No. 06-6407

IN THE

Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

vs.

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 *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

Does the Eighth Amendment permit the execution of a murderer who has a factual awareness of his guilt and the reason for his execution but who has a delusional belief as to why the state is executing him?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, *amici* supporting petitioner seek to expand the constitutional limit on the execution of a person who is

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside monetary contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

presently insane beyond the boundaries of the national consensus of what constitutes insanity for this purpose. The broad and poorly defined contours of this revised standard could only be made definite by many years of litigation. In the meantime, executions of many murderers who are not insane would be delayed, and the states' interests in both retribution and deterrence would be defeated. This result would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In August 1992, Scott Panetti's wife, Sonja, left him because of his drinking, threatening behavior, and physical abuse, including hitting her in the face with a rifle. See *Panetti* v. *State*, No. 72,230 (Tex. Crim. App., Dec. 3, 1997), p. 2, available at http://www.cjlf.org/briefs/Panetti/PanettiDirectAppeal.pdf. "Sonja took their three-year-old daughter and moved in with her parents, Joe and Amanda Alvarado." *Ibid.* During a confrontation at the Alvarado household, Panetti shot Mr. and Mrs. Alvarado at close range, splattering blood on Sonja and the child. See *id*., at 3-4.

Following a jury trial on the question of competence, Panetti moved to dismiss his lawyers and represent himself. See *id*., at 26. The trial court attempted to dissuade Panetti and warned him of the dangers, but he persisted. The court granted the motion and appointed standby counsel. See *id*., at 26-27. The Court of Criminal Appeals found that the trial court had properly granted the motion after finding an intelligent and voluntary waiver of the right to counsel. See *id*., at 27-28. Panetti testified on his own behalf and claimed that an alternate personality named "Sarge" had killed the Alvarados. See *id*., at 5-6. Following affirmance on direct appeal, the state and federal courts denied habeas relief in unpublished opinions.

The state trial court found Panetti competent to be executed. J. A. 99-100. The Federal District Court found that the state court's consideration was inadequate and set its own

evidentiary hearing. J. A. 131-135. Following a hearing and consideration de novo, see J. A. 361, the court denied the petition, applying the Fifth Circuit standard. "Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed." J. A. 373. The Court of Appeals affirmed, *Panetti* v. *Dretke*, 448 F. 3d 815 (CA5 2006), and this Court granted certiorari. J. A. 387.

SUMMARY OF ARGUMENT

Petitioner's argument that execution of a murderer in his mental state serves no retributive interest finds no support in modern retribution theory as generally understood. His guilt of the crime and deservedness of the punishment are sufficient to justify the punishment. Petitioner relies on an idiosyncratic revision of retribution theory by an opponent of capital punishment to support his argument, and this revision contains obvious fallacies.

Promulgation of a new, broad, and vague standard for competency to be executed would trigger a new wave of last-minute litigation. The delays caused by this move would impair the deterrent effect of the death penalty and cost the lives of innocent people.

ARGUMENT

I. A single difficult case should not be an occasion for a sweeping new mandate, removing yet another decision from the people and imposing yet another federal standard.

Petitioner's brief tells a disturbing tale of the trial of a marginally competent defendant who represented himself at trial and was sentenced to death. See Brief for Petitioner 6-16.

Petitioner and supporting *amici* urge this Court to enact a sweeping new rule, dramatically expanding the modest federal limit on execution of the mentally incompetent. They ask this Court to remove this area of law from democratic control, variation among the states, and refinement by legislation as knowledge of the human mind continues to advance. *Amicus* CJLF suggests that the Court keep in mind that it was just such a sweeping and unjustified constitutionalization that caused the problem in this trial in the first place.

But for the decision in *Faretta* v. *California*, 422 U. S. 806 (1975), states would be able to place limits on self-representation and require counsel for marginally competent defendants who can just barely meet the voluntary and intelligent election requirement, see *id*., at 807, but who are mentally incapable of mounting a coherent defense. At present, any attempt to deal with this problem legislatively would risk massive reversal if the statute were found to be in violation of *Faretta* years later, and a legislator would be foolish to introduce such legislation, however meritorious the reform would be.

