No. 06-6407

In The
Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the State is executing him, and thus does not understand that his execution is intended to seek retribution for his capital crime?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court, with the exception that during part of the prior proceedings, other individuals (Wayne Scott, Gary Johnson, Janie Cockrell, Douglas Dretke) served as the named Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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The opinion of the United States Court of Appeals for the Fifth Circuit, *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006), affirming the District Court's decision, appears at JA 374-84. The District Court's opinion, *Panetti v. Dretke*, 401 F. Supp. 2d 702 (W.D. Tex. 2004), appears at JA 354-73.

JURISDICTION

The Fifth Circuit entered its judgment on May 9, 2006, JA 374, and denied rehearing en banc on June 8, 2006. JA 385. Petitioner filed his petition for writ of certiorari on September 6, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Eighth and Fourteenth Amendments, 28 U.S.C. § 2254(d), and Article 46.05 of the Texas Code of Criminal Procedure. The relevant portion of the Eighth Amendment states: "nor [shall] cruel and unusual punishments [be] inflicted." The relevant portion of the Fourteenth Amendment provides: "nor shall any state deprive any person of life . . . without due process of law." The relevant portion of 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The text of Article 46.05 is set out in Appendix A.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner Scott Louis Panetti was convicted of capital murder for killing his parents-in-law and sentenced to death in 1995 in Texas. On October 31, 2003, after the conclusion of the direct appeal and collateral review proceedings, the trial court set Mr. Panetti's execution for February 5, 2004. On December 10, 2003, counsel for Mr. Panetti filed in state court a motion under Article 46.05, alleging that Mr. Panetti was not competent to be executed. The trial court denied the motion without a hearing, finding that Mr. Panetti had failed to make a substantial threshold showing of incompetence.

On January 26, 2004, counsel for Mr. Panetti filed in federal district court a motion for stay of execution and a petition for writ of habeas corpus raising a competency-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). After some preliminary proceedings, the District Court stayed Mr. Panetti's execution so that the state court would have time to adjudicate a renewed Article 46.05 motion. JA 113-16. The state court ordered the district attorney and habeas counsel to provide it with the names of mental health experts that it should consider appointing under Article 46.05(f). *See* App. A. Counsel for Mr. Panetti provided the court with the name of a mental health expert and filed ten motions related to the Article

46.05 proceedings.[1] Relying on Article 46.05(f), the court appointed two mental health experts – neither of whom had been recommended by habeas counsel – to examine Mr. Panetti. *See* JA 59-60.

The state court judge denied Mr. Panetti's motion to videotape the competency examinations and his motion for discovery. The judge said that he would revisit the remainder of the motions only if both court-appointed experts concluded that Mr. Panetti was competent to be executed. Counsel for Mr. Panetti filed a motion to reconsider, pointing out that the state court's inaction until after the experts had conducted their examinations would moot a number of the motions. JA 61-69. The court never ruled on the motion to reconsider.

On April 28, 2004, the court-appointed experts filed a joint report concluding that Mr. Panetti was competent to be executed. JA 70-76. Despite the judge's earlier decision to revisit the remainder of Mr. Panetti's motions if the experts concluded he was competent, the judge did not rule on any of the motions. Instead, he ordered the parties to raise any other matters regarding competency by May 21, 2004. JA 77-78. Counsel for Mr. Panetti filed objections

[1] Among the motions counsel filed were requests for appointment and compensation of counsel, funds to hire a mental health expert and investigator, discovery, videotaping of the mental health examinations, ensuring procedural due process in the competency determination, and transcription of all proceedings. In the motion for funds to retain an expert, counsel reviewed the procedural due process discussions in *Ford* and concluded that the decision demands "that a death row inmate who has made a substantial threshold showing of incompetence be provided with the means to retain the services of a consulting mental health expert to assist him in the competency determination." JA 57. Mr. Panetti's counsel made a similar argument in his motion to ensure procedural due process in the competency determination: that, at a minimum, *Ford* guarantees the prisoner's "right to present expert opinion differing from those offered by State or court-appointed experts." JA 53.

to the methods used and the conclusions reached by the court-appointed experts. JA 79-95. Counsel renewed his motions for appointment of counsel, funds to hire a mental health expert, and funds to hire an investigator. JA 95-97. He also asked the court to hold an evidentiary hearing, as indicated by the plain language of Article 46.05(k). JA 98; *see* App. A. On May 26, 2004, the state court held that Mr. Panetti "has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." JA 99.[2]

In federal habeas, the District Court ordered an evidentiary hearing and granted Mr. Panetti's motion for funds for expert assistance. JA 117-35.[3] After a two-day

[2] Counsel for Mr. Panetti could not appeal this ruling, because the Court of Criminal Appeals had previously held that it has jurisdiction only to review a finding of incompetence. *Ex parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).

[3] The State argued below that the District Court erred in failing to give the state court's decision the deference demanded by AEDPA. The Fifth Circuit did not address this contention. JA 376 & n.1. The argument lacks merit, because the state court's adjudication of Mr. Panetti's claim was "an unreasonable application of . . . clearly established federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). The state court disregarded Justice Powell's concurrence in *Ford*, which sets out the Court's holding on the minimum procedural due process requirements in determining competency for execution. Although Justice Powell did not undertake to define the precise contours of due process in such proceedings, he did require the states to provide a forum to "receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." 477 U.S. at 427. Despite the state court's finding that Mr. Panetti had made a substantial showing of incompetency, and despite Mr. Panetti's repeated requests for adversarial proceedings by which he could contest the court-appointed experts' opinions, the state court refused to allow any such proceedings. *See* JA 49-53; JA 54-58; JA 65-68; JA 95-98. As a result, the state court decided the competency claim without ever "receiv[ing] . . . from the prisoner's counsel . . . expert psychiatric

(Continued on following page)

hearing, the District Court denied relief on the *Ford* claim, JA 354-73, but later granted a certificate of appealability on the issue. The Fifth Circuit succinctly stated the issue presented on appeal:

> Panetti argues that the district court employed an erroneous legal standard in evaluating whether he was competent to be executed. The district court held that it is sufficient that Panetti knows: 1) that he committed two murders; 2) that he will be executed; and 3) that the reason the state has given for that execution is his commission of those murders. Panetti argues that the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the State's reason for the execution. Panetti contends that this understanding is lacking in his case because he believes that, although the State's purported reason for the execution is his past crimes, the State's real motivation is to punish him for preaching the Gospel.

JA 377. The panel rejected these arguments as a matter of law under the controlling precedent of *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994). "Barnard, like Panetti, suffered from paranoid delusions that his execution was the result of a conspiracy against him and not his crimes," JA 379, but the panel held this delusional belief irrelevant to the question of competency to be executed. JA 380. The panel found *Barnard* "nearly identical" to Mr. Panetti's case, JA 379, and "consistent with Justice Powell's concurrence in *Ford*." JA 381. Because "Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only

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evidence that . . . differ[ed] from the State's own psychiatric examination." 477 U.S. at 427 (Powell, J., concurring).

that he must be 'aware' of it," JA 381, the panel concluded that the District Court's findings were sufficient to establish that Mr. Panetti is competent to be executed. JA 384; *see* JA 384 (holding that "'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding'"). The Fifth Circuit denied rehearing en banc. JA 385-86. This Court granted certiorari on January 5, 2007. JA 387.

B. Facts Material to the Issue Presented

Justice Powell stated in *Ford* that a condemned inmate "does not make a claim of insanity against a neutral background," because "in order to have been convicted and sentenced, [the inmate] must have been adjudged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court." 477 U.S. at 425-26 (Powell, J., concurring). Certainly, the legal presumption of competency at the time of execution applies in Mr. Panetti's case. Factually, however, it rests upon a frail foundation. Evidence of incompetency runs like a fissure through every proceeding in this case.

1. Mental Health History[4]

Unlike Alvin Ford, Mr. Panetti suffered from a severe mental illness long before he ever arrived on Texas's death

[4] Mental health professionals note that reviewing an inmate's psychological and psychiatric history is an essential component of making a reliable determination of the inmate's present competency for execution. *See*, *e.g.*, Patricia A. Zapf *et al.*, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci. & L. 103, 106 (2003); Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 Law & Psychol. Rev. 29, 47-48 (2001).

row. *Cf. Ford*, 477 U.S. at 401-02. In the decade leading up to the offense, Mr. Panetti was hospitalized over a dozen times in numerous institutions for schizophrenia, schizoaffective disorder, bipolar disorder, depression, psychosis, auditory hallucinations, and delusions of persecution and grandiosity. *See* n.14, *infra* (summarizing hospitalizations). Several weeks before the crime, Mr. Panetti and his second wife Sonja had separated. 31 RR 60.[5] 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; Federal Petition for Writ of Habeas Corpus, No. 1:99-CV-00260 (W.D. Tex. Sept. 7, 1999) (hereinafter "Federal Petition") (Ex. 14: summary of medical records). 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. He shot them at close range with the rifle in front of his wife and daughter. 37 RR 1544-46. He 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.

Based on Mr. Panetti's long history of mental health problems, the judge ordered a psychiatrist to determine his competency to stand trial. Dr. E. Lee Simes

[5] Citations to the transcript of testimony from Mr. Panetti's capital murder trial and both competency-to-stand-trial proceedings are noted as "RR" ("Reporter's Record"). Citations to the pleadings, orders, and motions filed in the trial court during these proceedings are noted as "CR" ("Clerk's Record"). Citations to the *Ford* hearing held in federal district court are noted as "FH."

reported that Mr. Panetti did not know what year it was or who the President was; had some looseness and tangentiality in his thought processes; admitted to both auditory and visual hallucinations, including seeing Jesus in his jail cell; related chronic delusions marked by religiosity; appeared to have "an odd fragmentation of his personality in describing himself as several different people;" and suffered from "obvious mental difficulties." JA 9-14 (Defense Ex. 44, 37 RR 1429, 1430). Nonetheless, Dr. Simes concluded that Mr. Panetti was competent to stand trial. JA 13.

A competency trial was held on July 28-29, 1994. After the jury deliberated for nearly twelve hours, the judge declared a mistrial. 10 RR 371, 379.[6] After the trial court ordered a change of venue, a new jury heard nearly identical evidence about Mr. Panetti's competency to stand trial. At the second competency trial, Mr. Panetti's defense counsel testified that Mr. Panetti would become delusional and unresponsive to his questions under stress. 13 RR 27. During conversations, Mr. Panetti often said that he felt possessed by demons and had been visited by angels and Jesus in his jail cell. 13 RR 29-31. Defense counsel testified that he had never had a meaningful and rational conversation with Mr. Panetti about the legal issues in the case. 13 RR 34-36, 46.

