expressly recognized the importance of having qualified experts assist the factfinder in making the competency determination, favorably referring to the APA *Amicus* Brief and its discussion of the guidance mental health experts can provide. *Panetti*, 551 U.S. at 962. The APA *Amicus* Brief recommended that experts use probing questions specifically designed to elicit evidence of delusional beliefs. APA *Amicus* Brief at

17-19; see *Billiot v. Epps*, 671 F.Supp.2d 840, 879-81 (S.D. Miss. 2009) (approving expert’s interview technique modeled after the method approved in APA *Amicus* Brief in *Panetti*). Moreover, as Dr. Allen, the State’s expert, testified, some delusions are “very . . . encapsulated” and “highly specific,” so that “you may not even notice them until you push the right button.” 2 FH (2008) 50; see *Panetti*, 551 U.S. at 955 (“[I]t may be that if they’re dealing with someone who’s more familiar . . . [in] what may feel like a safer, more enclosed environment . . . those sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.” (quoting testimony of Dr. Cunningham)). As one expert testified in *Commonwealth v. Banks*, 29 A.3d 1129 (Pa. 2011):

“[T]he role delusions play in the life of [psychotic] persons . . . may ebb and flow, not because their belief in the delusion ebb[s] and flows, but because of the defendant’s temporal circumstances. So, in other words, there may be circumstances that are occurring that make the importance of the delusional thinking more relevant or less relevant, but the delusional thinking itself is *fixed*. . . . [H]e’s no more or less delusional at these different times. . . . Now, what he chooses to talk about is a totally different matter. It doesn’t have to do with whether the delusions are there or the thought process disturbances are there. It has to do with what’s provoked.”

Id. at 1145 (emphasis added). Mr. Panetti’s parents would have had no reason to ask probing questions or “push the right button” in a social visit, unlike an expert who is tasked with evaluating an inmate’s competency. See 1 FH (2008) 95, 99.

That Mr. Panetti did not discuss his delusions explicitly with his parents does not diminish the fixed nature of his irrational psychotic beliefs.⁵

Finally, the District Court and the Fifth Circuit concluded that Mr. Panetti's discussion of his case and the death penalty in his conversations with his parents provided further evidence of his rational understanding of the reason for his punishment. *See Panetti*, 727 F.3d at 411-12; *Panetti*, 2008 WL 2338498, at *35. However, Mr. Panetti's "fairly sophisticated understanding" of the legal process in his case, *id.*, does not even establish a *Dusky*-type "rational understanding" of the proceedings against him. *See, e.g., Lafferty v. Cook*, 949 F.2d 1546, 1555 (10th Cir. 1991) (explaining that a defendant suffering from a paranoid delusional system "may outwardly act logically and consistently but nonetheless be unable to make decisions on the basis of a realistic evaluation of his own best interests"). The Fifth Circuit itself correctly recognized that *Dusky's* "rational understanding" inquiry is

⁵ In any event, it is far from clear that Mr. Panetti did *not* speak of his delusions with his parents. The audiotapes are replete with evidence that Mr. Panetti is unrelenting in his efforts to fulfill his destiny and bring the Word of God to the men on death row. *See, e.g.,* Tape 49A (6 Supp. ROA) at 31 ("[W]hen I got born again in 1995 on April Fool's Day, God told me what to do. And I knew I could either take pills and lie down and die or obey God and fight."); Tape 30A (1 Supp. ROA) at 7-8 ("I've given him [neighboring Death Row inmate] plenty of God's word. . . . [O]ver the last two weeks he's heard, well, he's heard all of just about all of Matthew and Psalms and Proverbs and some Wisdom [H]e's pretty much a Satanist."); *id.* at 60 ("Some of [these Death Row inmates] are possessed with devils. They're anti-Christian, Satanists. So that's why I'm here to deal with that And I just give them from the Bible just like I did to every other."); Tape 30B (2 Supp. ROA) at 61-62 ("[W]e got some devils back here. They want mercy from the courts, but then they want to act like devils and wonder why they're getting executed. . . . [I]f they don't repent, they will be."); Tape 49A (6 Supp. ROA) at 46 ("[O]nce God puts his call on your life, you gotta – it ain't like you get the call of the sea or the call of the mountains. You got to obey.").

