No. 10-930

In The
Supreme Court of the United States

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

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

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

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CAPITAL CASE
(NO EXECUTION DATE SET)
QUESTION PRESENTED

Did the Ninth Circuit err when it held that 18 U.S.C. 3599(a)(2) – which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys" – impliedly entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel?

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OPINION BELOW

The Ninth Circuit's opinion, *In re Ernest Valencia Gonzales*, 623 F.3d 1242 (9th Cir. 2010), is reproduced at Pet. App. A. The district court's August 28, 2008, unpublished response to a Ninth Circuit Order is reproduced at Pet. App. B. The district court's order denying a stay, *Gonzales v. Schriro*, 617 F.Supp.2d 849 (D. Ariz. 2008), is reproduced at Pet. App. C. Additional Ninth Circuit unpublished orders dated May 23, 2008, June 19, 2008, and July 7, 2008, are reproduced at Pet. App. D, Pet. App. E, and Pet. App. F, respectively. The Ninth Circuit's amended order dated July 7, 2008, and its second amended order dated January 5, 2009, are reproduced at Pet. App. G, and Pet. App. H. The Ninth Circuit's docket is reproduced at Pet. App. I.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on October 20, 2010. The Director of the Arizona Department of Corrections filed his petition for writ of certiorari on January 18, 2011, invoking this Court's jurisdiction under 28 U.S.C. 1254(1). This Court granted the petition on March 19, 2012.

STATUTORY PROVISIONS

The entire provisions of 18 U.S.C. 3599 are set forth in the last appendix of the petition for certiorari, Appendix J. The relevant part on which the Ninth Circuit relied, 18 U.S.C. 3599(a)(2), provides:

> 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).

INTRODUCTION

Arizona death-row inmate Ernest Valencia Gonzales filed his first petition for a writ of federal habeas corpus in November 1999, effectively staying his execution. Pet. App. I1. The merits of his claims for relief have yet to be decided. Rather, for the last five years the parties have litigated whether Gonzales is competent to assist his habeas counsel in preparing his merits brief in district court. The Ninth Circuit has indefinitely stayed Gonzales's federal habeas proceeding because of Gonzales's alleged inability to assist counsel with a "judicial bias" claim notwithstanding a finding by the district court that

Gonzales's "properly-exhausted claims (including his judicial bias claim) are record-based and/or resolvable as a matter of law." Pet. App. C27-28.

The delay to assess Gonzales's competency resulted from the Ninth Circuit's application of its prior decisions in *Rohan v. Woodford*, 334 F.3d 803 (9th Cir.), *cert. denied*, 540 U.S. 1069 (2003), and *Ryan v. Nash*, 581 F.3d 1048 (9th Cir. 2009), *cert. dismissed*, 130 S. Ct. 1757 (2010)[1] In *Rohan*, the court found that a federal habeas petitioner must be competent to assist counsel in capital habeas proceedings brought under 28 U.S.C. 2254. 334 F.3d at 817-19. Unique among the federal courts of appeals, the Ninth Circuit found that, because 21 U.S.C. 848(q)(4)(b) provided for the appointment of counsel for any indigent federal habeas petitioner seeking to vacate or set aside a death sentence, the statute created a concomitant right to be competent to assist counsel. In *Nash*, the court found a similar requirement, under 18 U.S.C. 3599(a)(2), that an inmate must be competent to assist counsel in a record-based appeal from the denial of federal habeas relief.[2] 581 F.3d at 1055.

The indefinite stay imposed by the Ninth Circuit thwarts the State of Arizona's interest in the finality

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[1] Viva Leroy Nash died while the State of Arizona's petition for certiorari review was pending.

