No. 14-70037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SCOTT LOUIS PANETTI,

Petitioner-Appellant,

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

On Appeal From The United States District Court
For The Western District of Texas, Austin Division
Case No. 1:04-cv-00042

BRIEF OF NATIONAL CONSERVATIVE MOVEMENT LEADERS AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

Thomas F. Allen, Jr.
JONES DAY
2727 N. Harwood St.
Dallas, TX 75201
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

Counsel for Amici Curiae *National Conservative Movement Leaders*

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation; that no *amicus curiae* on this brief has a parent corporation; and that no publicly held corporation owns ten percent or more of the stock of any *amicus curiae* on this brief.

Dated: February 4, 2015

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici, referred to here collectively as "National Conservative Movement Leaders," are: Mark L. Earley, Sr., Former Attorney General of Virginia and Former President and CEO of Prison Fellowship USA; David A. Keene, Opinion Editor, *The Washington Times*; James C. Miller III, Director of the Office of Management and Budget under President Ronald Reagan; C. Preston Noell III, President, Tradition, Family, Property, Inc.; Patrick J. Nolan, Director, Center for Criminal Justice Reform, American Conservative Union Foundation; Harold D. Stratton, Jr., Former Attorney General of New Mexico; Patrick A. Trueman, Attorney at Law; and Richard A. Viguerie, Chairman, ConservativeHQ.com.

The *amici* are legal experts, conservative policymakers, and thought leaders from across the United States. They have long been concerned about government encroachment in the lives of American citizens. Many of them have sworn oaths as policymakers to defend the rights of citizens—even those who have been convicted of heinous crimes. The *amici* believe that this case presents the Court with overwhelming evidence of the justice system's failure to adhere to American constitutional principles of due process.

[1] In accordance with Rule 29(a) of the Federal Rules of Appellate Procedure, all parties to this appeal have consented to the filing of this *amicus* brief. No person or entity other than *amici* or their counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission. Institutional affiliations, where applicable, are provided for purposes of identification only. The *amici* speak solely for themselves, not those affiliations or their employers.

Some of the *amici* support the death penalty. Others do not. They are united, however, in their belief that the execution of Scott Panetti would serve no penological purpose and would in no way promote public safety. Rather than serving as a proportionate response to murder, the execution of Panetti would only undermine the public's faith in a fair and moral justice system. And it would be a glaring and unwelcome example of excessive governmental power.

INTRODUCTION AND SUMMARY

Over half a century ago, in tracing the origins of the constitutional phrase "cruel and unusual," a plurality of the Supreme Court observed that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The Supreme Court continues to reaffirm this principle. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."). While the government has the authority to punish its citizens, the Eighth Amendment "stands to assure that this power be exercised within the limits of civilized standards." *Trop*, 356 U.S. at 100.

Executing a mentally incompetent prisoner violates the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Imposition of the death penalty on an insane person (1) offends humanity, as it would be "abhorren[t]" to condemn one "who has no capacity to come to grips with his own conscience or deity," *id.* at 409, (2) finds virtually no support in English common law, *see id.* at 407-08, and (3) fails to

fulfill the retributive and deterrent ends of capital punishment, *see id.* "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction [on executing the insane] finds enforcement in the Eighth Amendment." *Id.* at 410.

This case brings these concerns into stark relief. Scott Panetti has a long, well-documented history of severe mental illness—an illness that, the evidence shows, has substantially worsened over time. Panetti again finds himself before this Court, seeking a stay of execution, the appointment of counsel, and funding to hire an expert, all of which are necessary if he is to have a meaningful opportunity to file a petition for writ of habeas corpus raising a *Ford* claim that he is incompetent to be executed.

It has been *seven years* since Panetti's competency was last adjudicated. He has put forth new evidence of his deteriorating sanity that is sufficient, in both its character and scope, to make a preliminary threshold showing of incompetence. Indeed, that evidence reveals that Panetti lacks a rational understanding of his punishment, which, under Supreme Court precedent, is a prerequisite for his execution. And yet the District Court impermissibly relied on outdated competency determinations in denying his motion for a stay of execution. In short, executing Panetti would not serve justice and would flout that precedent. His execution should be stayed and he should be granted the relief he seeks.

ARGUMENT

I. Panetti Has Made A Sufficient Showing Of His Incompetence For Execution, And The Right To Due Process Entitles Him To The Relief He Seeks.