Dr. Richard Coons, a forensic psychiatrist, found that Mr. Panetti suffers from schizophrenia. 13 RR 60. Dr. Coons testified that Mr. Panetti decompensates when under stress, causing his thinking to become tangential, circumstantial, and inefficient. 13 RR 61-64. As an example, during one of their meetings Mr. Panetti:

[6] Notes in the record indicate that the jury deadlocked 9-to-3 in favor of finding Mr. Panetti incompetent to stand trial. 3 CR 290.

> began to talk about scripture and then he began, with no prompting from me, no interjection from me whatsoever, he went from scripture to being in jail in Bell County to the way prisoners look, to the Waco Veterans Administration Hospital. He described patients. He talked about lightning, talked about having been drowned a couple of times, the Lord wants me to help a person, talked about the meaning of life, suicidal thoughts, his mother's prayers, so much to be thankful for, problem marriages, women he's dated, rodeo, drinking, tequila in old Mexico, the YO Ranch, his battle with the bottle, a mescal dream of a bottle with worms in it, dope dealer sitting in the courtroom, Luke, Chapter 13 Verse 33, new saddle, boots, boot maker is dead, hobbles for a horse, an old piece of cotton rope and riding with a lead shank.

13 RR 63-64.[7] According to Dr. Coons, Mr. Panetti had other distractions besides his inefficient thinking: He hears voices that may have "particular religious significance" and others that are "more precise and commanding." 13 RR 65. Although Mr. Panetti was then taking antipsychotic medication that diminished some of the symptoms of his schizophrenia, 13 RR 69-70, Dr. Coons said that Mr. Panetti still suffered from the disorganized thought processes that characterize schizophrenia. 13 RR 75, 77. He said that Mr. Panetti's mind "saddles up and rides off in all directions." 13 RR 85. Mr. Panetti was not

[7] Shortly after arriving on death row, a medical services worker described a visit with Mr. Panetti: "He assertively opened the interview [with] a rambling, tangential, circumstantial diatribe (e.g. – 'I read Dr. Orr's belt buckle – hard to see at a distance – thought it said "Stand Tall, Walk in Peace" – like a code I saw on my milk carton – saw 3 ravens and a very contented bunny rabbit' – have a Woman Warrior in Washington,' etc., etc." JA II 36 (Respondent's Ex. 3, 1 FH 46, 91) (punctuation in original).

malingering, Dr. Coons testified, because his symptoms were consistent with the psychiatric records beginning in the 1980's. 13 RR 82.

Dr. Simes testified that Mr. Panetti is clearly mentally ill, that his thought processes are tangential, and that he most likely suffers from schizophrenia. 13 RR 144-45, 158. Although he concluded that Mr. Panetti was competent to stand trial, 13 RR 146, Dr. Simes admitted that he recalled Mr. Panetti's delusional, irrational thinking about "gold dust coming down and spiritually filling him," "the demons Dagon and Beelzebub," and "the tinglies." 13 RR 153-54. He also recalled Mr. Panetti's discussion about the four personalities inside him and his belief that the purpose of the competency trial was to provide him with the proper medication. 13 RR 154-56. Because stress exacerbates the symptoms of schizophrenia, Dr. Simes testified that, as the capital murder trial progressed and the stress increased, Mr. Panetti could decompensate and his delusions could render him incapable of assisting his attorneys. 13 RR 163, 172, 174.

The jury found Mr. Panetti competent to stand trial. 13 RR 206-07.

Seven months later, Mr. Panetti experienced his "April Fool's Day revelation" that God had cured his schizophrenia. 15 RR 9.[8] He refused to take any more antipsychotic

[8] Mr. Panetti described this religious experience in his opening statement to the jury at the guilt-innocence phase of his capital murder trial:

> In my year in the Waco Branch Davidian expert's cell in Bell County, I didn't hear from my previous law firm, and I got paranoid that I wasn't being told or lost a chance to appeal the decision of the illegal evidence that was found illegal and then found legal, and I came to the conclusion after my medicine was taken from me and I went into the paranoia and the thought disorder that it depended on me, the April fool, as I consider myself the born again April fool, not saying being

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medication. He asked the trial court that he be allowed to represent himself. 15 RR 14-16, 26. His attorneys objected, 15 RR 12-13, as did the District Attorney. 15 RR 23-24. The trial court ruled that Mr. Panetti could represent himself. 15 RR 29-30.

Wearing a cowboy outfit,[9] Mr. Panetti raised a defense of not guilty by reason of insanity. He told the jury in his opening statement that only an insane person could prove insanity. 31 RR 29. 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.

Mr. Panetti applied for over 200 subpoenas, including 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

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born again bars someone from being able to sin, but I depended on the Lord to do for me what the medicine wasn't doing.

31 RR 31-32; *see* JA 339, 345 (Petitioner's Ex. 2, 1 FH 159, 159).

[9] His 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 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.

JA 23-24.

Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that."). He made unintelligible comments to the panel of prospective jurors during general voir dire:

> The death penalty doesn't scare me, sure but not much. Be killed, power line, when I was a kid. I've got my Injun beliefs as a shaman. I sent the buffalo horn to my sister. Adjustment, Jesus wrote. I was born in the North woods in a reservation hospital and my granddad was a justice of the peace and he sobered up the doctor and the doctor was half sobered and they delivered me and my mom had a bad sickness in her milk and they wondered why I wasn't dead, and a lot of beatings I took from the kids that show me had prejudice, which I don't have any prejudice, and they said this about me in the newspapers in the beginning, but I don't love Injuns and Mexicano, and Mexicano know, but I suffered a lot of reverse prejudice from Colored people, which is rare, darn rare, but I was named "He who doesn't cry" because I didn't cry when I should have, and I must admit, though, in Gillespie County Jail when I was in my little suicide box where there was an old boy committed suicide, I went through about a week of pretty much scuba diver's tears; although, I don't scuba.

21 RR 87-88. He became fixated on irrelevant issues when examining witnesses:

> The Court: Mr. Panetti, at this time I don't see how the belt buckle is relevant to any issue this jury is going to determine and so if you can't explain the relevance to me, I'm going to sustain the objection. Can you explain to me how the belt buckle is relevant to any issue in this case?

Mr. Panetti: Yes, I can, Your Honor. It has to do with jailhouse religion. It has to do what some men would do for a belt buckle. It has to do with the difference between a rodeo hand and a buckaroo poet. It has to do with my whole outlook and this will come up, God forbid, in the punishment stage.

Before religion, when you got religion, prior religion, church member, I'm going to have witnesses from the church come in and Chaplain Bob got on his knees and read that buckle, Ranger Cummings, read this buckle and people go out of their way. At rodeos cowboys make sure they look at your buckle without you looking at it.

33 RR 755-56. He prefaced incoherent questions with rambling statements:

Mr. Panetti: Canteen where – I was expecting the whole list to question, Donna Stanley, educated, expert.

The Court: You need to ask a question, Mr. Panetti.

Mr. Panetti: I hope you don't find any more – well, Dr. Bayardo, he didn't find any offense when I mentioned "Quincy." We didn't say whether we liked the show, but we mentioned about the beginning where the cops got sick, and I asked him that naturally for a reason, but I didn't ask him if it made the job popular or anything, but when it

> comes to dealing with blood, his autopsy, and the crime scene, your expert evidence, autopsy, crime scene. I'm thinking out loud, so I don't ask you questions that you're – well, it would be like asking a rodeo hand what cutting a horse means. They might know it all, but I just – have you got those pictures of the glow-in-the-dark?

32 RR 443. He assumed the personality of "Sarge" when he testified about the crime:

> Joe, Joe, Amanda, no talking, no words, knife, Sarge knife, threatened, scared, fight, no. Sarge shoots, CC. Sarge turns, shoots, boom, boom. Where is Amanda? Mom is dead. Joe look up. No. Where's Birdie? Sonja bedroom. Birdie. Joe. Where's Amanda? Sarge, Sarge, left a bullet. Scott, what? Scott, what did you see Sarge do?
>
> Fall. Sonja, Joe, Amanda, kitchen. Joe bayonet, not attacking. Sarge not afraid, not threatened. Sarge not angry, not mad. Sarge, boom, boom. Sarge, boom, boom, boom, boom. Sarge, boom, boom.
>
> Sarge is gone. No more Sarge. Sonja and Birdie. Birdie and Sonja. Joe, Amanda lying kitchen, here, there, blood. No, leave. Scott, remember exactly what Sarge did. Shot the lock. Walked in the kitchen. Sonja, where's Birdie? Sonja here. Joe, bayonet, door, Amanda. Boom, boom, blood, blood.
>
> Demons. Ha, ha, ha, ha, oh, Lord, oh, you.
>
> The Court: Mr. Panetti, let's stop.

37 RR 1544-46. He delivered an incoherent guilt-innocence phase closing argument:

> Ladies and gentlemen of the jury, I think that State will have more than a few comments, judging by the time allowed to respond to mine.

> Briefly, in 45 minutes you might wonder a little bit about when I testified, and Scott and Sarge and who talked and who talked about who and who talked about what and in light of Dr. Simes not being here, he did leave this letter and it will explain that and it has something to do about me showing you the tattoo and introduce you to Will, and I don't tell you Texas Will and Chaplain or Montana Will and go into that, and the evidence will, if you read that, look over that, might explain that. I wish you not to mistake charisma for sanity. Charisma is by definition a spiritual gift.
>
> Briefly touching on just a few of the – demon dabbling is my understanding just a nonphysical being hostile to humans and God, caused by bad influences and disease, mental distress on human beings.

38 RR 1645-46.

On September 21, 1995, the jury found Mr. Panetti guilty of capital murder. The next day, the punishment phase began. The prosecution called two witnesses, including Dr. James Grigson, who testified that antipsychotic medications would not reduce the likelihood that Mr. Panetti would be a future danger to society. 39 RR 54, 60. Mr. Panetti called only one witness, his standby counsel. He was sentenced to death the same day. 7 CR 1033-38.[10]

[10] Less than two months after Mr. Panetti was sentenced to death, the trial court found him incompetent to waive the appointment of state habeas counsel under Article 11.071 of the Texas Code of Criminal Procedure. 43 RR 6-9. Soon thereafter, Mr. Panetti wrote to the trial court that he wished to waive his right to direct appeal. Federal Petition at Ex. 32. The judge denied his request and appointed an attorney to represent him on direct appeal.