[2] Congress recodified Section 848(q)(4)(b) in 2005, without material change, at Section 3599(a)(2). Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222(a), 120 Stat. 231 (2006).

of its criminal convictions. Contrary to the Ninth Circuit's conclusion, Section 3599(a)(2) does not create a right to competency to assist counsel. The Ninth Circuit's ruling conflicts with this Court's "next-friend" and competency-to-be-executed jurisprudence and cannot be reconciled with limitations placed on federal habeas corpus review by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as codified in 28 U.S.C. 2254.

STATEMENT OF THE CASE

On February 20, 1990, Gonzales stabbed Darrel Wagner to death and severely injured Deborah Wagner after the couple arrived home from dinner to find Gonzales burglarizing their home. *State v. Gonzales*, 892 P.2d 838, 842 (Ariz. 1995). Jurors convicted Gonzales of murder and aggravated assault, among other felonies. *Id*. Gonzales received a death sentence for murdering Darrel Wagner. *Id*.

Gonzales raised several issues on direct appeal, including a claim of judicial bias at trial and sentencing. *Id*. at 843. The Arizona Supreme Court rejected all of Gonzales's claims and affirmed his convictions and sentences, including his death sentence. *Id*. at 843, 847-48. This Court denied certiorari. *Gonzales v. Arizona*, 516 U.S. 1052 (1996).

Gonzales subsequently pursued post-conviction relief in state court. Among other claims, Gonzales

again asserted that judicial bias during trial and sentencing denied him a fair trial. The trial court and the Arizona Supreme Court denied relief. Pet. App. B3.

After filing his initial federal habeas corpus petition in November 1999, Gonzales filed a 237-page amended petition raising 60 claims for federal relief. Pet. App. B3. In 2001, Gonzales returned to state court to pursue a second, successive state-court petition for post-conviction relief. *Id*. The state trial court denied the petition, and the Arizona Supreme Court denied a petition for review from that decision. Pet. App. B3-B4.

In January 2006, the district court decided the procedural status of Gonzales's claims and thereafter gave the parties an opportunity to provide updated legal citations and arguments regarding Gonzales's properly exhausted claims. Pet. App. B5. On the eve of the court's deadline for Gonzales's opening merits brief, his counsel filed a *Rohan* motion for a competency determination and a stay. *Id*. Gonzales's attorneys 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 the exhausted habeas claims. *Id.* at A3.

Given these representations, the district court directed the parties to have mental health experts examine Gonzales. *Id*. at C3. After two psychiatrists reached conflicting conclusions regarding Gonzales's competency, he was transferred to the Arizona State

Hospital for an extended mental health assessment. *Id.* at C4, C5. At the end of the assessment period, the supervising psychologist submitted a final report indicating continuing reservations "concerning the veracity of Mr. Gonzales's symptoms" and stating that "malingering cannot be ruled out." *Id.* (quoting the report). The supervising psychologist was ultimately persuaded, however, that Gonzales's symptoms were genuine after observing improvement when Gonzales was treated with antipsychotic medication. Despite this apparent improvement, the medication was stopped at Gonzales's request after he complained of back pain and restlessness. *Id.*

Following further briefing, including pleadings in which Gonzales asserted that, under *Sell v. United States*, 539 U.S. 166 (2003), he should not be forcibly medicated to restore competency, the district court ordered merits briefing on Gonzales's pending claims. *Id.* at C29. In rejecting Gonzales's counsel's assertion that Gonzales's input was necessary to develop his judicial-bias claim, the district court relied on the following facts: 1) Gonzales's first trial ended in a hung jury. *Id.* at C10. Acting *pro se*, prior to the retrial, Gonzales claimed, based on adverse rulings and the trial judge's on-the-record comments, that the judge was biased against him. *Id.* 2) Gonzales's motion to disqualify the trial judge was heard by a different judge, who denied it. *Id.* at C10-C12. 3) After his conviction in the second trial, and prior to sentencing, Gonzales again filed a *pro se* motion seeking to disqualify the trial judge. *Id.* at C12. Once again a

different judge heard and denied the motion. *Id*. 4) On direct appeal, Gonzales's counsel raised a claim of judicial bias, which the Arizona Supreme Court denied on the merits. *Id*. at C12-13. The district court found that the fully-developed record in the case and controlling authority precluding further factual development in federal court made Gonzales's personal knowledge unnecessary to resolve the claim. *Id*. at C15-16.