founded on due process principles that are “conceptually distinct” from *Ford’s* Eighth Amendment concerns. *Panetti*, 727 F.3d at 410.⁶

The lower courts’ standard is inconsistent with clinical knowledge and practice, because it treats delusions as mutable and, ultimately, irrelevant, if the prisoner appears to exhibit some cognitive awareness of his situation. As this Court made clear in *Panetti*, the retributive goal of capital punishment is concerned with what the punishment means to the offender at the time of execution. 551 U.S. at 958. Mr. Panetti’s execution would not satisfy this objective, for when a death row inmate attributes his imminent execution to reasons that only someone suffering from a severe mental illness could espouse – such as a delusion that he is being put to death for preaching the Gospels of Jesus Christ – he cannot be said to have the capacity to accept responsibility for his crimes. This Court should grant certiorari.

II. THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION BY A STATE COURT OF LAST RESORT.

In *Commonwealth v. Banks*, 29 A.3d 1139 (Pa. 2011), the Supreme Court of Pennsylvania articulated a standard for assessing execution competency that stands in stark contrast to the one the Fifth Circuit approved. In the wake of this Court’s decision in *Panetti*, the Supreme Court of Pennsylvania developed a more

⁶ The lower courts also found it highly persuasive that Mr. Panetti attributed his conviction to the trial judge’s political corruption rather than Satan’s minions. *Panetti*, 2008 WL 233 8498, at *28; *Panetti*, 727 F.3d at 412. However, the District Court and the Fifth Circuit overlooked Mr. Panetti’s remark on the audiotapes that the trial judge was a “Devil worshipper” because he refused to order witnesses to place their hand on the Bible when being sworn in. Tape 56B (12 Supp. ROA) at 13-14.

nanced test that takes into account the clinical realities and diagnostic features of psychotic disorders. This Court should grant certiorari and resolve this conflict. *See* S.Ct. Rule 10(a).

In *Banks*, the experts agreed that Banks suffered from a psychotic disorder with symptoms that included auditory hallucinations and delusions. 29 A.3d at 1136. Banks believed that his incarceration was the result of a government conspiracy and that God, Jesus, the Governor, or the President had vacated his death sentences. *Id.* The experts also agreed that “Banks was capable of some ‘rational’ thought.” *Id.* As one expert explained:

[H]e is capable of a factual recitation of his circumstances. And to the extent that that’s rational, yes, he is capable of that . . . you wouldn’t expect his psychotic condition to interrupt or interfere with his ability to present to you information factually and reasonably about his circumstances because that’s part of being cognitively intact, and that’s a feature of psychotic illness. . . . He is able to give you rational, factual information about his circumstances consistent with the cognitive intactness that you would expect to see in an individual with a psychotic disorder like Mr. Banks.

Id. at 1136-37.

The primary disagreement among the experts centered on whether Banks’s delusional belief system affected his rational understanding of the death penalty and its implications. *Id.* at 1137. At times, Banks would say that he was facing the death penalty for his convictions, but then say that the sentences had been vacated. *Id.* He did not understand that the two statements were contradictory. *Id.*; *see id.* (expert explaining that “both things are just as real to him, and . . . they’re not in conflict with each other”).

One of the defense experts testified that Banks is aware of the death penalty but holds “a number of differing reasons as to why he is subject to the punishment, including ‘racism, his understanding of the Bible, his special relationship with God, and the goal being to in some way circumvent or in some way sabotage his religious beliefs and insight.’” *Id.* Another expert testified that Banks believed “his religious enlightenment made him a target and ‘there has been an increasing effort to stop him from doing the work that he is doing that’s been directed to [sic] by God.’” *Id.*

One of the defense experts testified about the “interplay” between psychosis and cognitive awareness, explaining that, because psychotic disorders do not impair cognitive function, an individual can simultaneously have an active psychosis and an intact cognitive awareness. *Id.* at 1138. In Banks’s case, the defense expert noted that the psychosis deprived Banks of a rational understanding because the psychosis had become interwoven with his appreciation of his factual circumstances. *Id.* 1138-39. The Supreme Court of Pennsylvania summarized the defense experts’ testimony:

[T]he defense experts generally shared an opinion that any link Banks made between his conviction and the death penalty was not rational, *i.e.*, his hallucinations and delusional thought process (of his exoneration and sentences being vacated) were so intertwined with his rational thought process that he was unaware of the reasons for the penalty.