Dr. Wolfgang Selck, a psychiatrist who treated Mr. Panetti during one of his hospitalizations years before the crime, watched part of the trial. Dr. Selck described Mr. Panetti's behavior in the courtroom:

> I saw Scott's rambling and antics as a sign of his clear incompetence. I suspect that the members of the Jury as lay persons saw Scott and thought he was normal and pretending to be mentally ill. In my opinion it [is] not possible to imitate the words and deeds of a mentally ill person. To an expert, there are too many details of voice and action that indicate the signs of mental illness: the inappropriate behavior, the repetition of words, the fixation on details, the bizarre presentation. He should be institutionalized in a State Hospital for the criminally insane. In my opinion, Scott is not a malingerer. Scott was not faking a mental illness. Scott was severely mentally ill and has not changed and most likely shall not improve to an appreciable degree. When I was treating Scott in 1986 he was not facing any charges and had no reason to act mentally ill.

JA 34-35.

2. Deterioration

It is undisputed that Mr. Panetti's mental health markedly deteriorates when he is not taking antipsychotic medication. At the time Mr. Panetti was found competent to stand trial, he was on antipsychotic medication to alleviate some of the symptoms of his schizophrenia. 13 RR 69-70. However, after his 1995 April Fool's Day religious experience, he stopped taking his medication. By the time the trial began, he had been in an unmedicated state for five months. Except for a brief period shortly after arriving on death row, Mr. Panetti has not taken any

antipsychotic medication since the day he declared that God had cured him of his schizophrenia. *See* JA 196; JA II 26, 32-33.

The evidence at the competency-to-stand-trial proceedings showed that Mr. Panetti's schizophrenic symptoms (delusions, hallucinations, tangentiality, and circumstantial thinking) markedly diminished when he was taking his medication. 13 RR 67-70; *see* 13 RR 74 (testimony of Dr. Coons stating that medication and hospitalization have had a "positive influence" on Mr. Panetti); 13 RR 80 (testifying that Mr. Panetti "gets better" when he is treated). Mr. Panetti was then being treated with such a heavy dosage of Trilafon that it would render somebody without a severe mental illness dysfunctional. 13 RR 69, 71. Without any medication, Dr. Coons testified, Mr. Panetti would be "very psychotic," "tremendously paranoid," and "more delusional." 13 RR 71. Dr. Simes agreed that Mr. Panetti's condition would worsen if he were not taking any antipsychotic medication. 9 RR 279.[11]

At the federal hearing, the evidence confirmed that Mr. Panetti's mental condition has deteriorated since he was found competent to stand trial. Dr. Conroy attributed the deterioration to the fact that Mr. Panetti has not been on any kind of psychotropic medication since April 1, 1995. JA 195. She testified that "[i]t is likely with Mr. Panetti that his condition would be worse the farther he is from the medication." JA 195. Dr. Silverman testified that Mr.

[11] After reviewing the trial record and examining Mr. Panetti for state habeas counsel, psychiatrist Michael R. Arambula concluded: "As a result of his unmedicated state, Mr. Panetti's disease process deteriorates to such a level that he was subject to persecutory delusions, and severe disturbances in his thinking (and ability to communicate with others)." JA 353.

Panetti was "more lucid, coherent, and logical when he took his medication." JA 228. He suspected that since Mr. Panetti stopped taking his medication, "his illness has progressed more significantly." JA 228. Noting the type and amount of psychotropic medication that Mr. Panetti was taking on a daily basis prior to the 1994 competency proceedings, Dr. Silverman explained that:

> I can't imagine anybody getting that dose waking up for two to three days . . . . And he, actually, before that had to be put on 32 milligrams of Stelazine and then, Trilafon. He got that regularly, and he was still walking and talking. You would have to be extremely psychotic just to tolerate it and then, benefit from it. To me, that's almost diagnostic – that is diagnostic of a psychotic illness.

JA 233.[12] Dr. Silverman concluded that the lack of medication in a case like Mr. Panetti's would most likely lead to "a more severe refractory kind of illness." JA 236.

3. Present Competency

Shortly before Mr. Panetti was scheduled to be executed on February 5, 2004, habeas counsel visited him on death row to gather evidence of his present competence. Counsel reported that Mr. Panetti believed that his imminent execution was part of a satanic conspiracy to prevent him from preaching the Gospel. JA 102. Clutching a well-worn

[12] Dr. F.E. Seale, who treated Mr. Panetti at Starlite Hospital in 1986, testified at trial that he prescribed "huge doses of Thorazine to bring [Mr. Panetti] under control, up to 2400 milligrams a day. We finally settled on about 2,000 milligrams of Thorazine a day, when 100 milligrams would knock the average person out, but it took that to control [Mr. Panetti]." 38 RR 1568-69. Dr. Seale also testified that, without antipsychotic medication for several days, Mr. Panetti could lapse into a severe psychosis. 38 RR 1574-75.

and meticulously tabulated Bible, Mr. Panetti described in rambling and disjointed fashion how the Holy Spirit had freed him from his handcuffs after prison guards had placed him in a room filled with inmates who began beating him. JA 102-03.

Having represented Mr. Panetti for several years, counsel was familiar with his lengthy mental health history, his delusions of persecution, and his excessive religiosity. Nearly two decades earlier – years before the crime – Mr. Panetti first succumbed to the delusion that he was engaged in an apocalyptic struggle with the devil.[13] With this history in mind, counsel arranged for Mark Cunningham, a clinical and forensic psychologist, and David Dow, a law professor who represents condemned inmates in post-conviction proceedings, to visit Mr. Panetti. Dr. Cunningham reported that Mr. Panetti exhibited disorganized thinking, characterized by flight of ideas,

[13] In 1986, Mr. Panetti's first wife provided an affidavit in support of her request to have Mr. Panetti transferred from Kerrville State Hospital and involuntarily committed to the Waco V.A. Hospital:

> 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.

JA 38-39.

tangentiality, and circumstantiality. JA 108-09 (Petitioner's Ex. 7, 2 FH 53, 53). He found that Mr. Panetti was actively psychotic, had delusional beliefs that were both grandiose and paranoid, and was suffering from schizophrenia or schizoaffective disorder. JA 109. Dr. Cunningham said that Mr. Panetti believed that he is the target of evil forces that "included not only Wicken [sic] national headquarters in Wisconsin, but also reached even into 'the administration.'" JA 109. He attributed his impending execution to these demonic forces that wish to stop him from continuing to preach the Gospel. JA 109. Mr. Panetti also described himself as a "born again April fool," miraculously healed by God and, therefore, no longer in need of medication or treatment. JA 109. Dr. Cunningham concluded that Mr. Panetti was not malingering his symptoms, because it is nearly impossible to imitate the disorganized thinking he exhibited and because he has a history of "psychotic decompensation and inpatient psychiatric treatment." JA 110.

Professor Dow stated that Mr. Panetti was unable to answer questions in a linear fashion, bounced wildly from topic to topic, freely associated, and peppered his remarks with random and irrelevant biblical quotations. JA 111 (Petitioner's Ex. 10, 2 FH 73, 74). He described Mr. Panetti's delusion that prison officials and inmates had thrown boiling water on him, but Jesus had cooled the water before it touched his skin. JA 111. Mr. Panetti also said that he had not shed any blood when inmates had shot him with blowgun darts. JA 111. Half a dozen times during Professor Dow's interview, Mr. Panetti had explained that his imminent execution was being orchestrated by evil, "anti-Christian forces" that wanted to "rub him out" to keep him from preaching the Gospels of Jesus Christ. JA 111.

Based on this evidence, the state court appointed two mental health experts. JA 59-60. These experts, Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist, conducted a joint evaluation of Mr. Panetti and co-authored a report. JA 70-76. They described Mr. Panetti as controlling and uncooperative, ignoring their repeated questions and, instead, "filibustering about the Bible and the Lord." JA 70. Mr. Panetti did, however, unambiguously state that he is on death row, because "[t]hey don't want me to preach the Word of God." JA 72. Deciding that further questioning was futile, the experts ended the clinical interview after an hour. JA 73. Dr. Anderson and Dr. Parker believed that "Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation by deflecting the interview into religious topics." JA 75. They concluded that Mr. Panetti knows that he is to be executed, and that, "[a]lthough Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason he is to be executed." JA 75. The state court agreed and found that Mr. Panetti "has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." JA 99-100.

At the federal evidentiary hearing, counsel for Mr. Panetti presented the testimony of four mental health experts. The State presented the testimony of three death row correctional officers and the two mental health experts who had been appointed by the state court.

Mary Alice Conroy, a forensic psychologist, testified that Mr. Panetti has "a severe thought disorder," meaning that "his thinking does not fit together in any kind of logical, rational way." JA 139. She believed he suffers from schizoaffective disorder. JA 144. His symptoms include

pressured speech, flight of ideas, loose associations, and inappropriate affect. JA 146. Dr. Conroy testified that Mr. Panetti knows he is on death row and that the State intends to execute him. JA 147. However, 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.
>
> He says granted he understands that the state is saying that they wish to execute him for this murder, he knows that, but that's really a sham, that that's not why the state wants to execute him. The state wants to execute him to stop him from preaching.

JA 149; *see* JA 150, 155 (explaining delusion that his execution is part of "spiritual warfare"). She testified that Mr. Panetti believes these evil forces first manifested themselves in the mid-1980's, when demons possessed his home, his furniture, and his possessions. JA 149-50; *see* n.13, *supra*.[14] Dr. Conroy concluded that Mr. Panetti does

[14] Mr. Panetti was involuntarily committed for psychiatric problems over a dozen times in hospitals in Texas and Wisconsin in the decade preceding the crime. 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. The doctors frequently prescribed antipsychotic medication to alleviate some of his psychotic symptoms. Auditory and visual hallucinations exacerbated

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not appreciate the connection between his killing of his wife's parents and his execution. JA 150. Because of the difficulty of imitating the symptoms of a severe thought disorder – jumping from topic to topic, thinking illogically, and making loose associations – Dr. Conroy found that Mr. Panetti was not malingering. JA 150-51, 153-54. Adding support to her conclusion, she noted that Mr. Panetti's lengthy mental health history showed that his delusions about demonic persecution had remained remarkably consistent. JA 182-83.