"[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford*, 477 U.S. at 409-10. Once a condemned prisoner makes the "requisite preliminary showing that his current mental state would bar his execution," the Eighth Amendment "entitles him to an adjudication to determine his condition." *Panetti v. Quarterman*, 551 U.S. 930, 934-35 (2007). Procedural due process demands that a prisoner who has made such a showing be afforded, at a minimum, a "fair hearing in accord with fundamental fairness." *Id.* at 949 (internal quotation marks omitted). This protection means an offender must be given an opportunity to be heard and "to submit evidence and argument from [his] *counsel*, including *expert* psychiatric evidence that may differ from the State's own psychiatric examination." *Id.* at 950 (emphasis added) (internal quotation marks omitted).

Panetti has submitted new evidence that he does not rationally understand why he is to be executed and that the delusions from which he suffers have grown more severe. But his lawyers need more time and resources to develop this evidence in support of his *Ford* claim. To affirm the District Court's decision, and thus deny Panetti such relief, would deprive him of a *meaningful* opportunity to be heard, robbing

him of the fundamental due process to which he is entitled. Accordingly, the District Court's decision should be reversed.

A. Panetti's Motion For A Stay Of Execution Was Neither Untimely Nor Frivolous.

Panetti's motion to stay his execution, the denial of which triggered the series of events that has led him to this Court, was timely. He filed the motion within days of his counsel learning—from the press—that the Texas court had signed the execution warrant, and one month before the scheduled execution. This was in no way a frivolous, "last-minute" stalling tactic.

In *Panetti*, the Supreme Court recognized that a *Ford* claim regarding a condemned prisoner's competency to be executed is different from most habeas claims in that it becomes ripe only when the execution is imminent. 551 U.S. at 946. Cognizant of the potential for a prisoner to file claim after claim challenging his competency each time his execution date is scheduled, the Court acknowledged that "last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course. The requirement of a threshold preliminary showing, for instance, will, as a general matter, be imposed before a stay is granted or the action is allowed to proceed." *Id.* at 946-47.

That was not the case here. Without any notice to Panetti or his pro bono counsel, on October 16, 2014, the state trial judge signed an execution warrant, setting Panetti's execution for December 3, 2014. Pet. Op. Br. at 7. Disturbingly, no one at

the state trial court, the county district attorney's office, or the state Attorney General's office saw fit to inform Panetti's lawyers that the execution date had been set. *Id.* This failure was particularly prejudicial to Panetti because the execution date triggers an important deadline affecting a condemned prisoner's rights. *See* Tex. Code Crim. Proc. art. 46.05(l-1) ("[T]he court of criminal appeals may not review any finding of the defendant's competency made by a trial court as a result of a motion filed under this article if the motion is filed on or after the 20th day before the defendant's scheduled execution date.").

It was not until two weeks had passed before Panetti's counsel discovered in a newspaper article that his execution had been scheduled. Pet. Op. Br. at 7. Nevertheless, within just a few days, and one month before Panetti's then-scheduled execution date, counsel filed in the state trial court a motion to stay the execution date and for other relief that would permit Panetti a meaningful opportunity to litigate his competency to be executed. *Id.* This was simply not a last-minute filing. Nor, as explained in Part I.C. below, can Panetti's efforts to stay his execution be deemed frivolous in light of the evidence recently adduced.

B. Panetti's Competency To Be Executed Must Be Evaluated On The Basis Of His Present Mental Condition.

In *Panetti*, the Supreme Court observed that the Eighth Amendment's prohibition on executing the insane "applies *despite* a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it." 551 U.S. at 934

(emphasis added). Accordingly, "[p]rior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his *present* mental condition." *Id.* (emphasis added). This rule comports with the Supreme Court's recognition that mental competency is not static. *See Indiana v. Edwards*, 554 U.S. 164, 175 (2008) ("Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways."). *Cf. Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977) ("The mental . . . status of individuals, whether in or out of custody, do[es] deteriorate and there is no power on earth to prevent it."). Because an individual's mental fitness can erode over time, and given the prospective nature of the potential Eighth Amendment violation at stake, it is critical that an inquiry into competency for execution be separate from prior determinations and focus on contemporaneous indicia of sanity rather than rely on past evidence. *See Green v. Thaler*, 699 F.3d 404, 421-22 (5th Cir. 2012) (Owen, J., concurring) ("Each competency proceeding may well be a discrete proceeding that is largely if not entirely independent of the outcome of prior incompetency proceedings.").

C. Because Panetti Has Presented Sufficient Evidence Of His Incompetence, Due Process Demands That He Be Given The Time And Resources Necessary To File A Habeas Petition.

