Nos. 10-930 and 11-218

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

ERNEST VALENCIA GONZALES
(CAPITAL CASE)

TERRY TIBBALS, WARDEN, PETITIONER

v.

SEAN CARTER
(CAPITAL CASE)

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital inmate pursuing federal post-conviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel (No. 10-930).

2. Whether this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a capital inmate a "right to competence" in federal postconviction proceedings and entitles such a prisoner to a stay of those proceedings if he is not competent to assist his counsel (No. 11-218).

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INTEREST OF THE UNITED STATES

Ryan v. *Gonzales*, No. 10-930, presents the question whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital prisoner pursuing federal postconviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel. *Tibbals* v. *Carter*, No. 11-218, pres-

ents the question whether this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a capital inmate a "right to competence" in federal postconviction proceedings and entitles such a prisoner to a stay of those proceedings if he is not competent to assist his counsel. Although these cases arise on federal habeas review of state convictions under 28 U.S.C. 2254, federal capital prisoners challenging the legality of their detention under 28 U.S.C. 2255 (2006 & Supp. II 2008) also have a statutory right to counsel. See 18 U.S.C. 3599(a)(2). Furthermore, if the Court were to conclude that *Rees* affords state capital prisoners a right to competence in federal postconviction proceedings, that holding would presumably extend to federal capital prisoners. The United States therefore has a substantial interest in the Court's resolution of the questions presented. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of *Gonzales*, No. 10-930.

STATEMENT

A. *Ryan* v. *Gonzales*, No. 10-930

1. In 1990, respondent Gonzales stabbed to death Darrel Wagner and severely injured Deborah Wagner while he was burglarizing their home. *State* v. *Gonzales*, 892 P.2d 838, 842 (Ariz. 1995), cert. denied, 516 U.S. 1052 (1996). His first trial for felony murder and other offenses resulted in a hung jury. *Id.* at 842-843; Pet. App. C10. Before retrial, Gonzales, acting pro se, unsuccessfully moved to disqualify the trial judge based on adverse rulings and on-the-record comments from the first trial. Pet. App. C10-C12. After a retrial, Gonzales was convicted on all counts. *Id.* at C12; *Gonzales*, 892 P.2d at 842-843. Before sentencing, Gonzales again unsuccessfully moved to disqualify the trial judge. Pet.

App. C12. The trial court sentenced Gonzales to death for the felony-murder conviction and imposed prison terms for the other counts. *Gonzales*, 892 P.2d at 843.

Gonzales's appellate counsel raised several issues on direct appeal, including the judicial-bias claim. *Gonzales*, 892 P.2d at 843. The Supreme Court of Arizona rejected the judicial-bias argument and affirmed. *Id.* at 843, 847-848, 852. This Court denied certiorari.

After the judgment became final, Gonzales sought state postconviction review. Pet. App. B3. His asserted grounds included a judicial-bias claim. *Id.* at C15. The state courts denied relief. *Id*. at B3.

2. In 1999, Gonzales filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. 2254. Pet. App. B3. The Office of the Federal Public Defender was appointed to represent him pursuant to 18 U.S.C. 3599(a)(2), which provides that in federal postconviction proceedings "seeking to vacate or set aside a death sentence" imposed by either a state or a federal court, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services." Counsel's appointment covers not only the district-court proceedings, but also additional proceedings, including "applications for stays of execution and other appropriate motions and procedures," as well as "such competency proceedings and proceedings for executive or other clemency as may be available." 18 U.S.C. 3599(e).

In 2000, Gonzales filed a federal habeas petition raising 60 claims, including a judicial-bias claim. Pet. App. B3, C10. He later withdrew 13 claims so that he could pursue them in state court. *Id*. at C2. His renewed mo-

tion for state postconviction relief included a claim that he was not competent to assist his postconviction counsel. *Id.* at B3. The state court rejected that claim as noncognizable. *Id.* at B3-B4.

3. a. In 2006, after the case had returned to federal court, Gonzales's counsel moved for a competency determination and a stay. Pet. App. A2, B5. Counsel relied on *Rohan* v. *Woodford*, 334 F.3d 803 (9th Cir.), cert. denied, 540 U.S. 1069 (2003), in which the court of appeals had held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel" provided by 18 U.S.C. 3599(a)(2). *Rohan*, 334 F.3d at 819; Pet. App. B5. Counsel asserted that "due to a progressive deterioration in Gonzales's mental health he had lost the ability to rationally communicate with his counsel and assist them" and that his "assistance was essential to a number of his remaining habeas claims." Pet. App. A3.

The district court permitted two mental-health experts to examine Gonzales, but they reached conflicting conclusions. Pet. App. C3. Gonzales's expert concluded that Gonzales was not competent to understand his current legal situation or to assist counsel and that there was a good chance he would remain incompetent even if medicated. *Id.* at C4. The State's expert concluded that Gonzales was competent and was faking his symptoms, noting that Gonzales had "verbalized his desire to be found incompetent, (and thereby delay or avoid [execution])." *Id.* at C3-C4. The State's expert could not, however, exclude the possibility of a mental disorder, and

she recommended a period of observation, and medication if necessary. *Id.* at C4.