Susana A. Rosin, a psychologist, testified about Mr. Panetti's inability to maintain a train of thought, his flight of ideas, and his use of excessive, irrelevant detail. JA 200-02. She said that his symptoms are consistent with someone suffering from schizophrenia. JA 205. She also noted that he displayed some signs of schizoaffective disorder, which she described as a thought disorder accompanied by rages, manic episodes, and sleeplessness. JA 206. Dr. Rosin testified that Mr. Panetti has a set of fixed delusions

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his delusions of persecution and grandiosity. He believed that the devil had possessed his furniture. He buried it in the backyard and sprayed it with water to exorcize the devil. He claimed to have seen the devil on the walls of his home and admitted to hearing the voice of the devil. He believed he was being controlled by an unseen power. He believed the neighbors were spying on him, so he nailed his curtains shut. 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 thought the citizens of Fredericksburg were plotting against him. In July 1991, he was hospitalized and found to be suffering from delusions of grandiosity and psychotic religiosity. The possible presence of three alternative personalities was noted. *See generally* JA 339-41 (summarizing psychiatric history). Each of the experts who testified at the federal hearing reviewed Mr. Panetti's mental health records predating the crime. JA 141; JA 211-12; JA 222; JA 240; JA 307; 2 FH 56-57.

that date back to the 1980's, centered around grandiose ideas that he must save others by preaching the word of God. JA 203. She explained that Mr. Panetti could hold a normal conversation if the discussion did not deal with his fixed delusional system. JA 203-04. She believed that he knows he is on death row and that he is going to be executed. JA 207. Dr. Rosin also testified that Mr. Panetti knows he killed his parents-in-law. JA 208. However, he told her that he does not believe these murders are the real reason the State seeks his execution. Instead, he believes that he was put on death row to preach the Gospel to save other inmates, and that "the forces of evil, demons, devils" have been in a conspiracy for years to kill him and put an end to his preaching. JA 202, 209. She concluded that Mr. Panetti was not malingering. JA 202, 205, 213.

Seth Silverman, a forensic psychiatrist, diagnosed Mr. Panetti with schizophrenia. JA 227, 233. He testified that Mr. Panetti believes an individual named "Sarge" killed his wife's parents. JA 221, 235. Dr. Silverman said that Mr. Panetti knows the State wants to execute him, but that these murders are not the reason. JA 221. Mr. Panetti persisted in his belief that the real reason is "[b]ecause he preaches the word of the gospel." JA 222. He does not associate his killing of his parents-in-law with his execution, or have a rational understanding of why the State wants to execute him. JA 221-22, 231. Dr. Silverman concluded that Mr. Panetti was not feigning symptoms of severe mental illness, because no one could fabricate the intensity, the grandiosity, and the tangentiality of thinking that Mr. Panetti has consistently exhibited. JA 222-24.

As its first witness, the State called Dr. George Parker, the psychologist whom the state court had appointed to evaluate Mr. Panetti. According to Dr. Parker,

Mr. Panetti refused to cooperate with the evaluation, because Dr. Parker and Dr. Mary Anderson would not answer his question about their religious preferences. JA 238. Dr. Parker did not dispute that Mr. Panetti suffers from "significant psychological problems." JA 239. He testified that Mr. Panetti said he was going to be executed to keep him from preaching the word of God. JA 255, 272. However, Dr. Parker testified that Mr. Panetti is not incapable of understanding why the authorities have ordered his execution even though he is preoccupied with religion and may, on some level, genuinely believe that he is being executed for preaching the Gospel. JA 247. Dr. Parker admitted that he does not know whether Mr. Panetti understands why he is going to be executed, but he insisted that Mr. Panetti is "capable of understanding." JA 247.

The State also called Mary Anderson, the forensic psychiatrist who had examined Mr. Panetti in the state execution competency proceedings. She explained that Mr. Panetti would not answer her and Dr. Parker's questions, because they refused to respond to his question whether they believed in Jesus. JA 299-301. Mr. Panetti told Dr. Anderson that "the devil is trying to rub me out for preaching the word of Jesus Christ." JA 309; *see* JA 303, 319. However, Dr. Anderson believed that Mr. Panetti had the mental capacity to understand the real reason he is going to be executed. JA 304, 315. She said that Mr. Panetti's refusal to cooperate with the evaluation was the result of deliberate, conscious choice rather than the product of mental illness. JA 312-13. She refused to conclude that Mr. Panetti suffers from schizophrenia,

because she did not think that his mental illness was relevant to the competency determination. JA 313-14.[15]

In rebuttal, counsel for Mr. Panetti called Dr. Cunningham, the same expert who had visited Mr. Panetti days before his scheduled execution. After conducting a more thorough evaluation, 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. JA 324. Dr. Cunningham explained that Mr. Panetti has a lengthy history of responding to questions with religiosity rather than concrete answers. JA 324-26.[16] Emphasizing that Mr. Panetti

[15] The State also called three correctional officers at the hearing. Steven Miller testified that Mr. Panetti knows that he is going to be executed. JA 296. However, Miller did not have any idea whether Mr. Panetti knows why he is going to be executed. JA 296. Terri Hill testified that Mr. Panetti appeared to be aware of his situation, but that she had never had a lengthy conversation with him. 1 FH 196-97. She described an incident where Mr. Panetti was jogging "frantically" around the recreation room, preaching to the other inmates from a Bible he carried. 1 FH 195. The inmates shouted profanities and yelled at him to stop, but Mr. Panetti was undeterred. 1 FH 195. Victoria Williams testified that Mr. Panetti is different from others because he "over-preaches" to the inmates and correctional officers. 1 FH 201. She said that he realizes his preaching angers the other inmates but that he keeps doing it anyway. 1 FH 204.

[16] Mr. Panetti behaved in a similar manner when his post-conviction counsel attempted to discuss the issues with him in preparation for filing the federal habeas petition:

> When I attempted to mention a topic, he was unable to continue the same line of thought in his conversation, instead going off on some bizarre tangent. He would talk about the Death Row guards and the "belly of the whale" or his spiritual healing and role as God's son. . . . Mr. Panetti was often making esoteric references to the Bible and would hold up his copy to show us some important significance that only he saw. To answer a question from counsel, he would open his Bible to read a verse that signified to him the answer.

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behaved in a manner consistent with someone suffering from schizophrenia, Dr. Cunningham explained:

> [W]hy we call schizophrenia thought disorder is 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 sort of relevant, not really relevant kind of way. That's the essence of somebody being schizophrenic.
>
> And so, when I encounter somebody like that and they respond in that way, they're behaving like somebody who is unmedicated, untreated schizophrenic . . . .

JA 328. According to Dr. Cunningham, Mr. Panetti believes the State of Texas is not acting as a lawfully constituted authority in seeking his execution. JA 333. Instead, Mr. Panetti thinks that the State "is in league with the forces of evil to prevent him from preaching the gospel." JA 333. 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 documented in the records

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> Among his many bizarre statements, Mr. Panetti said that he alone was a "closet commando Guru" and that "he who is first is last."

JA 43; *see* JA II 1 (Death Row medical records noting that: "The patient reports: he is a preacher and is to deliver the Word of God to those around him. . . . Pt was hyperreligious. . . . Pt would only speak of the Bible and God.").

from his numerous psychiatric hospitalizations since the 1980's. JA 334.[17]

SUMMARY OF THE ARGUMENT

Scott Louis Panetti is a captive to a malfunctioning brain that cannot tell the difference between what is real and what is imagined. Nearly all of the experts and treating professionals who have examined him over the last two decades have consistently diagnosed him as suffering from schizophrenia or schizoaffective disorder. Profound distortions in thinking and perception characterize these mental illnesses.[18] The hallmark of Mr. Panetti's condition is his psychotic delusion of religious persecution. Mr. Panetti believes that demonic forces, in league with the State of Texas, have orchestrated his execution in a final effort to prevent him from preaching the Gospels of Jesus Christ. According to Mr. Panetti, the State of Texas is using the murder of his wife's parents as a pretext to

[17] The District Court found it significant that "no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed." JA 364.

[18] Schizophrenia is one of the most chronic and disabling of the severe mental illnesses, because its core symptoms include "distortions in thought content (delusions), perception (hallucinations), language and thought process (disorganized speech), and self-monitoring of behavior (grossly disorganized or catatonic behavior)." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 299 (4th ed. text revision 2000). "The essential feature of Schizoaffective Disorder is an uninterrupted period of illness during which, at some time, there is a Major Depressive, Manic, or Mixed Episode concurrent with [the characteristic symptoms] for Schizophrenia." *Id.* at 319. Schizophrenia and schizoaffective disorder affect less than one percent of the population. R.W. Buchanan & William T. Carpenter, *Concept of Schizophrenia*, in *Comprehensive Textbook of Psychiatry* 1330 (B. Sadock & V. Sadock eds., 8th ed. 2005).

fulfill the devil's plot to silence him. In short, Mr. Panetti is in the grip of a delusion that puts his execution at the center of his irrational beliefs.

Mr. Panetti's execution can proceed, the Fifth Circuit held, because the Eighth Amendment does not require that a prisoner must "rationally understand" the reason for his punishment, only that he must be "aware" of the reason the State has given. JA 381. This functionless distinction is incompatible with the Eighth Amendment and *Ford v. Wainwright*. Analysis of the relevant indicators of the Amendment's meaning demonstrates that it does not permit the execution of a person who is so lacking in rational understanding that he cannot comprehend that he is being put to death because of the crime he was convicted of committing.

First, the reasons for the firmly-embedded common-law rule against executing the insane include the recognition that killing a person who is unable to understand that the execution is a punishment for his crimes (1) serves no retributive purpose, and (2) denies the condemned an opportunity to prepare properly for death. The *Ford* majority opinion and Justice Powell's concurrence agree that these rationales retain contemporary cogency. In requiring an inmate to have a rational understanding of the reason for his execution, Justice Powell crafted a standard that implements the enduring purposes of the common-law ban.

Second, among the States that have defined a standard of competency for execution, there is a broad contemporary consensus against executing condemned inmates who are too mentally ill to understand the connection between the crime and its punishment. This consensus confirms that the capacity for such an understanding

continues to this day to be recognized as a necessary component of the competency standard.

Third, putting to death a person who has no rational understanding of the reason for his execution does not measurably contribute to the retributive or deterrent functions of capital punishment and is, therefore, mere wanton cruelty for Eighth Amendment purposes. Moreover, executing a person who cannot understand that his impending death is the result of the crimes for which he stands convicted adds a further dimension to this cruelty, because it deprives the person of any opportunity to expiate the offense by making amends with his conscience or his God.

Each one of these indicators – recognized by the Court's precedents as keys to Eighth Amendment interpretation – points in the same direction. To execute someone like Scott Panetti – a man who, in Justice Powell's *Ford* formulation, cannot "perceive[ ] the connection between his crime and his punishment," 477 U.S. at 422 – offends a standard of decency with established common-law roots, pervasive contemporary acceptance, and a particular fitness to accommodate the recognized aims of capital punishment with those of Cruel and Unusual Punishment doctrine.

