Nos. 10-930, 11-218

In The Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

TERRY TIBBALS, Warden,

Petitioner,

vs.

SEAN CARTER,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Sixth And Ninth Circuits

BRIEF OF UTAH, ALABAMA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, NEVADA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The States have compelling sovereign interests in the finality of their criminal judgments, their power to punish offenders, and their good faith efforts to enforce constitutional rights. *See, e.g., Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). The decisions below improperly undermine those interests. They allow a death-sentenced petitioner to postpone, perhaps forever, the final disposition of a federal court's review of a State's death sentence.

SUMMARY OF ARGUMENT

The Ninth and Sixth Circuits permit an indefinite, perhaps permanent, federal stay of execution of a state death sentence even though no court has found the sentence to be unconstitutional. Both created this remedy based on a perceived statutory right to be competent to proceed in federal habeas review. As Arizona and Ohio have shown, neither statute relied on supports the right the circuits created. This amicus brief supplements their textual analysis by showing how the judicially concocted right to competence and a stay undermines legitimate state efforts to enforce their criminal judgments.

While federal habeas review provides a legitimate "'guard against extreme malfunctions in the state criminal justice systems,'" it also "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some

admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id*. at 786-87 (citations omitted). The atextual right to be competent to proceed in federal habeas review – first created by the Ninth Circuit nearly a decade ago – compounds those problems by generating lengthy competency litigation in death penalty habeas cases even when a stay is ultimately denied. And competency litigation has expanded beyond just the Ninth Circuit to courts across the nation.

Neither the Constitution nor any Act of Congress creates a right to competence to assist habeas counsel. This Court should therefore hold that such a right does not exist – and put an end to the indefinite stays and protracted litigation in federal habeas cases that has resulted from the decisions of the Ninth and Sixth Circuits.

ARGUMENT

Through 18 U.S.C. § 3599(a)(2), Congress provided funded counsel to state death row inmates to prosecute their federal habeas challenges to their capital convictions and death sentences. The Ninth Circuit has read into that provision an additional right: the right to be competent to assist their federally funded habeas counsel. The Ninth Circuit did not purport to find the additional right in the text of § 3599(a)(2). Rather, it based the right on a purported

"common law tradition" that "inform[s] [its] interpretation of the statutes Congress has enacted." *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 812-13 (9th Cir.), *cert. denied*, *Woodford v. Rohan*, 540 U.S. 1069 (2003). Applying this court-created rule, the Ninth Circuit ordered the federal district court to stay Gonzales's death sentence. *Gonzales*, Pet. App. A8-9. The Ninth Circuit's atextual right and the remedy created for it allows an inmate to use § 3599(2) as a means to halt the habeas action he has initiated rather than as a means to prosecute it.

The Sixth Circuit recently created the same right. It did so by importing the statute governing competency proceedings in federal criminal prosecutions into federal habeas challenges to state convictions. *Carter,* Pet. App. 4a-9a. The Sixth Circuit adopted the same remedy the Ninth Circuit imposes: an indefinite stay. *Id*. at 13a-15a.

As Arizona and Ohio explain in their merits briefs, the Ninth and Sixth Circuits improperly rewrote or applied federal statutes to create a right to be competent to proceed in habeas review. The amici States offer this brief to explain the practical detriments to their legitimate interests that these improperly created rights perpetuate.

Competency-Based Stays And Competency Litigation In Federal Habeas Cases Unjustifiably Infringe On The States' Legitimate Interests In The Finality Of Their Presumptively Valid Judgments

The judicially-created rules in these two cases allow a habeas petitioner in a capital case to obtain relief – a delay, perhaps forever, in executing their sentence – even though the petitioner has failed to prove that his conviction or sentence resulted from an "'extreme malfunction[ ] in the state criminal justice systems.'" *Richter*, 131 S. Ct. at 787 (citations omitted). Such an indefinite, and potentially permanent, stay unreasonably interferes with the States' interests in punishing their worst offenders.