At the end of a 90-day assessment at the Arizona State Hospital, the supervising psychologist concluded that Gonzales had a "genuine psychotic disorder" and was "currently unable to communicate rationally for any extended period of time." Pet. App. C5. The psychologist became convinced that Gonzales's symptoms were genuine after observing improvement when Gonzales was put on antipsychotic medication. *Ibid.* Medication, however, had been discontinued at Gonzales's request, after he complained of side effects including back pain and restlessness. *Id.* at B5-B6, C5.

b. The district court denied Gonzales's request for a stay and a competency determination. Pet. App. C29. The court concluded that incompetence would not entitle Gonzales to a stay of the proceedings. *Id.* at C7-C29. The court explained that Gonzales's "properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel." *Id.* at C27-C28; see *id.* at C7-C27. With respect to the judicial-bias claim in particular, the court observed that the record "is fully developed"; that "additional, relevant facts do not exist that are within [Gonzales's] private knowledge"; and that, in any event, Gonzales's failure to allege or prove such facts in state court precluded further factual development in federal court. *Id.* at C16 (citing, *inter alia*, 28 U.S.C. 2254(e)(2)).

Because the court concluded that none of the exhausted claims could benefit from Gonzales's assistance, it did not reach the issue of whether Gonzales was, in fact, sufficiently competent or whether he could be medicated to competence. See Pet. App. C6, C28-29. The

court noted, however, that the record indicated Gonzales possessed a limited capacity for rational communication, which likely could be maximized through the use of antipsychotic medication. *Id.* at C28 & n.14.

4. Gonzales asked the court of appeals for an emergency stay of the district-court proceedings and an emergency writ of mandamus. Pet. App. E1-E2. The court granted a temporary stay and ordered briefing. *Ibid.*; see *id.* at F1-F2; *id.* at G1-G2. It then stayed the appellate proceedings pending resolution of *Nash* v. *Ryan*, 581 F.3d 1048 (9th Cir. 2009), cert. dismissed, 130 S. Ct. 1757 (2010). Pet. App. H2. The court later held in *Nash* that "the statutory right to competence in capital habeas cases that we recognized in *Rohan* applies to appeals," such that a prisoner "who lacks the ability to communicate rationally, and who seeks to raise claims on appeal that could potentially benefit from such communication is entitled to a stay of the appeal until [he] is found competent." 581 F.3d at 1055.

In October 2010, the court of appeals granted a writ of mandamus, holding that Gonzales "is entitled to a stay pending a competency determination." Pet. App. A2, A9. The court reasoned that *Nash* foreclosed the district court's conclusion "that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions." *Id.* at A5. The proper "claim-specific inquiry," the panel stated, "'should be whether rational communication with the [prisoner] is essential to counsel's ability to meaningfully prosecute'" the claim. *Ibid.* (quoting *Nash*, 581 F.3d at 1054).

The court concluded that Gonzales's judicial-bias claim satisfied the test. The court noted that Gonzales "had eleven different attorneys over the course of his

trial and sentencing, and was self-represented for part of that time." Pet. App. A5. The court stated that Gonzales's judicial-bias claim "centers on events regarding which 'counsel may need to communicate with [Gonzales] to understand fully the significance and context' of key facts so that counsel can pursue the most persuasive arguments." *Ibid.* (quoting *Nash*, 581 F.3d at 1053) (internal alterations omitted).

B. *Tibbals* v. *Carter*, No. 11-218

1. In 1997, respondent Carter raped his adoptive grandmother and stabbed her to death. *State* v. *Carter*, 734 N.E. 2d 345, 347-349 (Ohio 2000) (*Carter I*). Following his indictment on aggravated murder and other charges, three experts examined Carter to determine whether he was competent to stand trial. *Id.* at 355. One expert concluded that Carter was unable to assist in his own defense; the other two found him competent. *Id.* at 355-356. After the trial court held two hearings and found Carter competent, a jury convicted him of aggravated murder and other charges. *Id.* at 350, 355-356. The court sentenced Carter to death for the aggravated murder conviction and prison terms for the other counts. *Id.* at 350. Carter's appellate counsel raised several issues on direct appeal, including a challenge to the trial court's competency finding. *Id.* at 355-356. The Ohio Supreme Court rejected Carter's competency argument and affirmed. *Id.* at 356, 360. The court also conducted an independent review of Carter's sentence, including the mitigation evidence presented at trial, and concluded that the death penalty was appropriate. *Id.* at 359-360.

Carter sought postconviction relief in state court. He asserted that his attorneys had "failed to develop a complete record to show that he was incompetent to stand

trial because his paranoid personality did not permit him to trust, or therefore consult with and aid, his lawyers." *State* v. *Carter*, No. 99-T-0133, 2000 Ohio App. LEXIS 5935, at *10 (Ohio Ct. App. Dec. 15, 2000) (*Carter II*). He further asserted that "trial counsel did not properly prepare for the penalty phase of the trial." *Id.* at *8.

The trial court denied relief and the state appellate court affirmed. The appellate court stated that Carter's "inability or unwillingness to aid his attorneys in the defense of his case is well-documented in the record" and that nothing in Carter's petition or brief "raise[d] new grounds or point[ed] to anything outside the record to demonstrate that he is entitled to relief or a hearing." *Carter II*, 2000 Ohio App. LEXIS 5935, at *13. The court further stated that Carter's claim of ineffective assistance during the penalty phase was "not supported by the record" and that Carter "did not submit any evidentiary documents or point to any evidence outside of the record that would indicate that he was entitled to relief or a hearing on th[at] claim." *Id.* at *10.

2. In 2002, Carter's lawyers filed a federal habeas corpus petition pursuant to 28 U.S.C. 2254. Pet. App. 3a, 28a. They later filed a motion seeking a competency determination and a stay of the proceedings. *Id.* at 27a.