ARGUMENT

THE EIGHTH AMENDMENT PROHIBITS THE EXECUTION OF A PERSON WHO, BECAUSE OF A SEVERE MENTAL IMPAIRMENT, IS INCAPABLE OF RATIONALLY UNDERSTANDING THE REASON FOR HIS EXECUTION.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), counsel for the petitioner argued that the right not to be executed

while insane was a substantive federal constitutional right, guaranteed by the Eighth Amendment, as incorporated into the Fourteenth Amendment. Alternatively, counsel argued that, even if the right were merely a creature of Florida law, the Due Process Clause required Florida to administer it through fair procedures. A majority of the Court made a clear choice to rest its decision upon the first of these two grounds, holding that the Eighth Amendment "places a substantive restriction on the State's power to take the life of an insane prisoner." *Id.* at 405. It follows that, while the States may have some leeway in crafting the specific terms of their local test for competency to be executed, the Eighth Amendment imposes a constitutional minimum standard that all these tests must meet. "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967); *accord Ford*, 477 U.S. at 419 (Powell, J., concurring) ("The Court holds today that the Eighth Amendment bars execution of a category of defendants defined by their mental state. The bounds of that category are necessarily governed by federal constitutional law."). This case requires the Court to determine whether that minimum Eighth Amendment standard includes the mental capacity to understand that one is being executed as a punishment for a crime.

Texas proposes to execute Petitioner Scott Louis Panetti, despite overwhelming evidence that his schizophrenia has left him shackled to a psychotic delusion strong enough to thwart the power of logic and reason. Mr. Panetti believes that he and the devil have been engaged in an apocalyptic struggle – "spiritual warfare" – for years,

and that the devil has specifically targeted him because of his profound Christian faith and relentless efforts to persuade others to follow the teachings of Jesus Christ. He thinks that the actual reason for his execution is the devil's persecution for spreading the Gospels, not the State's retribution for killing his wife's parents. He views his capital murder conviction as simply part of the State's grand design to cover up the diabolical conspiracy that will make him a martyr. Mr. Panetti's distorted perception of reality falls substantially short of the constitutional minimum, which requires at least that the inmate "perceives the connection between his crime and his punishment." *Ford*, 477 U.S. at 422 (Powell, J., concurring).

"The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Recognizing that Eighth Amendment analysis "should be informed by 'objective factors to the maximum possible extent,' " *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring) (internal quotation marks omitted), this Court has looked to the "ancestral legacy" of the common law, *Ford*, 477 U.S. at 408; a discernible contemporary consensus of "legislative enactments and state practice," *Simmons*, 543 U.S. at 563, particularly when that is reflective of "a much broader social and professional consensus," *Atkins*, 536 U.S. at 316 n.21; and the conformity or disjuncture between the particular infliction of capital punishment and generally understood "penological justifications for the death penalty." *Simmons*, 543 U.S. at 571. With regard to the narrow question presented in Mr. Panetti's case – whether

the Eighth Amendment permits the execution of a person who is incapable of understanding that his death will be the punishment for a crime he has committed – all of these objective indicators point to the same, negative answer.

I. THE ANCESTRAL LEGACY OF THE COMMON LAW INSISTS THAT THE DEATH PENALTY CANNOT BE IMPOSED ON A PERSON SO LACKING IN RATIONAL UNDERSTANDING THAT HE IS UNABLE TO PERCEIVE THE CONNECTION BETWEEN HIS CRIME AND HIS PUNISHMENT.

A. *Ford* identified the common-law justifications for the ban on executing the insane that retain contemporary validity.

In holding that the Eighth Amendment prohibits the execution of the insane, *Ford* found that this ancient proscription was unquestioned and firmly embedded in the common law at the time the Bill of Rights was adopted. 477 U.S. at 406-08. The common law had settled on no single reason for the ban, and because some of its rationales might have become obsolete,[19] the prevailing *Ford* opinions undertook to identify those common-law purposes that still retain vitality today.

Both the majority and Justice Powell cited Blackstone for asserting that the rule reflected not only "'the humanity of the English law'" in appreciating that an insane prisoner might be unable to allege "'something in stay of judgment or execution,'" 477 U.S. at 407 (quoting William

[19] *See* Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 383 (1962).

Blackstone, 4 *Commentaries* *24-*25),[20] but also a recognition that "execution serves no purpose in these cases because madness is its own punishment." *Id.* at 407-08. Coke viewed the execution of the insane as but "'a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.'" *Id.* at 407 (quoting Sir Edward Coke, 3 *Institutes* 6 (6th ed. 1680)). His explanation suggests that execution of the insane "contributes nothing to . . . deterrence" and "simply offends humanity." *Id.* Still another rationale had religious roots: Executing a person who is unable to reflect on his conduct and predicament deprives him of a last opportunity to make peace with God. *Id*. A final rationale rested on the assertion that the execution of the insane does not satisfy "the community's quest for retribution." *Id.* at 408 (internal quotation marks omitted).

The majority opinion specifically concluded that at least three of these common-law rationales continue to "have no less logical, moral, and practical force than they did when first voiced." *Id.* at 409. First, the Court noted that "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id*. The Court characterized executions lacking retributive purpose as nothing more than "mindless vengeance." *Id.* at 410. Second, the Court believed that modern society abhorred the practice of executing "one who has no capacity to come to grips with his own conscience or deity." *Id.* at 409. Consequently, Eighth

[20] Justice Powell found that the rationale of protecting an inmate's ability to articulate legal grounds in bar of execution had "slight merit today." *Id.* at 421; *see id.* at 422 n.3.

Amendment prohibition of the practice would "protect the condemned from fear and pain without comfort of understanding." *Id.* at 410. Third, the Court concluded that, no less than in ancient times, execution of the insane "simply offends humanity." *Id.* at 409.

Justice Powell joined this portion of the majority opinion, but wrote separately to offer additional analysis that could guide specific application of the majority's Eighth Amendment holding. In defining "the meaning of insanity" in the execution setting, *id.* at 418, he looked to the common law and the modern practices of the States – the same sources that informed the majority's recognition of a substantive right against execution of the incompetent – to formulate a "precise definition" of incompetency. *Id.* at 419. Because the various rationales supporting the ancient ban on executing the insane "do not provide a common answer when it comes to defining the mental awareness required by the Eighth Amendment," *id.*, Justice Powell focused on the two that he believed still had merit in modern practice. First, because most people today "value the opportunity to prepare, mentally and spiritually for their death," he determined that the general concern of the common law – "that executions of the insane are simply cruel" – remained valid. *Id.* at 421. Second, he found that one of the "critical justifications" for the modern use of capital punishment – its retributive force – coincided with the common-law rationale that required "the defendant's awareness of the penalty's existence and purpose." *Id*. He concluded that a constitutionally appropriate standard for competency to be executed had to satisfy both of these rationales:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only

> if the defendant is aware that his death is approaching can he prepare for his passing.

Id. at 422. Accordingly, he proposed a standard that would prohibit the execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.*[21]

This review of the majority opinion and Justice Powell's concurring opinion in *Ford* leads to three unremarkable conclusions. First, the competency standard that Justice Powell endorsed must be read in light of the common-law rationales that he found had modern-day merit: (1) that the retributive goal of capital punishment is not furthered by executing someone so lacking in understanding that he cannot grasp "the connection between his crime and his punishment," and (2) that it is uniquely cruel to execute a person who has no chance to obtain mental or spiritual consolation in preparation for his death, because he does not comprehend the reason he is to die. Second, Justice Powell's standard is consistent with the majority's stated reasons for finding that the Eighth Amendment embodies the common-law prohibition: that "executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" has no retributive value, and that it offends humanity to execute someone who lacks the "comfort of understanding" his impending fate, because he does not have the "capacity to come to grips with his own conscience or deity." *Id.* at 409. Third, for these underlying common-law rationales to be satisfied, an inmate must

[21] Justice Powell's use of the term "suffer" is instructive. It provides additional support for the conclusion that his proposed test incorporates the common-law retributive rationale.

possess a rational understanding of his predicament, including a capacity to perceive the punitive connection between his criminal conviction and his impending execution.[22] The inmate must be capable of realizing his moral guilt before he can prepare himself for death as expiation for his offense, and the state's punitive purpose must be intelligible to him for retribution to be meaningful.

B. The common-law rationales embraced by the *Ford* opinions logically imply the need for rational understanding.

In *Ford*, both the majority and Justice Powell referred to Hawles's commentaries, which emphasize that:

> [T]here being so many to be made examples of, besides those on whom the misfortunes of madness fall, it is inconsistent with humanity to make examples of them; it is inconsistent with religion, as being against christian charity to send a great offender quick . . . into another world, when he is not of a capacity to fit himself for it.

[22] Justice Powell's opinion contains five slightly different formulations of the competency standard he approved. These formulations prohibit the execution of persons (1) who "are unaware of the punishment they are about to suffer and why they are to suffer it;" (2) "who d[o] not have the mental capacity to understand the nature of the death penalty and why it was imposed on them;" (3) who are "unable to understand the nature and purpose of such sentence;" (4) who are unable "to understand the nature of the sentencing proceedings, i.e., why he was being punished and the nature of his punishment;" and (5) who do not "know the fact of their impending execution and the reason for it." *Id.* at 421-22, 422 n.3 (citations and internal quotation marks omitted). A rational understanding of the connection between one's criminal conviction and execution is explicit or implicit in each formulation.

Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, in *XI State Trials* 477 (T. Howell ed., 1816). Hawles is the most explicit of the common-law writers regarding the specific capacity demanded for competency to be executed, and courts in the common-law tradition continue to echo his point. *See State v. Noel*, 133 A. 274, 283 (N.J. 1926) ("The law is zealous in permitting one condemned to death to make his peace with the Almighty, before he pays the penalty of his crime. This expiation cannot be made by one who is insane."); *Musselwhite v. State*, 60 So. 2d 807, 811 (Miss. 1952) ("It is . . . part of due process that there be available to [the condemned] as a rational person avenues toward . . . spiritual consolation."). Plainly, the capacity to understand why one is to die – the capacity to connect one's death with one's life and deeds and to come to terms with one's responsibilities in the end – is a necessary condition for fitting oneself for execution in the common-law sense.

Equally plainly, to inflict death upon one who does not understand its punitive purpose would substitute "mindless vengeance," *Ford*, 477 U.S. at 410, for the concept of just deserts that is central to the retributive justification for capital punishment. This is why common-law courts have insisted that, "before the prisoner could be found insane, it should be shown that he would not know he would deserve punishment for doing a wrong act, and, if punishment therefor should be inflicted upon him, would not comprehend the reason why he was being punished." *Lee v. State*, 45 S.E. 628, 630 (Ga. 1903); *see In re Lang*, 71 A. 47, 49 (N.J. 1908) (explaining that a mentally ill prisoner cannot be executed unless a "court or a jury has found that he is conscious of having committed a crime, is aware that he is amenable to punishment and is appreciative of his situation as a murderer condemned to death").