Gonzales's attorneys filed an emergency petition for writ of mandamus and an emergency motion for stay of the district court's proceedings. *Id*. at C29, D1, E1. On January 5, 2009, the Ninth Circuit stayed the district court proceedings. *Id*. at H1-H2. Ten months later, the Ninth Circuit issued its opinion, concluding as follows:

> *Nash* squarely controls this case, foreclosing 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. [citing *Nash*, 581 F.3d at 1050] . . . Thus, no less than Nash's claim of ineffective assistance of counsel, Gonzales's judicial bias claim could potentially benefit from the "first-hand insight into the earlier proceedings" that a competent petitioner would be able to provide.

> *Nash* thus compels the conclusion that Gonzales has raised at least one claim that could potentially benefit from rational communication with counsel and that he is accordingly eligible for a stay under *Rohan*.

Pet. App. A5-A6 (citing *Nash*, at 1056).

SUMMARY OF ARGUMENT

Indefinitely staying federal habeas corpus proceedings based on the habeas corpus petitioner's incompetence to assist counsel contravenes the States' interest in the finality of their criminal convictions. The Ninth Circuit has improperly stayed Gonzales's federal habeas proceedings, as well as his execution, notwithstanding the district court's reasoned conclusion that Gonzales's pending claims do not require further factual development and do not require further input from Gonzales.

The Constitution does not provide a right to be competent to assist counsel on federal habeas corpus review. The Ninth Circuit has nevertheless concluded that Congress gave death row inmates a statutory right to be competent to assist habeas corpus counsel and has extended that right to cases involving only a record-based review of legal questions.

The statute that the Ninth Circuit interpreted as creating a right to competency, 18 U.S.C. 3599(a)(2), does not provide such a right. Section 3599(a)(2) provides for the appointment of counsel for indigent

federal habeas corpus petitioners but does not address or otherwise provide for the inmate's competence. No reasoned basis supports the Ninth Circuit's conclusion that Congress impliedly intended that death penalty habeas appeals could be stayed indefinitely based on the inmate's alleged inability to assist counsel.

The Ninth Circuit's interpretation of Section 3599(a)(2) directly conflicts with this Court's "next-friend" jurisprudence, which expressly recognizes that habeas cases can proceed notwithstanding the mental incapacity of petitioners. *See Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990). The Ninth Circuit's interpretation also conflicts with *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), which imposes a standard for competency to be executed that requires only that the inmate understand he is being punished and why. Finally, the Ninth Circuit's rationale cannot be reconciled with Congressional intent as evidenced by AEDPA, which was enacted to reduce delay in capital cases and to mandate greater deference to state court decisions.

ARGUMENT

I. 18 U.S.C. 3599(A)(2) DOES NOT REQUIRE THAT AN INDIGENT FEDERAL HABEAS CORPUS PETITIONER BE COMPETENT TO ASSIST COUNSEL.

Recognizing the Constitution does not establish a right to be competent to assist counsel, the Ninth

Circuit incorrectly interpreted 18 U.S.C. 3599(a)(2) as creating a right to competently assist statutorily-appointed counsel. Nothing in the text of the statute, however, supports that interpretation. Section 3599(a)(2) states only that "[i]n 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)."

Section 3599(a)(2) does not reference competency. Indeed, the only reference to "competency" in Section 3599 is in subsection (e), which provides as follows:

> [E]ach 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.

(Emphasis added.)

The fact that Congress referenced counsel's role in competency proceedings in subsection (e) demonstrates that representation does not depend upon the habeas petitioner's competence. Congress cannot have intended to authorize counsel to represent an inmate in post-conviction competency proceedings only if the inmate is competent to assist counsel.