The district court held a competency hearing, during which Carter called two experts. Pet. App. 29a-33a. Dr. Robert Stinson testified that Carter suffered from schizophrenia, as well as depressive disorder and a personality disorder. *Id.* at 30a. He testified that the schizophrenia distorted Carter's inferential thinking, affected his communication, and prevented him from developing "a factual understanding of the proceedings" or from "truly understand[ing] the adversarial nature of

the proceedings." *Id.* at 30a-32a. Dr. Stinson further testified that Carter believed he could not be executed unless he volunteered. *Id.* at 31a-32a. Dr. Stinson's prognosis for Carter's return to lucidity was "poor," based on his observation that, even with powerful antipsychotic medication, Carter still experienced several symptoms of schizophrenia. *Id.* at 31a. Dr. Michael Gelbort testified that Carter's "thinking skills are fragmented and distracted" and that, while Carter could provide "basic assistance, * * * it's not worth a whole lot of time or effort on his attorneys' part because his cognitive capabilities are so limited." *Id.* at 32a-33a.

The State's expert, Dr. Phillip Resnick, agreed that Carter had schizophrenia, but concluded that he understood the nature of the murder conviction and the punishment and met "the minimum standard [of ability to assist defense counsel] because he [could] speak rationally and convey information," although he could not elaborate on his responses. Pet. App. 34a-35a.

The district court applied the Ninth Circuit's decision in *Rohan*, *supra*, to Carter's claims. Pet. App. 42a-48a. The court identified several exhausted claims that "potentially could benefit from Carter's assistance," including claims of ineffective assistance of trial and appellate counsel (for failure to adequately develop and pursue the competency claim) and ineffective assistance of counsel during the penalty phase. *Id.* at 42a-43a. The court next considered whether petitioner was competent to assist his counsel with litigation of those claims and concluded he was not. *Id.* at 44a. The court found that although Carter's capacity to understand his position and the proceedings was "debatable," his inability to assist counsel in developing his claims was "clear-cut." *Id.* at 44a-47a. The court disposed of the case by dis-

missing Carter's habeas petition without prejudice and prospectively tolling the one-year limitations period for filing a federal habeas petition, see 28 U.S.C. 2244(d), "until such time as [Carter] is competent to proceed with [the] litigation." Pet. App. 53a.

3. a. The court of appeals amended the district court's judgment. Pet. App. 1a-15a. The court concluded that the district court had not abused its discretion by holding a competency hearing and finding Carter incompetent. *Id.* at 8a-9a. The court acknowledged that capital prisoners "do not enjoy a constitutional right to competence" in federal postconviction proceedings. *Id.* at 4a. The court read this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), however, to afford capital prisoners a statutory right to competence during federal postconviction proceedings, grounded in the federal competency-hearing statute, 18 U.S.C. 4241. Pet. App. 4a-9a. The court stated that this Court had "appl[ied] section 4241 to habeas actions" in *Rees* and had thereby "define[d] a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." *Id.* at 6a.

The court concluded, however, that the district court had improperly disposed of the case. The court explained that rather than dismissing Carter's habeas petition and tolling the statute of limitations prospectively, the district court should have instead "stayed [the proceedings] according to section 4241(d)" for any claims that the district court determined "essentially require [Carter's] assistance," until such time as Carter is found competent. Pet. App. 13a-15a. The court explained that staying the proceedings "would allow all parties to remain actively involved and the court to monitor Carter's

on-going condition." *Id.* at 14a. The court noted that if the district court on remand concluded that Carter's assistance was not "essential" to the "full and fair adjudication" of any of Carter's claims, it should appoint a "next friend" to litigate them. *Id.* at 15a. The court agreed, however, that Carter's assistance was essential to litigation of his ineffective-assistance-of-counsel claims because "Carter alone has evidence of the interactions between him and his trial and appellate attorneys, and that evidence is inaccessible as long as [Carter] remains unable to communicate with his habeas attorneys." *Id.* at 12a.

b. Judge Rogers dissented. Pet. App. 15a-26a. In his view, Carter's asserted right to competence in habeas proceedings "has no basis in the Constitution or federal statutes." *Id.* at 15a-16a. He explained that the federal competency-hearing statute, 18 U.S.C. 4241, "provides for competency hearings for defendants in criminal proceedings, and cannot be read to extend to post-conviction proceedings." Pet. App. 19a. He further explained that *Rees* stands for the proposition that a habeas petitioner must be competent to terminate his postconviction proceedings, but not to assist counsel in those proceedings. *Id.* at 18a. In that respect, he reasoned, the prisoner is a witness in support of his petition, and civil proceedings are not halted when a witness becomes incompetent. *Id.* at 24a-26a. Judge Rogers stated that the majority's decision "allows habeas petitioners to prevent States from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in habeas proceedings." *Id.* at 15a-16a.

SUMMARY OF ARGUMENT

A. This Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence, but Congress has created a statutory right to counsel for capital prisoners in federal postconviction proceedings. See 18 U.S.C. 3599 (2006 & Supp. II 2008). Section 3599 does not expressly create a right to be competent to assist counsel. The court of appeals' holding in *Gonzales*, No. 10-930, that Section 3599 implicitly guarantees an additional right to competence to assist counsel—and a right for capital prisoners who are unable to meet that standard to stay their postconviction proceedings—does not withstand scrutiny.