The tests that common-law courts have developed for competency to be executed thus focus upon a condemned inmate's rational understanding of the purpose for which the State is about to put him to death. *See*, *e.g.*, *Ex parte Chesser*, 112 So. 87, 89-90 (Fla. 1927) (holding that, if the inmate is "unable to understand the nature, purpose and effect of the process about to be executed upon him," then the execution shall not be carried out until the inmate "regains his senses"); *State v. Genna*, 112 So. 655, 661 (La. 1927) ("He must be capable of understanding the situation in which he stands and the nature of the proceedings against him."). Scholars have agreed that the common-law standard was "generally said to be whether the condemned man has the capacity to understand the nature and purpose of the punishment about to be executed upon him." Henry Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651, 652 (1951); *see* Wayne LaFave & Austin Scott, *Handbook on Criminal Law* 303 (1972) ("[H]e must be so unsound mentally as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him."). As one commentator has suggested:

> [P]erhaps the most convincing purpose for which the rule has been said to exist in modern circumstances is that punishment should not be inflicted upon a person incapable of comprehending the reason why he is punished. Thus in the United States where the common law rules are still operative in many States the tests of insanity adopted consider the mental condition of the prisoner in regards closely connected with the purposes of execution.

J.D. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melb. U. L. Rev. 434, 468 (1964)

(footnotes omitted). Only through a radical divergence from the common-law tradition could a court today conclude – as the Fifth Circuit did below – that it is permissible to execute a psychotic who delusionally believes that the purpose of his execution is to aid and abet the devil by depriving Jesus of the benefits of his ministry.

II. CONTEMPORARY STANDARDS REQUIRE THE INMATE TO RATIONALLY UNDERSTAND THE CONNECTION BETWEEN HIS CRIME AND HIS PUNISHMENT.

A. State Law

The "clearest and most reliable objective evidence of contemporary values" relevant to the Eighth Amendment is state legislation. *Atkins*, 536 U.S. at 312 (citation omitted). Nineteen states currently have a statutory definition of competency for execution.[23] Of these, 14 states provide that a condemned inmate must "understand the reason" or "know why" he is being punished, or must "understand the purpose" or the "object" of the punishment.[24] These formulas expressly require capability to connect punishment with crime. That capability is probably implied, as well, by three additional statutes that forbid an execution if the inmate is "unaware that he is to be punished for the crime of murder" or "lacks awareness"

[23] For the Court's convenience, the relevant statutory provisions and case law decisions of the states are set out in Appendix B.

[24] Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Wyoming. The relevant federal statute also provides that: "A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person." 18 U.S.C. § 3596(C).

that he "is to be executed for the crime of murder."[25] The two remaining states with statutory definitions assimilate competency-to-be-executed with competency-to-be-sentenced and forbid an execution if the inmate "lacks capacity" or "is unable" to "understand the proceedings against" him.[26] Thus, *no* state statutory definition expressly permits the execution of someone incapable of connecting the execution to his criminal conviction; three-quarters of the definitions explicitly forbid such an execution;[27] and the remaining quarter most likely forbid it implicitly.

Nine states do not have a statutory standard for determining incompetency,[28] and ten states have no statute at all.[29] No judicial decisions appear to spell out the competency-to-be-executed standard in most of these states. However, in the six states where such decisions are found, at least five require an inmate to be capable of understanding the connection between his conviction of a

[25] Arizona, Colorado, and Maryland.

[26] Idaho and Montana.

[27] *See*, *e.g.*, *Provenzano v. State*, 750 So. 2d 597, 602 (Fla. 1999) (noting that Florida's statutory definition "does allow for a prisoner's rational appreciation of the connection between his crime and the punishment he is to receive"); *Billiot v. State*, 655 So. 2d 1, 16 (Miss. 1995) (explaining that the inmate "must comprehend the reasons for the penalty and its implications, he must understand 'the penalty's existence and purpose,' and in order for the retributive goal of the criminal law to be satisfied, he must 'perceive[ ] the connection between his crime and his punishment,' and be 'aware that his death is approaching [so] he can prepare himself for his passing' ") (quoting *Ford*, 477 U.S. at 417, 422 (Powell, J., concurring)).

[28] Alabama, California, Connecticut, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, and South Dakota.

[29] Delaware, Illinois, Indiana, New Hampshire, New Jersey, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington.

crime and his execution.[30] The remaining decision is silent on the issue.[31]

In summary, all of the states in which the relevant legal rule can be ascertained with any confidence prohibit the execution of an inmate so lacking in rational understanding that he cannot comprehend the connection between his crime and his execution. The rest of the death penalty states have not reached a different conclusion; they simply have not addressed the issue.

B. Informed Professional Opinion

This Court has looked to the positions of "organizations with germane expertise" to determine whether the judgment of state legislatures "reflects a much broader social and professional consensus." *Atkins*, 536 U.S. at 316 n.21. That is certainly the case here. The American Psychiatric Association, the American Psychological Association, and the American Bar Association have all adopted position statements regarding the execution of mentally impaired inmates. With minor differences, presently irrelevant, the positions of these national organizations are identical, stating that: "A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . to understand the nature and purpose of the punishment,

[30] Pennsylvania requires that the inmate comprehend the reasons for the death penalty. Tennessee and Indiana require that he be aware of why he is to suffer it. South Carolina requires that he be able to understand the reason for the punishment, and Oklahoma requires that he be able to understand the punishment's purpose.

[31] The Washington standard says only that an inmate must be "capable of properly appreciating his peril and of rationally assisting in his own defense." *State v. Harris*, 789 P.2d 60, 65 (Wash. 1990).

or to appreciate the reason for its imposition in the prisoner's own case."[32] The supporting commentary to the American Bar Association's resolution makes clear that the standard includes a rational understanding component:

> [The standard] would require that an offender not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution.

American Bar Association, Resolution 122A, *supra*, at 675. The consistency of the professional organizations' standards with state legislative and case law evidence "lends further support to [the] conclusion that there is a consensus among those who have addressed the issue." *Atkins*, 536 U.S. at 316 n.21.

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[32] American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, par. (a) (Dec. 2005), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf; American Psychological Association, Council Policy Manual: N. Public Interest - Part 2, VIII.2, par. 3(a) (Feb. 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8; American Bar Association, Resolution 122A, par. 3(a) (Aug. 7-8, 2006), in *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

III. EXECUTING A PERSON INCAPABLE OF RATIONALLY UNDERSTANDING THE CONNECTION BETWEEN HIS CRIME AND HIS PUNISHMENT WOULD NOT SERVE THE PENOLOGICAL PURPOSES OF THE DEATH PENALTY.

The imposition of capital punishment violates the Eighth Amendment when it is excessive, "involv[ing] the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). To execute a person who lacks the mental capacity to understand the causal connection between his crime and his punishment is excessive on two counts. First, execution of such a person does not serve either of the principal penological justifications for the death penalty: "retribution and deterrence of capital crimes." *Id.* at 183. Unless the imposition of the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless infliction of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). Second, executing a person who lacks rational understanding is "uniquely cruel," *Ford*, 477 U.S. at 421 (Powell, J., concurring), because it subjects the prisoner to "fear and pain without comfort of understanding." *Id.* at 410 (majority opinion).

A. Retribution

Retribution is "the primary justification for the death penalty." *Spaziano v. Florida*, 468 U.S. 447, 461 (1984). In retributive theory, capital punishment serves as "an expression of society's moral outrage at particularly

offensive conduct," *Gregg*, 428 U.S. at 183, and is "an attempt to right the balance for the wrong to the victim." *Simmons*, 543 U.S. at 571. Retribution demands that, when the time for execution arrives, the offender be able to recognize death as the price he must pay for his culpable deeds. *See* Mary Ellen Gale, *Retribution*, *Punishment*, *and Death*, 18 U.C. Davis L. Rev. 973, 1031 (1985) ("To give someone her just deserts implies her recognition that those deserts are just."). Society demands that the condemned inmate suffer the anguish of realizing that he is being put to death "for what he did." *Martin v. Dugger*, 686 F. Supp. 1523, 1569 (S.D. Fla. 1988). Because retribution attempts to awaken the conscience of the offender, Gale, *supra*, at 1031-32, it is designed to apply exclusively to rational persons who have the cognitive capacity to answer for their conduct. *See generally* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U. L. Rev. 35, 57-58 (1986).

Executing a delusional psychotic who believes that a conspiracy of demonic forces is orchestrating his execution does not serve the retributive goal of capital punishment. The condemned's lack of rational understanding severs the critical connection between crime and punishment, destroying his ability to appreciate that his suffering is payback for his offense. *See id*. at 54 ("Because of the immense suffering caused by the prisoner's criminal actions, he is to suffer in anticipation of his death, and this goal cannot be achieved if the prisoner does not appreciate his impending fate because of mental illness.") (footnote omitted); Gale, *supra*, at 1031 n.167 ("[W]e believe punishment appeals, whether successfully or not, to the offender's consciousness and conscience – [this] may help explain our moral distaste for killing those who cannot understand either what we are doing or why we are doing

it."); *Ford v. Wainwright*, 752 F.2d 526, 531 (11th Cir. 1985) (Clark, J., dissenting) (noting that "the social goal of retribution is frustrated when the power of the State is exercised against one who does not comprehend its significance"), *rev'd*, 477 U.S. 399 (1986); American Bar Association, Resolution 122A, *supra*, at 676 ("[T]he retributive purpose of capital punishment is not served by executing an offender who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people."). Under these circumstances, execution serves as vengeance, not retribution.[33]

The absence of any retributive value in executing those who do not possess a rational understanding of the reason for their impending death substantially influenced Justice Powell's formulation of the Eighth Amendment competency standard in *Ford*. *See* 477 U.S. at 421-22 (explaining that, only "[i]f the defendant perceives the connection between his crime and his punishment," is "the retributive goal of the criminal law . . . satisfied"). It also served as one of the mainstays of the *Ford* majority's decision to constitutionalize the common-law rule. *See id.* at 409. Executing a person who lacks the rational understanding needed to make the connection between his crime and his punishment thwarts "the retributive end of ensuring that the criminal gets his just deserts." *Enmund*, 458 U.S. at

[33] "Retribution focuses on the offender's deserved punishment; revenge focuses on retaliation and tries to satisfy the victim's or society's desire to strike back at the criminal." Gale, *supra*, at 1033 (internal quotation marks and footnote omitted); *see The Essays of Francis Bacon* 34 (S. Reynolds ed., 1890) ("Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out.").

