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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

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

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

6 Martinez-Villareal recognized that a
7 numerically second petition is not successive, it's not
8 a mere mathematical computation, it's a term of art.
9 And if you bring the claim the first time it's
10 justiciable, it's not second or successive. Texas law
11 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 his incarceration, his condition worsened?

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

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

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

21 Couldn't you have fit your claim under
22 2244(b)(2)(B), I guess, on that basis? And then we
23 don't have to engage in the fiction that a second
24 petition is actually not a second petition.

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

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

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

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

1 justiciability, I think, is --

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

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

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

11 MR. WIERCIOCH: Correct.

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

14 MR. WIERCIOCH: Right.

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

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

20 JUSTICE SOUTER: -- the textual argument?

21 MR. WIERCIOCH: Yes, it is.

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

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

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

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

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

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

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

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

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

12 JUSTICE KENNEDY: Because?

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

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

22 MR. WIERCIOCH: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. WIERCIOCH: That's correct.

21 JUSTICE SCALIA: Am I right?

22 MR. WIERCIOCH: Yes.

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

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

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

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

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

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

1 process that requires it.

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

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

16 And I should add --

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

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

21 JUSTICE SCALIA: Well.

22 MR. WIERCIOCH: -- who --

23 JUSTICE SCALIA: Who was --

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

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

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

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

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

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

1 MR. WIERCIOCH: Your Honor --

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

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

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

21 So the basis for this standard --

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

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

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

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

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

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

1 the difference also is --

2 JUSTICE SCALIA: We didn't have
3 incarceration.

4 MR. WIERCIOCH: Excuse me?

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

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

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

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

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

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

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

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

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

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

25 MR. WIERCIOCH: I would say that person does

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 If there are no more questions --

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. WIERCIOCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Cruz?

24 ORAL ARGUMENT OF R. TED CRUZ

25 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: Then what do you say to the

1 indication from those two exceptions that Congress
2 simply wasn't advertent to this problem?

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

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

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

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

1 Congress couldn't have intended that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. CRUZ: The Court court do see.

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

24 MR. CRUZ: The Court could do so --

25 JUSTICE BREYER: Would you object if we do

1 that?

2 MR. CRUZ: Yes, we would.

3 JUSTICE BREYER: Because?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 What about that one?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE KENNEDY: And it had discretion to
21 do that?

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

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

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

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

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

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

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

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

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

15 This particular --

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

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

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

3 JUSTICE SOUTER: Sure.

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

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

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

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

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

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

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

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

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

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

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

1 appendix.

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

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

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

25 That test, we submit, is entirely consistent

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

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

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

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

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

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

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

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

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

25 If there are no further questions?

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.
2 Mr. Wiercioch, your rebuttal time was used
3 up but not primarily by you. If you want to take two
4 minutes for rebuttal?

5 REBUTTAL ARGUMENT OF GREGORY W. WIERCIOCH
6 ON BEHALF OF PETITIONER

7 MR. WIERCIOCH: Thank you, Your Honor.
8 Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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