Under *Panetti*, an offender who cannot rationally understand why the State seeks to execute him is ineligible for capital punishment. *See* 551 U.S. at 960 (holding that a condemned prisoner must "*comprehend*[ ] *the* . . . *purpose* of the punishment to

which he has been sentenced.") (emphasis added). Panetti presented to the state courts (and summarized for both the District Court and this Court) *new* evidence that shows he lacks such a rational understanding.[2] Accordingly, he has made a sufficient showing of his incompetence to warrant the relief he seeks from this Court. This relief is integral to Panetti's ability to file a comprehensive petition for writ of habeas corpus. Indeed, to deny him that relief would violate his right to due process. *Id.* at 949.

Myriad signs of Panetti's mental deterioration over the past seven years could be recounted here, but it suffices to point out just a few noteworthy exemplars:

- The narrative portion of a November 2013 mental health report in part states: "Escorting officer mentioned [Panetti] . . . *often* acts irrational and delusional." Pet. RE at 53 (emphasis added).
- Despite refusing to seek mental health treatment or to take antipsychotic medication for the better part of twenty years, Panetti has, in just the last couple years, on multiple occasions requested mental health assistance and medication. *Id.*; Pet. Op. Br. at 13-14.
- Panetti believes the Texas Department of Criminal Justice ("TDCJ") implanted a listening device in his tooth that is also sending command messages to his brain. Pet. Op. Br. at 25, 27, 30, 50 n.5.
- Panetti reads the Gospel to keep from being overwhelmed by the voices he says and acts as though he hears. Pet. RE at 53; Pet. Op. Br. at 26-27, 29-30, 64.
- Panetti believes that CNN aired a report in which anchor Wolf Blitzer displayed Panetti's stolen TDCJ ID card. Pet. Op. Br. at 30.

[2] It should be noted that he did so without the resources he presently seeks, which are necessary to fully develop the facts in support of his *Ford* claim.

- Panetti claims to be the father of the actress and singer Selena Gomez. *Id.*

The foregoing examples are sufficient to make a prima facie showing of a substantial change in circumstances since his last competency determination. But the most significant evidence of Panetti's incompetence is his belief that the State seeks to execute him because TDCJ wants to (1) silence him from talking about the department's corruption, and (2) stop him from preaching the Gospel.[3] Pet. Op. Br. at 28. In other words, Panetti appears to suffer from delusions that "so impair [his] concept of reality that he cannot reach a rational understanding of the reason for his execution." *Panetti*, 551 U.S. at 958.[4]

The principles articulated in *Ford* "are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution as opposed to the real interests the State seeks to vindicate." *Id.* at 959 (citation omitted). Thus, as opposed to merely being aware of (1) the fact that he is going to die soon, and (2) the State's articulated reason for putting him to death, Panetti must "comprehend[ ] the meaning and purpose of the punishment to which he has been sentenced." *Id.* at 960.

---

[3] That Panetti misapprehends why the State seeks to execute him shows how materially his competence has changed since 2008, when the District Court determined that Panetti had a rational understanding that he had been sentenced to die because of the murders he committed. *See* Pet. RE at 34.

[4] Over seven years ago, the Supreme Court observed that there was "much in the record to support the conclusion that [Panetti] suffers from severe delusions." *Panetti*, 551 U.S. at 956. Recent evidence points to the growing severity of those delusions.

Here, the record reflects that, although Panetti understands the meaning of the State's intention to execute him, he fails to comprehend its purpose. He believes that the State's desire to execute him is a scheme to shut him up for his criticism of TDCJ and his evangelizing. The evidence thus strongly suggests that Panetti's "[g]ross delusions stemming from a severe mental disorder" have "put an awareness of a link between [his] crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id.* Panetti has put forth significant new evidence of his severe delusions and demonstrated that he lacks the rational understanding of the purpose of his punishment, which is a prerequisite to execution. Therefore, he has made a sufficient preliminary showing of his incompetence to be executed and due process compels the relief he seeks in furtherance of his *Ford* claim.

D. The District Court Erred By Relying On Outdated Evidence Of Panetti's Competency.

It has been *seven years* since Panetti's last competency evaluation. And yet, in assessing whether Panetti had made a threshold showing of incompetence, the District Court improperly relied on past competency evidence and determinations. Panetti must have a meaningful opportunity to demonstrate the extent to which his sanity has deteriorated since then and why executing him now would violate the Eighth Amendment.