Id. at 1137.

On the other hand, the State’s experts believed that Banks was competent to be executed. *Id.* at 1138. One of them concluded that Banks’s “racist” theory for his conviction was a “rational excuse” for the crime that did not rest on a delusion and

indicated a sense of wrongdoing. *Id.* The expert explained that, although there were two competing thoughts in Banks’s mind – “the rational thought that he was going to be put to death and the delusional thought that the sentences were vacated” – he showed an understanding that he is in an ongoing process involving the death penalty. *Id.* As the State’s expert put it, Banks’s delusions did not occupy “so much of the stage” that they prevented him from having a rational understanding of the reasons for his death sentence. *Id.* A second State’s expert noted that Banks’s delusional belief that his sentences had been vacated and his religious expressions that God had forgiven him were ways in which he dealt with his predicament while simultaneously having rational thoughts that the State had the right to execute him for his crimes. *Id.*

Relying on *Panetti* in upholding the trial court’s finding that Banks was incompetent to be executed, the Supreme Court of Pennsylvania explained that the State’s experts “failed to take into account whether the delusions interfered with Banks’s rational understanding of the death penalty and the reasons for it.” *Id.* at 1145. The court held that “[d]elusions or other psychotic symptoms cannot simply be discounted because the petitioner has a cognitive awareness of his circumstances.” *Id.* at 1144. The court found that, although Banks had a cognitive awareness (which the State’s experts termed a “rational understanding”) of the death penalty and the reasons for it, this understanding was “so intertwined with

his delusional belief that the link between his crime and his punishment was irrational or illogical.” *Id.* at 1145.⁷

This Court should grant certiorari and resolve the conflict between the Fifth Circuit and the Supreme Court of Pennsylvania.

III. THIS COURT SHOULD RESOLVE THE DIFFICULT AND COMPLEX QUESTION IT LEFT UNANSWERED IN *PANETTI* AND ANNOUNCE A PRECISE STANDARD FOR ASSESSING AN INMATE’S COMPETENCY FOR EXECUTION.

Echoing its approach in *Ford*, this Court in *Panetti* notably refused to “set down a rule governing all competency determinations.” 551 U.S. at 960-61. This Court noted its reluctance to decide “a question of this complexity” before allowing the District Court and the Fifth Circuit to develop the record more fully. *Id.* at 961. That record has now been developed, and this Court can provide guidance by announcing a clear standard.

Numerous legal scholars have observed that the lack of a definitive standard in *Panetti* gives the lower courts nearly unfettered discretion in determining which inmates will be executed, leading to the kind of arbitrariness and unpredictability that is inconsistent with this Court’s Eighth Amendment death penalty

⁷ Like *Banks*, *Billiot v. Epps*, 671 F.Supp.2d 840 (S.D. Miss. 2009), also developed a more flexible, less-absolutist approach to the execution competency determination than the Fifth Circuit. In *Banks*, the Mississippi district court resisted the temptation to find that one rational remark by Billiot overrode his entrenched delusional belief that he would be sent to a mental institution, rehabilitated, and set free as long as he took his antipsychotic medication. *Id.* at 881-83.

jurisprudence.⁸ In addition to enhancing the reliability and predictability of lower courts' competency determinations, a precise standard will make federal habeas review of *Ford* claims under the Anti-terrorism and Effective Death Penalty Act (AEDPA) more meaningful. The lack of clearly established federal law as determined by this Court has resulted in highly deferential federal review of state-