Lacking textual support, the Ninth Circuit relied in *Rohan* on "common law tradition" for reading a competency requirement into subsection (a). *See* 334 F.3d at 812-13 ("Congress has not explicitly required competence in federal habeas proceedings, but the common law tradition underlying the right to competence and its great practical significance in this context inform our interpretation of the statutes Congress has enacted."). However, a court's "task is to apply the text, not improve upon it." *Harbison v. Bell*, 556 U.S. 180, 198-99 (2009) (quoting *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989)). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotation marks omitted). Thus, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id*. Because Section 3599 does not, by its terms, create a right to competency to assist counsel, that should end the inquiry.

II. THE NINTH CIRCUIT'S JUSTIFICATIONS FOR ITS RULE DO NOT WITHSTAND SCRUTINY.

The Ninth Circuit's reliance (in *Rohan*) on common-law concepts of competency during and after trial is unpersuasive. Historically, the right to counsel has not been equated to a right to competency. While the trial right to counsel is found in the text of the Sixth Amendment, the right to competency at a criminal trial is derived from the Fourteenth Amendment's Due Process Clause. *Compare Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (announcing a Sixth Amendment right to counsel at trial) with *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (a defendant is deprived of due process if state procedures are inadequate to protect against being tried or convicted while incompetent).

The ability to collaterally attack a state-court judgment in federal court has no deep common-law roots or settled tradition. *See Kuhlmann v. Wilson*, 477 U.S. 436, 446-47 (1986) (plurality opinion) (detailing the history of federal habeas review). Likewise, there are no deep common-law roots relating to *post-conviction* competency to assist counsel. In fact, this Court has declined to apply the common-law concept of trial competency in determining post-trial competency to be executed. *See 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).

Thus, the Ninth Circuit's reliance on "common law" is misplaced.

Furthermore, regardless of common law relating to the right to counsel and the right to competency, "[s]tatutes should be interpreted consistently with the common law" only if the "statute . . . clearly covers a field formerly governed by the common law." *Samatar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). Here, a right-to-counsel statute and a common law right to competency cover different fields and Congress gave no indication that by guaranteeing a right to post-conviction counsel, it intended to occupy the field in the area of competency as well.

In *Rohan*, the Ninth Circuit also relied on *Rees v. Peyton*, 384 U.S. 312 (1996) (per curiam), as "support[ing]" its interpretation of Section 3599(a). *Rohan*, 334 F.3d at 815. *Rees*, however, involved a death row inmate's request to *withdraw* his federal habeas petition and forgo any further legal proceedings. After Rees's counsel advised the Court that he could not conscientiously accede to Rees's instructions because of Rees's alleged incompetence, this Court ordered the district court to determine whether Rees had "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." *Id*. at 313.

Because *Rees* did not involve competency to litigate a federal habeas petition, but rather competency to withdraw a certiorari petition, its reasoning is inapplicable. A limited stay to assess competency

to withdraw is reasonable to move a case forward because, if the inmate is found competent, it will obviate the need for further proceedings. In contrast, a stay to assess competency to assist counsel will not move a case forward. Thus, unless an inmate's input is essential to further the federal habeas corpus litigation, it is unreasonable to stay the proceedings.

The Ninth Circuit's conclusion that client input is essential in briefing record-based claims is similarly unpersuasive. In the appellate context, this Court has emphasized "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling arguments on [the appellant's] behalf." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). An inmate's input will not change the record from which counsel must base his or her arguments. Thus, the Ninth Circuit's finding in *Nash* that the inmate's input was essential to the preparation of his Ninth Circuit appellate brief is unsupportable.