The District Court acted contrary to the principle, articulated by the Supreme Court in *Panetti*, that an offender's competency to be executed must be evaluated on

the basis of his *present* mental condition. *See* 551 U.S. at 934. After briefly considering the new evidence Panetti had proffered in support of his motion for a stay, *see* Pet. RE at 31-32, the District Court found, "in light of the wealth of evidence on the issue of Panetti's competency *previously* amassed in this case," *id.* at 32 (emphasis added), that this new evidence was insufficient to make the threshold showing. Focusing on the evidence entertained during hearings in 2004 and 2008, the District Court attempted to buttress its conclusion that Panetti had failed to make a sufficient preliminary showing of incompetence by pointing to two pieces of evidence from 2008: (1) recorded conversations between Panetti and his family during which Panetti was "responsive" and displayed a "fairly sophisticated" understanding of his circumstances; and (2) Panetti's cooperativeness (or lack thereof) when interacting with his own experts versus the State's experts. *Id.* at 33-34. "Were this a case with a less-developed factual record," the District Court concluded, "[its] decision might well be different." *Id.* at 35.

The District Court assessed Panetti's new evidence as merely part of the court's reconsideration of evidence proffered at prior adjudications of his sanity. Worse, the District Court utilized seven-year-old evidence to cast aside Panetti's current evidence of incompetence. This flies in the face of the same court's prior recognition, compelled by the Supreme Court decisions, that "the question is whether [Panetti, in his] *current* mental state is not competent to be executed." *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at *33 (W.D. Tex. Mar. 26, 2008). Because the

District Court's decision was erroneously premised on stale evidence and outdated competency determinations, it should be reversed. *See Panetti*, 551 U.S. at 934.

II. Justice Would Not Be Served By Executing Panetti.

Capital punishment is the gravest sanction that the government may impose on its citizens. Because the death penalty is unparalleled in terms of its severity and irrevocability, its administration must be just. *See Ford*, 477 U.S. at 411 (describing "the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *see also Roper*, 543 U.S. at 568 ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."). And when, as here, a prisoner submits compelling evidence that he lacks the competency to be executed, he must be able to depend on the courts to enforce the Eighth Amendment over the wishes of jury and state. *See McCleskey v. Kemp*, 481 U.S. 279, 343 (1986) (Brennan, J., dissenting) ("Those whom we would banish . . . from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.").

Executing Panetti would not only be an affront to these bedrock values, but also fail to serve either of the principal goals of capital punishment: retribution and deterrence. Even for those who favor a measured and just system of capital

punishment, the execution of Panetti would be a moral scandal that would only undermine confidence in such a system.

A. *Ford*, *Atkins*, *Roper*, and *Panetti* Demonstrate That The Incompetent Should Not Be Subject To Capital Punishment.

Ford and *Panetti* are not the only cases in which the prisoner's competency informed the Supreme Court's inquiry into the constitutionality of a particular application of the death penalty. In *Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002), the Court determined that the Constitution places a substantive restriction on executing mentally retarded offenders whose impairments "can jeopardize the reliability and fairness of capital proceedings against [them]." The mentally retarded, like the insane, "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. In light of these deficiencies, the Court emphasized that (1) the primary justifications it had previously recognized as bases for the death penalty—namely, retribution and deterrence—do not apply to mentally retarded offenders, *see id.* at 318-19, and (2) the mentally retarded may not be capable of providing meaningful assistance to their counsel, *see id.* at 320.[5]

[5] The Supreme Court's reference in *Atkins* to the principle that an incompetent offender is less capable of providing meaningful assistance to his counsel echoes *Ford*, in which the Court cited Blackstone for one of the common-law rationales underlying the prohibition against executing the mentally incompetent: "had the prisoner been of sound memory, he might have alleged something

The Supreme Court cited similar concerns in *Roper*, declaring capital punishment unconstitutional for offenders who were under the age of 18 at the time they committed the underlying crime. There, the Court pointed out that, as compared to adult offenders, juveniles have less control, are more susceptible to negative influences, possess personalities that are more transitory, and are less responsible. 543 U.S. at 569-73. The same can be said of the insane.

The unifying theme of these cases is that a prisoner's mental incompetence—whether gauged by sanity, intelligence, or maturity—bars his eligibility for capital punishment. When, as here, such competency is called into question by recent, convincing evidence, the Supreme Court's precedents urge caution before proceeding with an execution.

B. None Of The Purposes Of Capital Punishment Is Served By Executing Panetti.

Above all other ends, the death penalty serves two distinct social purposes: retribution to the convicted and deterrence of capital crimes by prospective offenders. *See Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008). Executing Panetti achieves neither goal.

State-sanctioned punishment is justified, in part, under the rationale of retribution, "which reflects society's and the victim's interests in seeing that the

---

in stay of judgment or execution." 477 U.S. at 407 (quoting 4 W. Blackstone, Commentaries *25); *see also* Part II.C. *infra.*

offender is repaid for the hurt he caused," *id.* at 442, or, in other words, that he receives his "just deserts," *Atkins*, 536 U.S. at 319. But especially in the context of capital punishment, that retributive end is not served when the offender is insane and, as a result, fails to rationally apprehend the State's purpose in putting him to death. *See Panetti*, 551 U.S. at 957 ("[T]oday, no less than before, 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.") (quoting *Ford*, 477 U.S. at 409).