⁸ See Jacob M. Appel, *Capital Punishment, Psychiatrists and the Potential "Bottleneck" of Competence*, 24 J.L. & Health 45, 69 (2010) (arguing that *Panetti* has left the lower courts with even less guidance on what constitutes competence for execution); Paul S. Appelbaum, *Death Row Delusions: When is a Prisoner Competent to be Executed?*, Law & Psychiatry 1258-60 (Oct. 2007) ("[T]here seems little question that in the future the issue of when a prisoner is incompetent to be executed will again make its way to the Supreme Court for a definitive ruling."); Danielle N. Devens, *Competency for Execution in the Wake of Panetti: Shifting the Burden to the Government*, 82 Temp. L. Rev. 1335, 1363-65 (2010) (criticizing District Court's approach after this Court's remand in *Panetti*); Jonathan Greenberg, *For Every Action There Is A Reaction: The Procedural Pushback Against Panetti v. Quarterman*, 49 Am. Crim. L. Rev. 227, 248 (2012) (arguing that the "amorphous nature of 'rational understanding' ultimately gives lower courts tremendous discretion in death row competency proceedings"); Chris Koepke, *Panetti v. Quarterman: Exploring the Unsettled and Unsettling*, 45 Hous. L. Rev. 1383, 1395 (2008) (noting that *Panetti* "creates substantial difficulty for the lower courts, both because of its vagueness as well as the difficult and contentious concepts involved"); Lauren E. Perry, *Hiding Behind Precedent: Why Panetti v. Quarterman Will Create Confusion for Incompetent Death Row Inmates*, 86 N.C. L. Rev. 1068, 1069, 1079 (2008) (urging the Court to establish a bright-line rule for determining execution competency to avoid disparate application); Robert A. Stark, *There May or May Not Be Blood: Why the Eighth Amendment Prohibition Against Executing the Insane Requires a Definitive Standard*, 41 Creighton L. Rev. 763, 786-89 (2008) (arguing that the vague rule in *Panetti* will lead to the arbitrary infliction of the death penalty and "is a ticket back to the Supreme Court either for *Panetti* himself or some other prisoner who may or may not be competent to be executed"); Carol S. Steiker, *Panetti v. Quarterman: Is There A "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 Ohio St. J. Crim. L. 285, 300 (2007) (noting *Panetti*'s reluctance to "go very far with a substantive analysis" and, instead, choosing a remand that allowed it to avoid a definitive ruling); see also *Panetti*, 551 U.S. at 978 (Thomas, J., dissenting) ("Because the Court quibbles over the precise meaning of *Ford*'s opinions with respect to an issue that was not presented in that case, what emerges is a half-baked holding that leaves the details of the insanity standard for the District Court to work out.").

court *Ford* determinations under 28 U.S.C. § 2254(d)(1). See *Ferguson v. Secretary, Florida Dept. of Corrections*, 716 F.3d 1315, 1337 (11th Cir. 2013) (“The AEDPA principles of deference have special force here given the Supreme Court’s recognition in *Panetti* that the Court itself did not know exactly what a ‘rational’ understanding requires.”); *Green v. Thaler*, 699 F.3d 404, 407-08 (5th Cir. 2012) (finding “no basis for the state court’s decision that Petitioner was competent to be executed was contrary to, or involved an unreasonable application of, federal law”).

Mr. Panetti’s case is an ideal vehicle for developing a clear standard. The facts surrounding Mr. Panetti’s severe mental illness and symptoms are compelling and largely undisputed. Moreover, unlike *Ferguson* or *Green*, Mr. Panetti’s case is unencumbered by AEDPA’s trappings. See *Panetti*, 551 U.S. at 948-54. This Court will have an unobstructed view of the merits. The Court should grant *certiorari* to announce a standard for assessing execution competency that takes into account the clinical realities and diagnostic features of psychotic disorders.

IV. THIS COURT SHOULD CORRECT THE INJUSTICE OF MR. PANETTI’S CASE.

This is the enduring image of Mr. Panetti’s case: A paranoid schizophrenic wearing a TV-Western cowboy costume; on trial for his life; insisting on defending himself without counsel; attempting to subpoena the Pope, John F. Kennedy, and Jesus Christ; and raising an insanity defense. Any objective reader of the court reporter’s record must reach the painfully obvious conclusion that Mr. Panetti’s *pro se* performance was an abomination, his trial a disaster of the criminal justice system.