In the postconviction setting, a prisoner's competence has never been an inflexible prerequisite to litigating his habeas claims. Courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who is unable to litigate his own case due to mental incapacity. See *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990). The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against carrying out a death sentence against an insane person. See *Ford* v. *Wainwright*, 477 U.S. 399 (1986) (plurality opinion). By requiring a stay of postconviction proceedings when a capital prisoner is unable to assist his counsel, the right recognized by the court of appeals in *Gonzales* would frequently supersede the constitutional rule recognized in *Ford*, which requires a stay only when the prisoner is unaware of the punishment he is about to suffer and why he is to suffer it, not when he is unable to assist his lawyers.

The court of appeals' holding in *Gonzales* is not justified by common-law concepts of competency during and

after trial. The right to competency in postconviction proceedings is not provided by the Constitution, and it is not expressly provided by Section 3599. Moreover, no valid due-process concerns justify inferring a right to competency in Section 3599. Although due process demands that a criminal defendant be competent to stand trial, the demands of due process are less stringent after the conclusion of direct review. Congress could, consistent with constitutional principles, choose to provide counsel to indigent capital prisoners seeking postconviction relief without providing those prisoners with an additional right of competence to assist counsel in those proceedings.

B. Neither the federal competency-hearing statute, 18 U.S.C. 4241, nor this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a right to competence to assist postconviction counsel as the court of appeals concluded in *Carter*, No. 11-218. By its terms, Section 4241 does not apply to postconviction proceedings. It permits a district court to grant a competency hearing between the commencement of a prosecution and the sentencing, or between the commencement of supervised release and the completion of a sentence. 18 U.S.C. 4241(a). Postconviction proceedings do not occur during those specified periods.

This Court's citation of the competency-hearing statute in *Rees* did not create a right to competency in federal postconviction proceedings. In *Rees*, the Court instructed the district court to determine whether Rees, who had tried to withdraw his petition for certiorari, had the capacity to make a rational choice about whether to abandon his petition. It included a "Cf." citation to the then-current version of the federal competency-hearing statute. 384 U.S. at 314. After the district court found

Rees incompetent, the Court held his petition without further action until he died. *Rees* does not address whether an inmate has a right to be competent to *litigate* his federal habeas petition; it stands only for the proposition that he must be competent to *withdraw* his petition and forgo postconviction relief.

Nor does *Rees* suggest that Section 3599 provides a right to competence in postconviction proceedings. *Rees* substantially predates the 1988 enactment of Section 3599's predecessor, and there is no evidence that Congress considered *Rees* when it enacted Section 3599.

C. Although Section 3599 and *Rees* do not mandate that a district court stay a capital prisoner's postconviction proceedings when he is incompetent to assist counsel, district courts have inherent authority to granted limited competency-related stays in appropriate circumstances. In the postconviction context, the district court would have discretion to grant a stay that was consistent with the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which are to reduce delays in the execution of state and federal sentences and to further the principles of comity, finality, and federalism.

When a capital prisoner's claims can be fairly litigated without his assistance, a competency-related stay would be difficult to justify. That will usually be the case in Section 2254 proceedings, where a federal court's review of claims that were exhausted before a state court is limited to the state-court record. See 28 U.S.C. 2254(d)(1); *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011). In cases where a capital prisoner's assistance would be crucial to a potentially meritorious claim, AEDPA would not necessarily foreclose a stay for a lim-

ited period to afford the prisoner the opportunity to regain his competence.

D. Indefinite stays of postconviction proceedings were not warranted in either of these cases. In *Gonzales*, the district court concluded that the claims were record-based and could fairly be litigated without Gonzales's assistance. Under those circumstances, the court of appeals had no warrant for ordering a stay.

In *Carter*, the ineffective-assistance-of-counsel claims that the court of appeals identified as warranting a stay are record-based and would not require Carter's assistance. Under those circumstances, no stay, let alone an indefinite one, was appropriate to determine whether Carter might regain competence.

ARGUMENT

A CAPITAL PRISONER'S INCOMPETENCE TO ASSIST HIS COUNSEL DOES NOT PROVIDE GROUNDS FOR AN INDEFINITE STAY OF POSTCONVICTION PROCEEDINGS

A. Section 3599 Does Not Guarantee A Right Of Competence To Assist Postconviction Counsel

1. The Sixth Amendment, as applied to the States through the Fourteenth Amendment, provides that the accused "[i]n all criminal prosecutions * * * shall * * * have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. At trial, that constitutional guarantee entitles indigent felony defendants to appointed counsel in either state or federal court. See *Gideon* v. *Wainwright*, 372 U.S. 335, 341, 344 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Once the right to counsel attaches, it applies at all phases of the trial proceedings "where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967); see *United States* v. *Wade*, 388 U.S. 218,

224-225 (1967). The Court has further held, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that indigent defendants pursuing their first appeal of right from a criminal conviction have a right to appointed counsel. *Douglas* v. *California*, 372 U.S. 353, 356-357 (1963); see *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005).

The Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence. See, *e.g.*, *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1315 (2012); *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007); *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). Congress, however, "created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings" when it enacted 18 U.S.C. 3599. *McFarland* v. *Scott*, 512 U.S. 849, 851 (1994); see also *Martel* v. *Clair*, 132 S. Ct. 1276, 1283-1285 (2012).[1] Section 3599(a)(2) provides that "[i]n any post conviction proceeding under" 28 U.S.C. 2254 or 2255 "seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the

[1] Section 3599 was originally enacted as part of the statute creating the federal capital offense of drug-related homicide, and it was originally codified at 21 U.S.C. 848(q)(4)-(10) (1988). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-4394. In 2006, Congress determined that the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, would provide the exclusive framework for imposing a federal death sentence. It repealed the death-penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to 18 U.S.C. 3599. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 231-232.

furnishing of such other services in accordance with subsections (b) through (f)." Counsel appointed under the statute must generally meet certain experience requirements, 18 U.S.C. 3599(b)-(d), and will, unless replaced, represent the litigant throughout a variety of judicial and other proceedings, 18 U.S.C. 3599(e). Section 3599 "reflec[ts] a determination that quality legal representation is necessary in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Clair*, 132 S. Ct. at 1285 (internal quotation marks and citation omitted).

Section 3599 does not, however, expressly create a right to be competent to assist counsel in federal capital postconviction proceedings. The only mention of "competency" in Section 3599 appears in the list of proceedings in which appointed counsel will represent the habeas applicant, which includes "such competency proceedings * * * as may be available." 18 U.S.C. 3599(e). But Section 3599 does not itself make "available" any new categories of "competency proceedings." And the federal statute governing competency determinations, 18 U.S.C. 4241, does not apply to capital postconviction proceedings. See p. 23, *infra*.

2. a. The court of appeals in *Gonzales*, No. 10-930, concluded that Section 3599 implicitly guarantees an additional right of competence to assist counsel and, in turn, a right for capital prisoners unable to meet that competency standard to stay their federal postconviction proceedings. That holding does not withstand scrutiny.

Even at trial, the right to counsel (which is guaranteed by the Sixth Amendment) and the right to competency (which is guaranteed as part of a criminal-trial defendant's general due-process and fair-trial rights) are separate. Compare, *e.g.*, *Turner* v. *Rogers*, 131 S.

Ct. 2507, 2516 (2011) (characterizing right to appointed counsel for indigent defendant in a criminal trial as a Sixth Amendment right), with *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975) (characterizing competency at criminal trial as a due-process right). In the postconviction setting in particular, a prisoner's competency to consult personally with an attorney has never been an inflexible prerequisite to litigating his habeas claims. To the contrary, courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who "is unable to litigate his own cause due to mental incapacity." *Whitmore* v. *Arkansas*, 495 U.S. 149, 165 (1990); see 28 U.S.C. 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.").[2]

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[2] Rule 2(c)(5) of the Rules Governing Section 2254 Cases in the United States District Courts was specifically amended to permit a motion for postconviction relief to be signed "by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. [Section] 2242." See also Rules Governing Section 2255 Proceedings for the United States District Courts R. 2(b)(5). The advisory committee amending those rules referred to *Whitmore* and clarified that it expected courts to "apply third-party, or 'next-friend,' standing analysis in deciding whether the signer was actually authorized to sign the petition on behalf of the petitioner." Rules Governing Section 2254 Cases R. 2 advisory committee's note (2004); accord Rules Governing Section 2255 Proceedings R. 2 advisory committee's note (2004).

Furthermore, Federal Rule of Civil Procedure 17(c), which applies to federal postconviction proceedings, see Rules Governing Section 2254 Cases R. 12 (Supp. III 2009); Rules Governing Section 2255 Proceedings R. 12, broadly provides for the appointment of a "next friend" to pursue federal claims on behalf on an incompetent person. See Fed. R. Civ. P. 17(c) ("A minor or an incompetent person who does not have a duly adopted representative may sue by a next friend or by a guardian ad litem.").

The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against "carrying out a sentence of death upon a prisoner who is insane." *Panetti* v. *Quarterman*, 551 U.S. 930, 934 (2007) (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986) (plurality opinion)). The prohibition against executing an insane prisoner, however, does not imply a right of competence to assist counsel in the litigation of a collateral attack on the original conviction and sentence. First of all, a claim of incompetence to be executed generally does not become ripe "until *after* the time has run to file a first federal habeas petition." *Id.* at 943 (emphasis added). Furthermore, a prisoner may be competent to be executed even if he is not competent to communicate with counsel. Justice Powell's controlling opinion in *Ford* explained that the standard for competency to be executed requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be "able to assist in his own defense." 477 U.S. at 422 & n.3 (Powell, J., concurring in part and concurring in the judgment); see *Panetti*, 551 U.S. at 949 (stating that Justice Powell's concurrence in *Ford* is the controlling opinion).

Had Congress intended for Section 3599 to create not only a new right to counsel, but also a new right of competency in the postconviction context, it would have said so expressly. Not only the Constitution, but also the laws of a number of States, permit execution of an otherwise competent prisoner even if he is not "able to assist in his own defense." *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the "prevailing test" in the States did not require competence to assist counsel as a prerequisite to

carrying out a death sentence). The right recognized by the court of appeals in *Gonzales*, however, would as a practical matter frequently supersede those constitutional and state-law rules. If a district court is required to stay a capital prisoner's first habeas petition when he cannot assist counsel, the court will also have to stay the prisoner's execution. See *Lonchar* v. *Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."). Congress gave no express indication that, by guaranteeing a right to postconviction counsel, it intended to occupy the field in the area of competency as well.