So too, in the instant case, Gonzales's input is not essential to the preparation of his district court merits brief. Under AEDPA, Gonzales's merits briefing is limited to properly exhausted claims. *See Rose v. Lundy*, 455 U.S. 509 (1982) (federal habeas corpus proceedings are limited to consideration of claims that have already been presented and exhausted in state court proceedings); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (state court is first forum to review claims and provide relief). And, under *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398

(2011), review of claims (such as Gonzales's judicial bias claim) that have been addressed on the merits in state court is limited to the record considered by the state court:

> Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

131 S. Ct. at 1398. Because review of Gonzales's judicial-bias claim (as well as his other claims) is limited to the record developed in state court, the Ninth Circuit's conclusion that Gonzales's input is essential does not withstand scrutiny.

Finally, accepting the Ninth Circuit's reading of Section 3599 would result in disparate treatment of indigent and non-indigent defendants. Section 3599 applies only to indigent defendants. There is no corresponding provision relating to non-indigent defendants that would impliedly create a right to be competent to assist counsel. As a consequence, the Ninth Circuit's approach compels the unjustifiable result that indigent and non-indigent death-row prisoners have different rights to be competent to assist counsel.

III. THE NINTH CIRCUIT'S RULE IS INCONSISTENT WITH THIS COURT'S NEXT-FRIEND JURISPRUDENCE.

This Court has never required lower courts to stay a habeas corpus petitioner's claims pending a finding of competency to consult with counsel. Rather, it has held that, if a petitioner is unable to litigate his own claims because of mental incapacity, a "next-friend" may pursue the litigation on his behalf. *See Whitmore*, 495 U.S. at 165. Congress codified that approach in 28 U.S.C. 2242, which allows a habeas petition to be filed "by someone acting" on behalf of the applicant. Thus, counsel and competence do not go hand in hand.

"Next-friend" standing under *Whitmore* is a well-established practice. *See, e.g., People v. Kelly*, 822 P.2d 385, 413 (Cal. 1992) (applying *Whitmore* and noting that an attorney representing a defendant can serve the same function as a "next-friend"); *Commonwealth v. Haag*, 809 A.2d 271, 278 (Pa. 2002) ("Through a series of cases, which relied upon the reasoning of *Whitmore*, we recognized that our law permits a next-friend to bring a [post-conviction] action on behalf of a prisoner."). To the extent Gonzales has a viable claim for relief based on the existing state-court record, a stay delays relief he could otherwise obtain if counsel, acting essentially as a "next-friend," briefs the issues raised in Gonzales's pending federal habeas corpus petition. To the extent the existing record does not provide a basis for federal relief, however, the State of Arizona and Gonzales's

crime victims are denied finality based solely on speculation that Gonzales is better situated than counsel to divine arguments that might justify relief.

IV. THE NINTH CIRCUIT'S RULE CONTRAVENES THIS COURT'S CASE LAW REGARDING COMPETENCY TO BE EXECUTED.

This Court has limited a capital prisoner's right to competency in post-conviction proceedings to 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*, 477 U.S. at 409-10). Generally, this claim does not become ripe until after the first habeas corpus petition has been resolved. *See Panetti*, 551 U.S. at 947. 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).

The Ninth Circuit's rulings in *Rohan*, *Nash*, and the instant case negate the *Ford* standard. There is no need to reach the *Ford* standard if an inmate can indefinitely stay his execution on the basis of a

standard that requires a higher degree of competency, *i.e.*, competence to assist counsel.

Had Congress intended for Section 3599 to create not only a right to counsel, but to also preempt or supersede this Court's competency-to-be-executed jurisprudence, it would have said so expressly. Congress gave no indication that, by guaranteeing a right to federal habeas counsel, it intended to occupy the field in the area of competency.