This Court itself clearly had Mr. Panetti in mind when it decided *Indiana v. Edwards*, 554 U.S. 164 (2008). *Edwards* held that states do not violate *Faretta v. California*, 422 U.S. 806 (1975), if they force counsel on severely mentally ill defendants who are competent to stand trial but who may not be competent to defend themselves. Quoting one of the physicians who treated Mr. Panetti years before the offense, this Court explained:

[P]roceedings must not only be fair, they must appear fair to all who observe them. An *amicus* brief reports one psychiatrist’s reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: “[H]ow in the world can our legal system allow an insane man to defend himself?”

Id. at 177 (citation and internal quotation marks omitted).⁹ That same *amicus* brief pointed to Mr. Panetti’s case as an example of “national media attention [that] focuses on the most egregious cases of the mentally impaired representing themselves, shattering the public’s confidence in its own justice system.” Brief for State of Ohio *et al.* as *Amici Curiae* 24. Besides this Court, numerous legal commentators have also noted the debacle of Mr. Panetti’s capital murder trial.¹⁰

⁹ Although the *amicus* brief cited by the Court does not mention Mr. Panetti by name, the brief does refer to a newspaper article as the source. Brief for State of Ohio *et al.* as *Amici Curiae* 24 (citing Howard Witt, *Inmate Granted Stay*, Chi. Trib., Feb. 5, 2004, at 16). It is that newspaper article that describes Mr. Panetti’s efforts to defend himself, and his doctor’s reaction. *See also* 3 Supp. ROA 840-41 (Affidavit of F.E. Seale, M.D.).

¹⁰ *See, e.g.*, Bonnie, *Mental Illness, supra*, at 262 (“Courts trivialize mental illness, disserve the important principle of autonomy protected by *Faretta*, and compromise the dignity of the law when they allow defendants such as Panetti to represent themselves in criminal trials.”); Ashley G. Hawkinson, *The Right of Self-Representation Revisited: A Return to the Star Chamber’s Disrespect for Defendant Autonomy?*, 48 Washburn L.J. 465, 466-67 (2009) (listing Mr. Panetti’s case as one of the most notorious, which calls into question “the scope of the right of self-

But for the adventitious historical circumstance that his trial post-dated *Faretta* and *Godinez* and pre-dated *Edwards*, a floridly psychotic individual like Mr. Panetti would never have been permitted to represent himself. But *Edwards* provides no respite: The Fifth Circuit held that *Teague v. Lane*, 489 U.S. 288 (1989), bars the retroactive application of *Edwards* to his claim for collateral relief. *Panetti*, 727 F.3d at 414-15; see *Panetti*, 2012 WL 290115, at *9 (same).

The failure of the justice system neither began nor ended with Mr. Panetti's trial. A fissure of incompetency runs through every proceeding in the case, from arraignment to the imminent execution. This Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). Unfortunately, Mr. Panetti cannot look to clemency as a realistic option in Texas. This Court is his last resort.

The execution of Scott Louis Panetti would be a "miserable spectacle." *Ford*, 477 U.S. at 407 (citation omitted). He would go to the execution chamber convinced that he is being put to death for preaching the Gospels, not for the murder of his wife's parents. The Court should grant certiorari to prevent this injustice.

representation"); Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 Ohio St. J. Crim. L. 391, 392 & n.8 (2009) (citing Mr. Panetti's case in support of the statement that *Godinez v. Moran*, 509 U.S. 389 (1993), "had sometimes permitted clearly disturbed individuals to make a mockery of the trial process and their own case.").

CONCLUSION

The Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully Submitted,

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January 27, 2014

No. _____

In The
Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

WILLIAM STEPHENS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

CERTIFICATE OF SERVICE

I, Gregory W. Wiercioch, certify that a true and correct copy of Petitioner's Petition for Writ of Certiorari was served on counsel for Respondent on this 27th day of January 2014, via First Class United States Mail, addressed to:

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