The problems of the human mind and mental illness and their relation to criminal law are difficult ones without clear answers. Although we have learned much since the Eighth Amendment was adopted, we still have much to learn. Constitutional case law is a blunt instrument. It can be changed only by deciding new cases, which by the nature of the judicial process means changes must be retroactive for the case in which the change is made and all others similarly situated. See *Griffith* v. *Kentucky*, 479 U. S. 314, 326 (1987). This makes case law ill-suited for issues dependent on advancing scientific knowledge.

A sweeping constitutional edict was the problem in this case. But for *Faretta*, Panetti might have been represented by counsel who could have made a compelling case that his schizophrenia was a potent mitigating circumstance, rather than the obviously bogus alternate personality defense that Panetti himself presented. Standby counsel says the trial was a farce

and a mockery of justice. This was not the state's choice. The state statute merely tracks *Faretta.* See Tex. Code Crim. Proc., Art. 1.051(g). The trial judge was compelled by *Faretta* to grant self-representation over the objection of counsel for both sides. See Brief for Petitioner 11.

Hard cases make bad law, and bad law makes hard cases. This case should not be the occasion for making more bad law. This Court is presented with a case of a mentally ill defendant whose mitigating mental illness was not adequately presented to the jury because of this Court's overreaching decision three decades ago. If the sentence is unjust, the safety valve is executive clemency. The way to prevent future cases like this one is to overrule or substantially modify *Faretta.* A decision federalizing and constitutionalizing a definition of incompetence any broader than the one in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), would cause more injustice than it cures, as discussed in Part III, *infra*.

II. Petitioner's delusional belief has no bearing on the State's retribution interest in carrying out its judgment.

In *Ford* v. *Wainwright*, 477 U. S. 399, 407 (1986), the Court noted that the rule against executing an insane person was universal in Anglo-American law, but "the reasons for the rule are less sure and less uniform than the rule itself." The *Ford* Court notes that a commentator claims that the retributive interest is not served, *id*., at 408, and it further notes "serious[] question" on the subject, citing a student note, see *id*., at 409, but the basis of the holding is the universality of the rule, see *id*., at 408-410, not any one of the various rationales for it.

In his concurring opinion in *Ford*, Justice Powell wrote that "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." See 477 U. S., at 421. No explanation or citation is given for this statement. The best petitioner can come up with is a decades-old article by a death penalty

opponent. See Brief for Petitioner 45. Our own review of the writings of leading modern advocates of the retributive theory of punishment find no support for the notion that the perpetrator's mental state at the time of punishment is a major or even significant consideration in the retributive value of punishment. Such a position could be derived from retributive principles only in the most extreme forms of insanity, not the kind at issue in this case.

Retribution as a purpose of punishment was once disparaged as mere revenge, but more recently has been widely accepted by criminal law theorists. See 1 W. LaFave, Substantive Criminal Law § 1.5(a)(6), pp. 41-43 (2d ed. 2003). The basic premise of retribution theory is that "the return of suffering for moral evil voluntarily done, is itself just or morally good." H. Hart, Punishment and Responsibility 231 (1968).

> "Retributivism . . . is the view that punishment is justified by the desert of the offender. The good that is achieved by punishing, on this view, has nothing to do with future states of affairs, such as the prevention of crime or the maintenance of social cohesion. Rather, the good that punishment achieves is that someone who deserves it gets it. Punishment of the guilty is thus for the retributivist an *intrinsic* good, not the merely *instrumental* good that it may be to the utilitarian or rehabilitative theorist." M. Moore, Placing Blame: A General Theory of the Criminal Law 87-88 (1997) (emphasis in original).