b. The court of appeals in *Gonzales* provided no specific evidence, textual or otherwise, that Congress implicitly intended to take such a transformative step by enacting Section 3599. In the previous Ninth Circuit case on which the court of appeals' decision was based, the court focused extensively on common-law concepts of competency during and after trial. See *Rohan* v. *Woodford*, 334 F.3d 803, 807-812, cert. denied, 540 U.S. 1069 (2003); see also *Gonzales* Br. in Opp. 21-23. But whatever the common law on that issue may have been, it does not illuminate the meaning of a statute that establishes only a right to counsel. As the court in *Rohan* acknowledged, "the right to competence has met with a mixed constitutional reception," as this Court has recognized a defendant's right of competence to assist in his defense at trial but has not required a similar degree of competency before a lawfully convicted prisoner may be executed. 334 F.3d at 808-809. Nothing in Section 3599 gives a postconviction right of competence a more favor-

able reception—or even suggests that Congress intended to create a statutory right of competence at all.

c. The court in *Rohan* also suggested that principles of constitutional avoidance support the inference of a right to competency in Section 3599. 334 F.3d at 813-814. In its view, a "substantial constitutional question[]" exists whether due process requires a right of competency as a necessary adjunct any time a statute grants a right to counsel. *Id.* at 813. No valid due-process concerns, however, would justify inferring a right to competency in Section 3599.

A criminal trial is "the paramount event for determining the guilt or innocence of the defendant." *Herrera* v. *Collins*, 506 U.S. 390, 416 (1993). Due process demands that a criminal defendant be competent to stand trial, see *Drope*, *supra*, because a defendant who cannot understand the nature of the proceedings against him or assist counsel in preparing his defense will be unable to exercise other rights "deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." See *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (internal quotation marks and citation omitted).

Once the direct appeal concludes, however, "a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). At that point, the demands of due process become less stringent. For example, in *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), a prisoner argued that he had been denied due process when postconviction counsel, appointed pursuant to state law, had withdrawn on appeal without following the procedures described in

Anders v. *California*, 386 U.S. 738 (1967). See *Finley*, 481 U.S. at 557-558. This Court rejected that argument, concluding that "the State has made a valid choice to give prisoners the assistance of [postconviction] counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Id.* at 559. In the postconviction context, "the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders*." *Ibid.*

The government "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009). Due process requires only that the habeas petitioner have "an adequate opportunity to present his claims fairly." *United States* v. *MacCollom*, 426 U.S. 317, 327-328 (1976); see also *Finley*, 481 U.S. at 556 (holding that postconviction proceedings are constitutional if they "comport[] with fundamental fairness"). Consistent with those principles, Congress could make a "valid choice" to provide counsel to indigent capital prisoners seeking postconviction relief without providing an additional right to competency to assist that counsel.

B. *Rees* v. *Peyton* Does Not Afford A Right Of Competence To Assist Postconviction Counsel

Unlike the Ninth Circuit in *Gonzales*, the Sixth Circuit in *Carter*, No. 11-218, did not rely on Section 3599 to require a competency-based stay of federal postconviction proceedings. Instead, the court concluded that this Court had already recognized a statutory "right to com-

petence" in federal postconviction proceedings grounded in the federal competency-hearing statute, 18 U.S.C. 4241. See Pet. App. 4a (citing *Rees* v. *Peyton*, 384 U.S. 312 (1966)). That is incorrect. Section 4241 does not apply to federal postconviction proceedings, and *Rees* did not hold otherwise.

1. By its terms, the federal competency-hearing statute does not apply to postconviction proceedings. The statute is entitled "Determination of mental competency to stand trial [or] to undergo postrelease proceedings." 18 U.S.C. 4241. It permits a district court to grant a competency hearing, either *sua sponte* or at the request of either party, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Capital postconviction proceedings occur neither "prior to the sentencing of the defendant" nor "after the commencement of probation or supervised release."

Furthermore, the statute provides that a hearing should be conducted if there is reasonable cause to believe that "the defendant" is suffering from a mental disease or defect that renders him "unable to understand the nature and consequences of the proceedings against him" or "to assist properly in his defense." 18 U.S.C. 4241(a). In postconviction proceedings, the prisoner is not "the defendant" in "proceedings [brought] against him." Rather, the prisoner initiates postconviction proceedings and requires the government to defend its conviction, which is presumed to be valid. See *Barefoot*, 463 U.S. at 887.

2. The court of appeals in *Carter* did not even attempt to address the plainly inapplicable text of Section 4241. It relied instead on this Court's decision in *Rees*, *supra*, stating that the Court in *Rees* had "appl[ied] section 4241 to habeas actions" and had thereby "define[d] a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." Pet. App. 6a. The court's reliance on *Rees* is misconceived.

In that case, Melvin Rees, a state capital prisoner, filed a habeas petition in federal district court challenging his murder conviction. *Rees*, 384 U.S. at 312-313. The district court denied relief; the court of appeals affirmed; and Rees's counsel, with Rees's consent, filed a petition for a writ of certiorari. *Id.* at 313. Roughly a month later, however, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Ibid.* Counsel advised the Court that "he could not conscientiously accede to these instructions" because he feared that Rees was incompetent. *Ibid.* This Court, "in aid of the proper exercise of [its] certiorari jurisdiction," ordered the district court to determine whether Rees had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313-314. The Court included a "Cf." citation to 18 U.S.C. 4244-4245 (1964), the predecessor to Section 4241. See *Rees*, 384 U.S. at 314.