801. Prohibiting such executions "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford*, 477 U.S. at 410.[34]

B. Deterrence

Most of the common-law authorities concluded, like Coke, that the execution of the insane "should be a miserable spectacle . . . of extream inhumanity and cruelty, and can be no example to others." Coke, *supra*, at 6; *see*, *e.g.*, *Beverley's Case of Non Compos Mentis*, 76 Eng. Rep. 1118, 1120-21 (K.B. 1598); L. Shelford, *A Practical Treatise on The Law Concerning Lunatics*, *Idiots*, *and Persons of Unsound Mind* 295 (1833). These writers suggest that the life of an incompetent person can be spared without weakening the deterrent effect of the death penalty. A prospective offender cannot imagine losing his capacity for rational understanding so that he will be spared from execution. Hazard & Louisell, *supra*, at 385. Moreover, an offender's execution can proceed if he regains his sanity, and it can have "the same deterrent effect as if he had been sane throughout." *Id*. Consequently, inflicting capital punishment upon a person who lacks a rational understanding of his predicament is "unnecessary to the accomplishment of the end of deterrence." *Id.* at 386.[35]

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[34] *Thompson v. Oklahoma*, 487 U.S. 815 (1988), cited *Ford* as an example of a case where the Court found a death sentence unconstitutional because the "retributive value is so low." *Id.* at 836 n.44 (plurality opinion).

[35] The "natural abhorrence" society feels at executing the insane, *Ford*, 477 U.S. at 409, also counsels against the practice:

> If the general population shares the opinion that execution of disturbed offenders constitutes cruel, brutal, and barbaric behavior, then the practice could cause the law to diverge

(Continued on following page)

C. Uniquely Cruel and Inhuman

An inmate who rationally understands the reason for his execution can allay some of the fear and torment he faces by coming to terms with his moral guilt, seeking forgiveness, expressing remorse, making amends, or clearing his conscience. An inmate who does not have this capacity cannot make this expiation.[36] Executing such a person, who is without the "comfort of understanding," *Ford*, 477 U.S. at 410, is a uniquely cruel and inhuman practice that does not "comport[ ] with the basic concept of human dignity at the core" of the Eighth Amendment. *Gregg*, 428 U.S. at 182.

When *Ford* found that executing an insane prisoner would violate the Eighth Amendment, the majority invoked "the natural abhorrence civilized societies feel at killing

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> from conventional morality so drastically that some would consider certain illegal conduct to be not only morally acceptable but morally mandatory. Thus, the [competency-for-execution] requirement might undermine the deterrent effect of capital punishment to some unspecified degree yet serve the preventive function of the criminal law by avoiding a practice that would promote alienation between the law and conventional morality.

Robert F. Schopp, *Wake Up and Die Right: The Rationale*, *Standard*, *and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 La. L. Rev. 995, 1016 (1991).

[36] *Compare* Last Statement of Derrick O'Brien (executed Jul. 11, 2006), *available at* http://www.tdcj.state.tx.us/stat/obrienderricklast.htm ("I have always been sorry. It is the worst mistake that I ever made in my whole life. Not because I am here, but because of what I did and I hurt a lot of people – you, and my family. I am sorry; I have always been sorry. I am sorry."), *with* Last Statement of Monty Delk (executed Feb. 28, 2002), *available at* http://www.tdcj.state.tx.us/stat/delkmontylast.htm ("I've got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this.").

one who has no capacity to come to grips with his own conscience or deity." 477 U.S. at 409. Equally concerned, Justice Powell formulated his standard, in part, to alleviate the excessive cruelty involved in dispatching persons who do not have the ability "to prepare, mentally and spiritually, for their death." *Id.* at 421. To execute an inmate laboring under a psychotic delusion about the reason for his execution would be "a uniquely cruel penalty," *id*., inconsistent with the fundamental premise of the Eighth Amendment that even the most contemptible criminal remains a human being entitled to respect and dignity.[37]

CONCLUSION

To affirm that the Eighth Amendment forbids the execution of a prisoner so mentally impaired that he cannot "perceive[ ] the connection between his crime and his punishment," 477 U.S. at 422, implements the constitutional standard that Justice Powell endorsed in *Ford*. It is consistent with the reasons the *Ford* majority gave for holding that the Constitution imposes a substantive restriction on the States' power to execute the insane. It is in the grain of a tradition of decency that has a deep and distinguished pedigree in the common law, yet still retains

[37] To execute a person "who lacks a rudimentary understanding of the nature and purpose of the proceedings . . . offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but as an object . . . ." Richard Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. Miami L. Rev. 539, 551 (1993) (emphasis in original); *see Caritativo v. California*, 357 U.S. 549, 559 (1958) (Frankfurter, J., dissenting) (explaining that it would be "barbaric" to execute a person who is "mentally unfit to meet his destiny").

contemporary validity. Its approval by state legislatures and state courts without dissent, and by informed national mental health and legal organizations, signifies more than simply historical continuity. It reveals a broad social consensus that a condemned inmate must have the mental capacity to rationally understand the reason for his execution. To execute someone like Scott Panetti, who lacks this rudimentary level of rational understanding, would disserve the penological purposes of the death penalty and would exact a uniquely cruel punishment at odds with the core value of the Eighth Amendment – human dignity.

This Court should reverse the Fifth Circuit's judgment and remand the case so that the District Court can determine Mr. Panetti's competency under the proper constitutional standard.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Article 46.05 of the Texas Code of Criminal Procedure

Competency to be Executed

(a) A person who is incompetent to be executed may not be executed.

(b) The trial court retains jurisdiction over motions filed by or for a defendant under this article.

(c) A motion filed under this article must identify the proceeding in which the defendant was convicted, give the date of the final judgment, set forth the fact that an execution date has been set if the date has been set, and clearly set forth alleged facts in support of the assertion that the defendant is presently incompetent to be executed. The defendant shall attach affidavits, records, or other evidence supporting the defendant's allegations or shall state why those items are not attached. The defendant shall identify any previous proceedings in which the defendant challenged the defendant's competency in relation to the conviction and sentence in question, including any challenge to the defendant's competency to be executed, competency to stand trial, or sanity at the time of the offense. The motion must be verified by the oath of some person on the defendant's behalf.

(d) On receipt of a motion filed under this article, the trial court shall determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:

(1) the motion, any attached documents, and any responsive pleadings; and

(2) if applicable, the presumption of competency under Subsection (e).

(e) If a defendant is determined to have previously filed a motion under this article, and has previously been determined to be competent to be executed, the previous adjudication creates a presumption of competency and the defendant is not entitled to a hearing on the subsequent motion filed under this article, unless the defendant makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed at the time of filing the subsequent motion under this article.

(f) If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed.

(g) If the trial court does not determine that the defendant has made a substantial showing of incompetency, the court shall deny the motion.

(h) A defendant is incompetent to be executed if the defendant does not understand:

(1) that he or she is to be executed and that the execution is imminent; and

(2) the reason he or she is being executed.

(i) Mental health experts who examine a defendant under this article shall provide within a time ordered by the trial court copies of their reports to the attorney representing the state, the attorney representing the defendant, and the court.

(j) By filing a motion under this article, the defendant waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether the defendant is incompetent to be executed.

(k) If, on the basis of reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing, the trial court makes a finding by a preponderance of the evidence that the defendant is incompetent to be executed, the clerk shall send immediately to the court of criminal appeals in accordance with Section 8(d), Article 11.071, the appropriate documents for that court's determination of whether any existing execution date should be withdrawn and a stay of execution issued. If a stay of execution is issued by the court of criminal appeals, the trial court periodically shall order that the defendant be reexamined by mental health experts to determine whether the defendant is no longer incompetent to be executed.

(l) If the trial court does not make the finding as described by Subsection (k), the court may set an execution date as otherwise provided by law.

APPENDIX B

COMPETENCE TO BE EXECUTED: STATUTORY AND CASE LAW STANDARDS

Jurisdiction	Statute	State Case Law Interpreting Standard*
1. Alabama	"If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith enter an order in the trial court suspending the execution of the sentence . . . ." Ala. Code § 15-16-23 (2006).	No case law.
2. Arizona	"A person who is sentenced to death shall not be executed as long as he is mentally incompetent to be executed." "As used in this article, 'mentally incompetent to be executed' means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death." Ariz. Rev. Stat. § 13-4021 (A),(B) (2006).	
3. Arkansas	"[A]n individual under sentence of death is not competent [to be executed when], due to mental illness, [he or she does not] understand the nature and reasons for that punishment . . . ." Ark. Code § 16-90-506(d)(1) (2006).	
4. California	If the warden has "good reason to believe that a defendant, under judgment of death, has become insane," he must notify the	Since 1850, competency for execution has been governed by statute in California. *Ex parte Phyle*, 186

* No case law is provided for those states that have an explicit statutory definition of incompetency.

Jurisdiction	Statute	State Case Law Interpreting Standard*
	district attorney for the county in which the prison is located. The district attorney is required to notify the court, which must in turn convene a jury to decide the issue. "[W]hen it is found that the defendant is insane, the order must direct that he be taken to a medical facility of the Department of Corrections, and there kept in safe confinement until his reason is restored." Cal. Penal Code §§ 3701, 3703 (2007).	P.2d 134, 139 (Cal. 1947), *cert. granted*, *Phyle v. Duffy*, 333 U.S. 841, *and cert. dismissed*, 334 U.S. 431 (1948). The current statutory scheme, enacted in 1941, is a continuation of the provisions in place since at least 1905, *id*., though the procedures and authority for decision-making have been amended. Applying the insanity provisions in 1918, the Supreme Court of California stated: "The evidence on the question of insanity was amply sufficient to support the conclusion that the defendant was sane, within the meaning of the law applicable. That he was not perfectly poised mentally may be freely conceded. Such, however, is not the test. There was no substantial showing to the effect that his mind was in such a condition that he did not rightly comprehend his own condition with reference to the proceedings against him that he had been convicted of a crime punishable by death, and was before the court for the purposes of judgment on that conviction, or that he was then unable to present in a rational manner any defense that he might have, either on motion for new trial or to the pronouncing of judgment." *People v. Lawson*, 174 P. 885, 888 (Cal. 1918).
5. Colorado	"'Mentally incompetent to be executed' means that, due to a mental disease or defect, a person who has been sentenced to death is presently unaware that he or she is to be punished for the crime of murder or that the impending punishment for that	

Jurisdiction	Statute	State Case Law Interpreting Standard*
	crime is death." Colo. Rev. Stat. § 18-1.3-1401(2) (2006).	
6. Connecticut	If a prisoner "awaiting execution of a sentence of death appears to the warden thereof to be insane," the warden may apply to the court, which may in turn have the prisoner examined by physicians. "Upon return to said court or such judge of a certificate by such physicians, or a majority of them, stating that such person is insane, said court or such judge shall order the sentence of execution to be stayed and such person to be transferred to any state hospital for mental illness for confinement . . . ." Conn. Gen. Stat. § 54-101 (2007).	No case law.
7. Delaware	No statute.	No case law.
8. Florida	An inmate is incompetent to be executed if he "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him." Fla. Stat. Ann. § 922.07(3) (2006). "A person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it." Fla. R. Crim. Pro. 3.811(b) (2006).	
9. Georgia	An inmate is incompetent to be executed if "because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-60 (2006).	