Unlike utilitarian justifications such as incapacitation and deterrence, retribution is not focused on prevention of crime by the offender or others. See Hart, *supra*, at 234. Unlike rehabilitative justifications, retribution is not focused on the mind of the offender. Moore denounces rehabilitation as paternalistic and says such theories have "no proper part to play in any theory of punishment, even in the minimal sense of constituting a prima facie justification of punishment." Moore, *supra*, at 85-86. Similarly, Hart, *supra*, at 26, notes that

"[r]eforming methods include the inducement of states of repentance, or recognition of moral guilt," and he rejects reform as a justification for punishment.

The focus of retributivism is on society as a whole and what makes for a just society. "[J]ustice requires individuals to accept the pattern of liberty and restraint specified by political authorities . . . . The central wrong in crime . . . [is] that the criminal unfairly usurps liberty to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law." Bradley, Retribution: The Central Aim of Punishment, 27 Harv. J. L. & Pub. Pol'y 19, 23 (2003). "The criminal's act of usurpation is equally unfair to everyone else, in that he has gained an undue advantage over those who remain inside the legally required pattern of restraint. ¶ Depriving the criminal of this ill-gotten advantage is therefore the central focus of punishment." *Ibid*.

Discussion of the effect of punishment on the offender is conspicuously absent from most writings on retribution, as is any discussion of the offender's mental state at the time of punishment. Retributivists discuss mental state and mental illness in the context of the *mens rea* of the crime in determining whether a person is morally to blame for the harm he has caused. See, *e.g.*, Moore, *supra*, at 609 ("was the accused so irrational that he cannot justly be held responsible?"). "Desert is thus at least a necessary condition of just punishment. Desert in criminal law is in turn based on a *retrospective* evaluation of the agent's behavior." Morse, Inevitable Mens Rea, 27 Harv. J. L. & Pub. Pol'y 51, 61 (2003) (emphasis added). To retributivists, the past counts and it continues to count regardless of future benefits.

Yet counsel for petitioner attempts to place the offender's mental state at the time of punishment at the center of retribution. He does not cite a single work of a single major retributive theorist in this argument. See Brief for Petitioner 45. His primary support is an article by an opponent of the death penalty who claims that retribution does not justify the death

penalty under *any* circumstances. See Gale, Retribution, Punishment, and Death, 18 U. C. Davis L. Rev. 973, 974 (1985). Gale's main thesis is that the finality of death negates its value as retribution, because it extinguishes the offender and the offender's ability to appreciate the justness of punishment at the moment the death sentence is executed. See *id*., at 1028. Gale effectively admits that standard retribution theory does not support her thesis, and therefore she must "revise the model of retributive theory," *ibid*., to reach her desired destination.

It is Gale's revision, not retribution as commonly understood, that places the offender's mental state at the time of punishment front and center. "Even though retribution appeals indirectly to law-abiding members of society who witness that justice was done to the offender, retribution's direct appeal is to the offender's consciousness." *Id*., at 1031. This idiosyncratic view is the basis for the passage of the article relied on so heavily by petitioner. Gale contends that retribution "recognizes that we inflict punishment not merely to denounce criminal offenses, but to displace from our collective conscience opposing crime *and implant into the offender's conscience* the blame that justly attaches to her conduct." *Ibid*. (emphasis added, footnote omitted). Gale cites no authority for the italicized portion of the statement. The offender's conscience has little, if any, place in retribution theory. Retribution is based on moral blameworthiness, and the most blameworthy offenders are those who have no remorse and no conscience. Cf. *Brown* v. *Payton*, 544 U. S. 133, 142-143 (2005).

Gale's barely recognizable version of retribution theory culminates in a statement so preposterous that it is sufficient by itself to refute the argument leading to it. "To give someone her just deserts implies her recognition that those deserts are just." Gale, 18 U. C. Davis L. Rev., at 1031. If that were true, we could dispense with adversary sentencing proceedings altogether, and the judge would simply ask the convicted defendant what he thinks he deserves. Our prisons are full of

people who do not think their deserts are just. Obviously, society imposes the punishment that *society* thinks is just, and the defendant's opinion is irrelevant. Yet Gale's patently absurd thesis is central to defendant's argument. See Brief for Petitioner 45.