The objective of retribution is called into question if the offender's psyche is so distorted by a mental affliction that his comprehension of the crime and its penalty "has little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S. at 959. Indeed, "the need to offset a criminal act by a punishment of equivalent moral quality" is not fulfilled by executing a mentally incompetent offender, "which has a lesser value than that of the crime for which he is to be punished." *Ford*, 477 U.S. at 408 (internal quotation marks and citation omitted). When such proportionality is absent, retribution is not served and the law "risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy*, 554 U.S. at 420; *see also id.* ("It is . . . retribution . . . that most often can contradict the law's own ends."). Accordingly, it cannot be said that executing an insane prisoner fulfills the retributive goals of the

death penalty. *Cf. Roper*, 543 U.S. at 571 (same for the execution of juveniles); *Atkins*, 536 U.S. at 319 (same for the execution of the mentally retarded).

Neither does it deter capital offenses. In *Ford*, the Supreme Court noted the common law's long-standing recognition that executing an insane person "provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment." 477 U.S. at 407; *see also* 3 E. Coke, Institutes 6 (6th ed. 1680) ("[B]y intendment of the Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream [sic] inhumanity and cruelty, and can be no example to others.") (quoted in *Ford*, 477 U.S. at 407). Simply put, it is illogical to maintain that executing someone who fails to rationally understand the connection between his crime and punishment would affect "the cold calculus that precedes the decision of other potential murderers." *Atkins*, 536 U.S. at 319 (internal quotation marks omitted). Thus, executing the mentally incompetent cannot appreciably further the goal of deterrence. *Cf. Roper*, 543 U.S. at 571-72 (same for the execution of juveniles); *Atkins*, 536 U.S. at 319-20 (same for the execution of the mentally retarded).

Executing Panetti, who appears not even to rationally understand why he is to be put to death, will exact no appreciable retribution and will prevent no future capital offenses from being committed. And because his execution would not "measurably contribute[ ] to one or both of these goals, it [would be] nothing more than the

purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (internal quotation marks omitted).

C. Panetti's Inability To Assist His Counsel Further Suggests That Execution Is Inappropriate.

Courts should also be particularly vigilant about executing insane offenders because there is an enhanced risk of wrongfully executing such persons. The Supreme Court's concerns in the context of the mentally retarded and juveniles apply here as well. As the Court explained in *Atkins*,

> [t]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

536 U.S. at 319 (internal quotation marks and citation omitted). So also in *Roper*:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.

543 U.S. at 572-73.

These principles apply with particular force here. Despite suffering from "a fragmented personality, delusions, and hallucinations," *Panetti*, 551 U.S. at 936, Panetti presented his own defense at trial, with predictably disastrous results, and thereby likely undermined any ability to assert a claim of insanity at that time. *See id.* (noting that, according to his standby counsel, Panetti's "behavior both in private and in front of the jury made it evident that he was suffering from mental incompetence, and the net effect of this dynamic was to render the trial truly a judicial farce, and a mockery of self-representation") (internal quotation marks omitted). At this stage, the severity of Panetti's mental illness poses at least an equal risk of wrongful execution because it is particularly difficult for him to assist his lawyers in their efforts to file a meaningful habeas petition. Indeed, that is one of the reasons they have sought additional time and resources.

* * *

Because he has put forth new evidence that his mental condition has worsened since 2008 and that he cannot rationally understand why the State of Texas intends to execute him, Panetti has made a preliminary showing that he is incompetent to be executed. As a result, due process entitles him to the relief he seeks, including a stay of his execution. Indeed, executing Panetti would offend the Eighth Amendment and basic values of American justice. *See Ford*, 477 U.S. at 417 ("It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty . . . .").

CONCLUSION

For the forgoing reasons, the judgment of the District Court should be reversed, Panetti should be given the time and resources he seeks, and the case should be remanded so that he can prepare a petition for writ of habeas corpus raising a claim that he is incompetent to be executed.

Dated: February 4, 2015

Respectfully submitted,

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.
JONES DAY
2727 N. Harwood St.
Dallas, TX 75201
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

Counsel for Amici Curiae *National Conservative Movement Leaders*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in a 14-point Garamond font in the text, and in a 12-point Garamond font in the footnotes.

Dated: February 4, 2015

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.

CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: February 4, 2015

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: February 4, 2015

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.