Following the Court's instructions, the district court determined that Rees was incompetent. *Rohan*, 334 F.3d at 815 (citing district court docket). This Court,

apparently over the State's objection, then ordered that the case be "held without action on the petition for certiorari until further order." *Rees* v. *Peyton*, 386 U.S. 989 (1967). The petition remained held until 1995, when the Court dismissed it, apparently because Rees had passed away. *Rees* v. *Superintendent of Va. State Penitentiary*, 516 U.S. 802; see *Rohan*, 334 F.3d at 815 n.8.

The Court's "Cf." citation cannot fairly be read to have "appl[ied] section 4241 to habeas actions" as the court of appeals concluded it did. Pet. App. 6a. That citation is more logically read as this Court suggesting that the district court, in carrying out the instruction to hold a competency hearing, might follow procedures similar to the federal statutory procedures for determining trial competence.

In any event, *Rees* does not address the situation presented by these cases. *Rees* did not concern competency to *litigate* a federal habeas petition, but instead competency "to *withdraw* a certiorari petition." *Godinez* v. *Moran*, 509 U.S. 389, 398 n.9 (1993) (emphasis added). The Court's disposition of *Rees* therefore should not be taken to suggest that a prisoner has a right to stay his habeas proceedings indefinitely on the ground that he is not able to assist in the litigation. To the contrary, the Court has since suggested that if a habeas applicant meets the incompetency standard set forth in *Rees*, the case might be litigated without his participation by a "next friend." See *Whitmore*, 495 U.S. at 166 (using *Rees* to define the standard for determining when a prisoner's mental incapacity might permit "next friend" habeas litigation).

3. Nor does *Rees* support the Ninth Circuit's interpretation of Section 3599 as providing a right to competence to assist counsel in postconviction proceedings.

See *Rohan*, 334 F.3d at 815 (stating that *Rees* "supports [the] conclusion" that Section 3599 provides a right to competence in postconviction proceedings). *Rees* substantially predates the 1988 enactment of Section 3599's predecessor, and the Ninth Circuit in *Rohan* identified no evidence that Congress had *Rees* in mind when it passed Section 3599.

C. District Courts Have Inherent Authority To Grant Limited Competency-Related Stays In Certain Cases

1. Although neither Section 3599 nor *Rees* mandates that a district court stay a capital prisoner's habeas proceedings when he is incompetent to assist counsel, those authorities do not preclude the possibility of such a stay. Even in the habeas context, "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (citations omitted).

Of course, a district court's discretion to grant a stay is "circumscribe[d]" by AEDPA. *Rhines*, 544 U.S. at 276. Stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes," which are "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," *ibid.* (citation and internal quotation marks omitted), and "to further the principles of comity, finality, and federalism," *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (citation omitted); see also *Rhines*, 544 U.S. at 277 ("Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA."). This Court repeatedly has emphasized "the State's interest in the finality of convictions that have survived direct review within the state court system," which "'preserve[s] the

federal balance'" by respecting the States' "'good-faith attempts to honor constitutional rights'" as well as their "'sovereign power to punish offenders.'" *Calderon* v. *Thompson*, 523 U.S. 538, 555-556 (1998) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986)).

A competency-related stay of a habeas petition that could fairly be litigated without the capital prisoner's assistance could not be squared with those purposes. Nor could an indefinite stay issued solely in the hope that the prisoner might some day regain competence. Cf. *Rhines*, 544 U.S. at 277 (declining to endorse stay procedure in which a case could be "stayed indefinitely"). Such stays would delay—perhaps permanently—resolution of the proceedings and destroy the notion of finality implicit in state court judgments. Those concerns have particular force in capital postconviction proceedings, where the incentive for habeas petitioners to pursue speedy postconviction relief is largely absent. See *id.* at 277-278 (noting that "not all petitioners have an incentive to obtain federal relief as quickly as possible" and that capital prisoners in particular have an interest in "prolong[ing] their incarceration and avoid[ing] execution of the sentence of death"). Such stays would also defeat the purpose of postconviction relief. A prisoner may legitimately commence postconviction proceedings because he has one or more claims that he believes may entitle him to relief from his conviction or sentence. Staying the proceedings of an incompetent prisoner with a meritorious claim, rather than allowing the proceedings to be litigated by a "next friend" with the prisoner's best interests in mind, does nothing to "assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights." *Herrera*, 506 U.S. at 402.

2. a. When a capital prisoner's claims can be fairly litigated without his assistance, a competency-related stay would not be warranted. The prisoner's assistance is not needed to select and advance the arguments having the greatest possibility of success. This Court has "recognized the superior ability of trained counsel in the examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (citation and internal quotation marks omitted; brackets in original) (holding that on direct appeal, appointed counsel may select the points to be raised and need not raise "nonfrivolous points requested by the client"); see also *Gonzalez* v. *United States*, 553 U.S. 242, 249-250 (2008) ("In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume.").