This is not to say that mental condition at the time of execution never undermines the retributive interest. In *Ford*, both the opinion of the Court and Justice Powell's concurrence refer to lack of retributive value as a reason for the common law rule. The Court, see 477 U. S., at 408, refers to a brief and unilluminating paragraph in Hazard & Louiselle, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 387 (1962). Vague references to "moral quality" and the "lesser value" of the execution of an insane person tell us little about what kind of mental illness negates the retributive value of executing the sentence. Justice Powell's discussion supports the Fifth Circuit's theory in this case. "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied." *Ford*, *supra*, at 422. This conclusion is based more on a survey of state practices than on a critical examination of retributive interest, however. See *id*., at 421-422.

The connection between retribution and mental state at the time of execution, *amicus* submits, goes to the concept sometimes called "personhood" or the status of the defendant as a "moral agent," the same concepts that form the basis for allowing insanity at the time of the crime to be an excuse. See Moore, *supra*, at 595, 608. "Only people can violate expectations of what they owe each other, and only people can do wrong. Machines do not deserve praise, blame, reward or punishment." Morse, 27 Harv. J. L. & Pub. Pol'y, at 53. We generally think of people as rational agents, morally responsible for their actions. This is not true of all people however, and we would not hold an infant to blame for, *e.g.*, playing with a loaded gun and shooting someone, even if that person died as

a result. The irrationality of mental illness can warrant a similar moral exemption. See Moore, *supra*, at 595, 608.

If retribution is fundamentally backward-looking, if it is based on the principle that a person who deserves to be punished should be punished, and if the defendant's mental state at the time of the crime was such that he was morally responsible, then how can a subsequent change in mental state negate the retributive interest? That can only be possible if the change is so fundamental that the defendant is no longer the same "person" for the purpose of retribution as the one who committed the crime. It is the same house, but someone else is living there now. That could be true in some cases, but not this one. Panetti knows what he did and knows that he has been sentenced to death for the crime. See J. A. 373. His delusional belief of a conspiracy against him does not negate his moral responsibility for the crime he chose to commit and still knows he committed. Other arguments may be made for not executing a person in Panetti's condition, but lack of a retributive value in executing this judgment is not among them.

III. Creation of a broad, vague constitutional standard for competence for execution threatens the deterrent effect of the death penalty.

In recent years, there has been a sea change in research on the deterrent effect of the death penalty. One expert testifying before Congress in 2004 summarized the developments.

> "Recent research on the relationship between capital punishment and crime has created a strong consensus among economists that capital punishment deters crime. Early studies from the 1970s and 1980s reached conflicting results. However, recent studies have exploited better data and more sophisticated statistical techniques. The modern studies have consistently shown that capital punishment has a strong deterrent effect, with each execution deterring between 3 and 18 murders. This is true even for crimes that

might seem not to be deterrable, such as crimes of passion." Shepherd, Capital Punishment and the Deterrence of Crime, Written Testimony for the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on H. R. 2934, the "Terrorist Penalties Enhancement Act of 2003" (April 21, 2004).

Abstracts and citations of deterrence studies published in peer-reviewed journals are collected at CJLF's Web site, http://www.cjlf.org/deathpenalty/DPDeterrence.htm. Among the most commonly cited studies showing a deterrent effect are Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003) and Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453 (2003). As may be expected for such a controversial topic, the expert opinion is not unanimous. Tellingly, though, the authors of the two most severe criticisms have chosen to bypass the peer-review process and publish their critiques in law reviews. See Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791 (2005); Fagan, Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment, 4 Ohio St. J. Crim. L. 255 (2006).[2]

For the purpose of federal judicial review of state criminal cases, it is not necessary that deterrence be proven. It is sufficient that there be an empirical basis for the state decision-makers to believe that the penalty serves a valid penological purpose, see *Gregg* v. *Georgia*, 428 U. S. 153, 186-187 (1976) (lead opinion) (Court cannot say that the judgment of the

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2. Responses to the recent criticisms are presently in the "working paper" stage. See, *e.g.*, Mocan & Gittings, The Impact of Incentives on Human Behavior: Can We Make It Disappear? The Case of the Death Penalty, NBER Working Paper No. 12631 (Oct. 2006), available at http://www.nber.org/ papers/w12631.