Jurisdiction	Statute	State Case Law Interpreting Standard*
10. Idaho	"No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 18-210 (2006).	
11. Illinois	No statute.	Until 1994, an Illinois statute mandated that a "defendant is considered unfit to be executed only if, because of a mental condition, he is unable to understand the nature and purpose of such sentence." *People v. Owens*, 564 N.E.2d 1184, 1186 (Ill. 1990) (citing Ill. Rev. Stat. 1989, ch. 38, par. 1005-2-3). The Illinois statute was repealed in 1994 and has not been replaced. *People v. Johnson*, 730 N.E.2d 1107, 1115 (Ill. 2000) ("Our legislature, however, has since repealed section 5-2-3 . . . and has not adopted a statutory provision delineating procedures for raising and determining fitness for execution . . . .").
12. Indiana	No statute.	"*Ford v. Wainwright* holds that the Eighth Amendment prohibits a state from executing persons who are insane at the time of execution. In this context, persons are insane if they are unaware of the punishment they are about to suffer and why they are to suffer it." *Baird v. State*, 833 N.E.2d 28, 29 (Ind. 2005) (internal citation and quotation marks omitted).

Jurisdiction	Statute	State Case Law Interpreting Standard*
13. Kansas	"At any time prior to execution, a convict under sentence of death, such convict's counsel or the warden of the correctional institution or sheriff having custody of such convict may request a determination of the convict's sanity by a district judge of the judicial district in which such convict was tried and sentenced . . . . If the district judge determines that there is sufficient reason to believe that the convict is insane, the judge shall suspend the execution and conduct a hearing to determine the sanity of the convict." "If, at the conclusion of a hearing pursuant to this section, the judge determines that the convict is insane, the judge shall suspend the execution until further order." Kan. Stat. Ann. § 22-4006(a),(d) (2005).	No case law.
14. Kentucky	"If the condemned person is insane, as defined in KRS 431.213 . . . , on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity . . . ." Ky. Rev. Stat. § 431.240 (2006). '"Insane' means the condemned person does not have the ability to understand: (a) That the person is about to be executed; and (b) Why the person is to be executed." Ky. Rev. Stat. § 431.213 (2006).	
15. Louisiana	"A person who is not competent to proceed to execution may not be executed." "A person is not competent to proceed to execution when a defendant presently lacks the competence to understand that he	

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	is to be executed, and the reason he is to suffer the penalty." La. Rev. Stat. § 15:567.1(A),(B) (2006).	
16. Maryland	An inmate is incompetent to be executed if, "as a result of a mental disorder or mental retardation," the inmate "lacks awareness: (i) of the fact of the inmate's impending execution; and (ii) that the inmate is to be executed for the crime of murder." Md. Code Ann., Correctional Services, § 3-904(a)(2) (2006).	
17. Mississippi	"If it is found that the convict is insane, as defined in this subsection, the court shall suspend the execution of the sentence." "[A] person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court." Miss. Code Ann. § 99-19-57(2)(a),(b) (2006).	
18. Missouri	"No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." Mo. Ann. Stat. § 552.060(1) (2006).	

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19. Montana	"If after judgment of death there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 14 of this title." Mont. Code Ann. § 46-19-201 (2005). "A person who, as a result of mental disease or defect or developmental disability, is unable to understand the proceedings against the person or to assist in the person's own defense may not be . . . sentenced for the commission of an offense so long as the incapacity endures." Mont. Code Ann. § 46-14-103 (2005).	
20. Nebraska	"[I]f, after judgment and before execution of the sentence, such person shall become mentally incompetent, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the incompetency." Neb. Rev. Stat. § 29-1822 (2006). "If any convict under sentence of death shall appear to be mentally incompetent, the warden or sheriff having him or her in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict." "If the judge shall determine that a commission ought to be appointed to examine such convict, he or she shall make a finding to that effect and cause it to be entered upon the records	Since at least 1901, if not earlier, the procedures for determining insanity for the purpose of execution have been regulated by statute. *In re Grammer*, 178 N.W. 624, 625 (Neb. 1920). However, "it was not the purpose of the statute to do away with the definition of insanity as it was understood in such cases at common law." *Id*. at 626. Applying the common law standard, the Nebraska court held that "Grammer, before he could reasonably ask a suspension of his execution in this court, should have made a showing here that he has become insane, not in some slight or peculiar or classical degree, but that his state of mind and mental condition are such that he does not understand, and is incapable of understanding, the nature of the proceedings against him and of his impending fate and execution, and

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	of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution . . . .” “If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order.” Neb. Rev. Stat. § 29-2537 (2006).	therefore is unable, in a rational manner, to offer a defense or make objection to execution.” *Id*. Although the procedures for determining competency for execution have varied over time, there has been no alteration of the competency standard. “Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated.” *Ebert v. Wenzl*, 260 N.W. 480, 482 (Neb. 1977).
21. Nevada	“If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death until the convicted person becomes sane, and shall therein order the director of the department of corrections to confine such person in a safe place of confinement until his reason is restored.” Nev. Rev. Stat. § 176.455(1) (2005).	No case law.
22. New Hampshire	No statute.	No case law.
23. New Jersey	No statute.	“If, therefore, a person sentenced for a crime is capable of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings and can conduct his defence in a rational manner, he is, for the purpose of undergoing punishment, deemed to be sane, although on some other subjects his mind may be deranged or unsound.” *In re Lang*, 71 A. 47, 48 (N.J. 1908).

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		"[W]e are not willing to adopt the view that in cases where the law has decreed that a murderer should be put to death, and the court or a jury has found that he is conscious of having committed a crime, is aware that he is amenable to punishment, and is appreciative of his situation as a murderer condemned to death, he shall be permitted to escape just punishment because of a mental infirmity which has no bearing on any of these features of the case." *Id*. at 49.
24. New Mexico	"If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the state penitentiary is situated, whose duty it is to immediately file in the district court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon it shall be the duty of said court to inquire into said question and render judgment thereon." "When it is found that the defendant is insane, the order shall direct that the defendant be taken to the New Mexico behavioral health institute at Las Vegas, and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. §§ 31-14-4, 31-14-6 (2006).	"Sanity" for the purposes of execution is not defined by statute but has a clear definition in the common law of New Mexico. In *In re Smith*, the court held: "If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court, then he would not be sane and should not be executed." 176 P. 819, 823 (N.M. 1918). In New Mexico, "[i]n criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several

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		states of the Union, shall govern." N.M. Stat. Ann. § 30-1-3 (2006); *see also State v. Bryant*, 655 P.2d 161, 162 (N.M. 1982) ("A statute designed to effect a change from that which existed under the common law must be strictly construed; it must speak in clear and unequivocal terms and the presumption is that no change is intended unless the statute is explicit.").
25. New York	"The state may not execute an inmate who is incompetent. An inmate is 'incompetent' when, as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out." N.Y. Correct. Law § 656(1) (2007).	
26. North Carolina	"No person may be . . . punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C. Gen. Stat. § 15A-1001 (2006).	
27. Ohio	"As used in this section and section 2949.29 of the Revised Code, 'insane' means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict." Ohio Rev. Code Ann. § 2949.28(A) (2006). "If it is found that the convict is insane and if authorized by the supreme court, the judge shall continue any stay of execution of the sentence previously issued, order the convict to be confined	

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	in the area at which other convicts sentenced to death are confined or in a maximum security medical or psychiatric facility operated by the department of rehabilitation and correction, and order treatment of the convict." Ohio Rev. Code Ann. § 2949.29(B) (2006).	
28. Oklahoma	"[I]f it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order to the medical superintendent of the hospital named in such order." Okla. Stat. Ann. tit. 22, § 1008 (2006) (footnote omitted).	"Before an inmate may be put to death, he must have: 'sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.'" *Fisher v. State*, 845 P.2d 1272, 1276 n.3 (Okla. Crim. App. 1992) (quoting *Bingham v. State*, 169 P. 2d 311, 314-15 (Okla. Crim. App. 1946)).
29. Oregon	"Notwithstanding any other provision in this section, if the court finds that the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the sentence of death or its implications, the court may not issue a death warrant until such time as the court, after appropriate inquiries, finds that the defendant is able to comprehend the reasons for the sentence of death and its implications." Or. Rev. Stat. § 137.463(6)(a) (2005).	
30. Pennsylvania	No statute.	"The Commonwealth may not execute someone who does not 'comprehend[] the reasons for the death penalty and its implications.'" *Commonwealth v.*

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		Haag, 809 A.2d 271, 277 (Pa. 2002) (quoting *Commonwealth v. Jermyn*, 652 A.2d 821, 824 (Pa. 1995)).
31. South Carolina	No statute.	An inmate is incompetent to be executed if the inmate fails on either prong of a two-prong test: "The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel." *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993).
32. South Dakota	"If the commission [of physicians appointed by the Governor] finds the defendant mentally incompetent to proceed the Governor shall suspend the execution of sentence and may in his discretion order the defendant removed to the Human Services Center, there to remain confined until he is no longer mentally ill." S.D. Codified Laws § 23A-27A-24 (2006).	No case law.
33. Tennessee	No statute.	"[O]nly those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve." *Van Tran v. State*, 6 S.W.3d 257, 266 (Tenn. 1999).
34. Texas	"A defendant is incompetent to be executed if the defendant	

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	does not understand: (1) that he or she is to be executed and the execution is imminent; and (2) the reason he or she is being executed." Tex. Code Crim. Proc. art. 46.05(h) (2006).	
35. Utah	An inmate is incompetent to be executed "if, due to mental condition, an inmate is unaware of either the punishment he is about to suffer or why he is to suffer it." Utah Code Ann. § 77-19-201 (2006).	
36. Virginia	No statute.	No case law.
37. Washington	No statute.	"[A] defendant is competent to be executed if he 'is capable of properly appreciating his peril and of rationally assisting in his own defense [and] that this standard [ability to assist] applies equally in the context of a person's insanity at the time of the punishment as it does at the time of trial.'" *State v. Harris*, 789 P.2d 60, 65 (Wash. 1990).
38. Wyoming	"If the court finds that the convict does not have the requisite mental capacity, the judge shall suspend the execution of the convict." Wyo. Stat. § 7-13-903(a) (2006). "'Requisite mental capacity' means the ability to understand the nature of the death penalty and the reasons it was imposed." Wyo. Stat. § 7-13-901(a)(v) (2006).	