V. THE NINTH CIRCUIT'S RULE CONFLICTS WITH CONGRESSIONAL INTENT AS EVIDENCED BY AEDPA.

In enacting AEDPA changes to 28 U.S.C. 2254, Congress limited the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. *Pinholster*, 131 S. Ct. at 1398; *see also Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 786 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). To obtain relief under AEDPA, an inmate must establish that state court resolution of his claims were "contrary to" or "an unreasonable application of" this court's precedents, or were "based on an unreasonable determination of the facts . . . in light of the evidence presented in the State court proceedings." 28 U.S.C. 2254(d)(1)-(2). And, as noted previously, under AEDPA, federal review of claims addressed on the merits in state court is limited to the record before the state court. *Pinholster*, 131 S. Ct. at 1398.

One of AEDPA's central purposes is to reduce delay in capital cases on habeas review. *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007); *Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *see also* 18 U.S.C. 3771(b) (recognizing a victim's independent right to be free from unreasonable delay in a federal habeas proceeding). An indeterminate stay pending restoration of competency to assist counsel is thus inconsistent with AEDPA. *Rhines*, 544 U.S. at 276.

This Court has noted that, although district courts retain authority to issue stays of habeas proceedings, AEDPA "circumscribe[s]" that authority. *Id*. A decision to stay a habeas proceeding "must . . . be compatible with AEDPA's purposes." *Id*.

This Court has further noted that "not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the death sentence." *Id*. at 277-78.

The Ninth Circuit's rule permits just such tactics. After initiating federal habeas proceedings, an inmate need only demonstrate an inability to assist counsel to stay those proceedings, as well as his execution, at least as long as it takes to conduct competency proceedings and perhaps indefinitely if the inmate is found to be incompetent to assist counsel.

A stay based on speculation that an inmate might have information that he is currently unable to share with counsel is illogical and is clearly incompatible with AEDPA. If, prior to becoming incompetent to assist counsel, the inmate has not communicated information that establishes a colorable claim for relief in his federal habeas corpus proceeding, the evidence remains the same as when state court proceedings concluded. Thus, there is no reasoned basis for staying the inmate's death sentence.

Mere speculation does not create a colorable claim. If, for example, a testifying witness dies after trial without having ever indicated that the testimony provided at trial was inaccurate, it would be illogical to stay federal habeas corpus proceedings on the basis that the testifying witness might have changed his or her testimony had he or she been given an opportunity to do so in federal court. It is similarly illogical to stay federal habeas corpus proceedings based solely on speculation that the petitioning inmate might remember something new if given an opportunity to do so.

Some rare circumstances might justify a federal district court's *limited* stay based on the inmate's alleged incompetence. For example, in cases involving an assertion of actual innocence, a stay of federal habeas corpus proceedings could potentially prevent a clear and grave miscarriage of justice absent an

available state court remedy.[3] *See House v. Bell*, 547 U.S. 518, 537-38 (2006); *Schlup v. Delo*, 513 U.S. 298, 327, 331-32 (1995); 28 U.S.C. 2244(b)(2)(B). It is difficult, however, to hypothesize any other type of claim that would warrant a stay based on the inmate's alleged incompetence given AEDPA's restrictions on the types of claims and the type of evidence that can be presented on federal collateral review. A federal court's authority to issue a stay based on alleged incompetence to assist counsel should therefore be limited to cases where the petitioner's personal knowledge is essential to establishing actual innocence, or where a stay may serve to advance, rather than indefinitely delay, the proceedings, as in a case in which an inmate attempts to withdraw his federal habeas corpus petition.

CONCLUSION

This Court should reject the Ninth Circuit's interpretation of Section 3599 and find that an inmate's competency to assist counsel is not required to carry out the limited review available under AEDPA, particularly when the claims at issue are record-based and no further evidentiary development is permitted. Accordingly, this Court should lift the

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[3] In Arizona, a prisoner can raise claims of actual innocence at any time in state post-conviction relief proceedings without regard to the rules of preclusion. *See* Ariz. R. Crim. P. 32.1(h).

emergency stay imposed by the Ninth Circuit and remand the case to the district court to resolve Gonzales's claims on the merits.

Respectfully submitted,

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