Legislature is clearly wrong), and the present state of deterrence research is much more than sufficient for that standard.

The mental health *amici* recommend, as a matter of policy, that a murderer should not be executed if his mental condition "significantly impairs his or her capacity . . . to appreciate the reason for [the punishment's] imposition in the prisoner's own case . . . ." Brief for *Amici Curiae* American Psychological Association, American Psychiatric Association and Mental Alliance on Mental Illness 16. Their brief is devoid of any justification for leaping the chasm between inability and significant impairment. This proposal smacks of the American Law Institute's "substantial capacity" test for the substantive insanity defense. Cf. LaFave, *supra*, § 7.5(a), at 557-558. That test has been widely repudiated in jurisdictions that once accepted it, including the federal system. See 18 U. S. C. § 17(a) (restoring traditional inability test); Cal. Penal Code § 25(a) (same); LaFave, *supra*, § 7.2(a), at 527, n. 7. "Significant" is a broad and vague term. Such a standard would necessarily involve litigation delays in many more cases than at present, and the boundaries of what is "significant" may take many years to resolve. If the standard is deemed a constitutional one, it can only be settled with finality by decisions of this Court. Standards set by legislatures, state high courts, and federal courts of appeals would only be tentative.

Competency for execution claims are uniquely disruptive of the timely execution of a death penalty because they only become ripe when execution is imminent. See *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 643 (1998); cf. *Hill* v. *McDonough*, 547 U. S. __, 126 S. Ct. 2096, 2104, 165 L. Ed. 2d 44, 54 (2006) (method of execution claim may be precluded if "filed too late in the day"). Special care is therefore needed before authorizing a major expansion of this type of claim.

There is substantial reason to believe that both delays in execution and the overturning of death sentences impair the deterrent effect of capital punishment and thereby indirectly

cause the deaths of innocent people. See Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283, 314-318 (2004); Mocan & Gittings, *supra*, 46 J. L. & Econ., at 469. The fact that we cannot single out the individuals who would be saved by an effective death penalty does not make their lives any less real or any less worthy of protection. See Sunstein & Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703 (2006). The deterrent effect is already too attenuated, as appeals drag on and courts defy the limits Congress has placed on their authority. See, *e.g.*, *Woodford* v. *Visciotti*, 537 U. S. 19, 20 (2002) (*per curiam*). The last thing we need is a new frontier for last-minute litigation under a broad and vague standard. There is strong reason to believe that the delays caused by such a standard would kill many innocent people.

IV. The constitutional rule should be limited to types of insanity on which the states are agreed.

The best argument against the execution of an insane person is the oldest and simplest. "The more general concern of the common law—that executions of the insane are simply cruel—retains its vitality." *Ford* v. *Wainwright*, 477 U. S. 399, 421 (1986) (Powell, J., concurring in part and concurring in the judgment). For this reason, all states agree with the general principle. But drawing the line around what constitutes "insane" is a difficult task best left to the legislative branch in defining the legal limit and the executive branch in granting clemency in appropriate cases. The Eighth Amendment prohibits punishments that are both cruel *and* unusual in the conjunctive, and the second prong is the more readily determined. The national consensus remains limited to the one described by Justice Powell in *Ford*, *id*., at 422, "the need to require that those who are executed know the fact of their

impending execution and the reason for it."[3] The extent of the federal constitutional rule should be limited to the extent of that consensus.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

March, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

3. *Amicus* CJLF understands that this point will be demonstrated in the State's brief and therefore will not repeat it here.