In Section 2254 proceedings, a state capital prisoner's assistance to counsel will usually be unnecessary for resolution of his claims. A state prisoner must generally exhaust the remedies available for his claims in state court. 28 U.S.C. 2254(b)(1)(A). And to be entitled to federal habeas relief on a claim that was adjudicated on the merits in state court, a prisoner must establish that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. 2254(d)(1). In *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), this Court made clear that the district court's review of such a claim "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398; see *id.* at 1400 ("[E]vidence introduced in federal court has no bearing on [Section] 2254(d)(1) review."). A state prisoner's ability to

provide testimony or direct his counsel to other non-record evidence in support of his exhausted habeas claims is therefore largely irrelevant.

b. In some scenarios, a capital prisoner's testimony or assistance might be crucial to a potentially meritorious habeas claim. For example, a state prisoner may be entitled to a federal evidentiary hearing if he meets the stringent requirements of 28 U.S.C. 2254(e)(2) for a claim that was not adjudicated on the merits in state court. See *Pinholster*, 131 S. Ct. at 1400-1401.[3] Moreover, for a federal capital prisoner, Section 2255 proceedings may be the first opportunity to present evidence of certain collateral claims, for example, ineffective assistance of counsel. See *Massaro* v. *United States*, 538 U.S. 500 (2003). In such circumstances, AEDPA would not necessarily foreclose a stay for a limited period to afford the prisoner the opportunity to regain his competence (on his own or with medication). Cf. *Rhines*, 544 U.S. at 277 (permitting habeas stays to al-

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[3] 28 U.S.C. 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

low for state court review of unexhausted claims on showing of "good cause," but noting that a stay would amount to an abuse of discretion if the unexhausted claims "are plainly meritless"); *Nelson* v. *Campbell*, 541 U.S. 637, 649 (2004) ("Before granting a stay, a district court must consider * * * the likelihood of success on the merits."). The district court would have discretion to strike an appropriate balance between the capital prisoner's interest in pursuing his habeas claims and the State's (and AEDPA's) "strong interest in proceeding with its judgment." *Gomez* v. *United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam).

Although a limited stay may be appropriate in those circumstances, an indefinite stay would not be. Counsel will usually have means other than the prisoner's knowledge to establish facts outside the record that bear on a potentially meritorious claim. Other witnesses, including the trial and appellate lawyers, could be called to testify, and those witnesses may also have notes and documentary evidence related to the claim. In that respect, the prisoner's testimony is no different than that of a third-party witness, and the unavailability of a third-party witness to testify in support of a habeas petitioner's claims plainly would not warrant an indefinite stay of the postconviction proceedings. Moreover, a district court in capital postconviction proceedings would have the discretion to permit an incompetent prisoner unable to offer testimony on his own behalf to introduce the necessary facts by otherwise inadmissible hearsay. See Fed. R. Evid. 807; cf. *Sears* v. *Upton*, 130 S. Ct. 3259, 3263 n.6 (2010) (per curiam) ("[W]e have * * * recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay

rule.") (citing *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (per curiam)). If it appears that the prisoner will not regain competence during a limited stay, the proper course is for the district court to allow the prisoner's claims to be litigated by a "next friend," not to prevent the State from carrying out its judgment by staying the postconviction proceedings indefinitely.

D. Indefinite Stays Were Not Warranted In Respondents' Cases

1. Under the principles set forth above, the Ninth Circuit's decision in *Gonzales*, No. 10-930, must be reversed. The district court declined to stay Gonzales's habeas proceedings because it concluded that his claims were purely record-based and could be fairly litigated by counsel without his personal involvement. Pet. App. C14, C16, C27-28. The court of appeals reversed, based on its view that Gonzales was entitled to a stay if he were incompetent to litigate his judicial-bias claim, which it believed "could potentially benefit" from Gonzales's involvement despite being limited to the written record. *Id.* at A5-A6; see 28 U.S.C. 2254(d)(1).

The court of appeals erred in concluding that Gonzales had such a right. The court of appeals did not disturb the district court's finding that Gonzales's habeas claims were fully developed and could be litigated even if he were not competent to assist counsel. See Pet. App. C7-C27. Under those circumstances, the court of appeals had no warrant for ordering a stay. Even assuming the district court could, consistent with AEDPA, grant a limited stay, declining to do so would not constitute an abuse of its equitable discretion.

2. The Sixth Circuit's decision in *Carter*, No. 11-218, also must be reversed. The court of appeals correctly

concluded that the district court should have appointed a "next friend" to litigate any claims for which Carter's assistance was not essential for a full and fair adjudication. Pet. App. 15a. The court incorrectly concluded, however, that Carter's ineffective-assistance-of-counsel claims must be stayed until Carter regains competence.

The state court considered and rejected Carter's ineffective-assistance-of-counsel claims in state post-conviction proceedings, *Carter II*, 2000 Ohio App. LEXIS 5935, at *10-*13, and the district court's consideration of those claims would therefore be limited to the state court record, see *Pinholster*, 131 S. Ct. at 1398. Furthermore, even if an evidentiary hearing on those claims were somehow warranted, it is not the case that "Carter alone has evidence of the interactions between him and his trial and appellate attorneys." Pet. App. 12a. Carter's attorneys could provide testimony or other assistance pertaining to their interactions with him, and the state court specifically concluded that Carter's competency claim was well-developed in the record, that he had identified nothing outside the record to indicate that counsel had inadequately pursued the competency claim, and that his claim of ineffective-assistance-of counsel during the penalty phase was unsupported. *Carter II*, 2000 Ohio App. LEXIS 5935, at *10-*13. Under those circumstances, no stay, let alone an indefinite one, was appropriate to determine whether Carter might regain competence.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3599 (2006 & Supp. II 2008):

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had

not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize

the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection[1] at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the[2] paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305[3] of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as neces-

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be "this".

[3] So in original. Probably should be "5303".

sary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph[4] for services in any case shall be disclosed to the public, after the disposition of the petition.

2. 18 U.S.C. 4241:

Determination of mental competency to stand trial to undergo postrelease proceedings[3]

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

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[4] So in original. Probably should be "subsection".

[3] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in

raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.