Unlike any other habeas petitioner, a death-sentenced petitioner has every incentive to find ways to postpone a federal court's decision on whether his sentence resulted from an "extreme malfunction" in state processes. If he loses, his sentence will be carried out sooner. Even if he wins, he may be retried and resentenced to death. An indefinite stay, on the other hand, will postpone the merits inquiry, and with it, the execution of his death sentence.

This Court has recognized that "[i]n particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). The Court has also recognized that staying federal habeas cases too frequently

undermines the Anti-Terrorism and Effective Death-Penalty Act's purpose to reduce delays in federal habeas litigation. *Id*. at 276-77. Above all, the Court has recognized that a habeas petition "should not be stayed indefinitely." *Id*. at 277. Yet, the rule adopted by the Ninth and Sixth Circuits potentially permits a petitioner to do just that.[1]

And even if the death-sentenced petitioner cannot convince the court that he is incompetent to proceed and win an indefinite stay, he has every reason to pursue the issue. Competency litigation provides another avenue for delay. Challenging his competency costs the petitioner nothing regardless of how frivolous the challenge may be. If he succeeds, he may avoid execution until his competence to assist habeas counsel is restored. If his competence is never determined to be restored, he may avoid execution forever without ever proving that his sentence was unconstitutional (or that he is incompetent to be executed under the standard of *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986)). Even if he does not succeed in procuring a stay, the additional delay generated by litigating his competence will "prolong [his] incarceration and avoid execution of [his death] sentence" at

[1] The Seventh Circuit has also adopted staying a habeas petition as the remedy when a petitioner is incompetent to proceed. But it did not actually recognize that a right to be competent to proceed exists. Rather, it assumed the right existed because the respondent did not argue otherwise. *Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010); *Holmes v. Buss*, 506 F.3d 576, 578-79 (7th Cir. 2007).

least for the period of that litigation. *See Rhines,* 544 U.S. at 277-78. This is precisely the kind of interference in state criminal justice processes that federal stays should avoid. *Id*.

Post-*Rohan* competency litigation in the Ninth Circuit has been widespread.[2] It has also been widespread in circuits where no right to be competent has been recognized. Those circuits have avoided deciding whether the right exists at all by finding – after often lengthy delays – that the petitioner was in fact competent. *See Ferguson v. Sec. Dep't of Corrections*, 580 F.3d 1183, 1222 (11th Cir. 2009), *cert. denied, Ferguson v. McNeil,* 130 S. Ct. 330 (2010); *Clayton v. Roper*, 515 F.3d 784, 790 n.2 (8th Cir.), *cert. denied,* 555 U.S. 1003 (2008); *Holmes v. Buss*, 506 F.3d at 578-79, *appeal after remand*, *Holmes v. Levenhagen*,

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[2] *See, e.g., White v. Ryan*, No. 08-cv-08139-GMS, 2012 WL 273707 (Jan. 31, 2012); *Mulder v. Baker*, No. 3:09-CV-00610-PMP-WGC (Sept. 26, 2011); *Gonzales*, Pet. App. A; *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009); *Blair v. Cullen,* No. CV 99-6859, 2010 WL 5563896 (C.D. Cal. Mar. 21, 2010), *report and recommendation adopted by Blair v. Cullen*, 2011 WL 91949 (C.D. Cal. Jan. 04, 2011); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504 (E.D. Cal. Jan. 26, 2010), *report and recommendation adopted by Lewis v. Ayers*, 2010 WL 3502667 (E.D. Cal. Sept. 2, 2010); *Rogers v. McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 at *3 (D. Nev. Mar. 24, 2008); *Hill v. Ayers*, No. 4-94-cv-641, 2008 WL 683422 (N.D. Cal. Mar. 10, 2008). In one case, a death-sentenced petitioner relied on the *Rohan* right to be competent to ask to reopen his federal habeas action under Fed. R. Civ. P. 60(b). *Van Adams v. Schriro*, No. CV-04-1359, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

600 F.3d 756; *Mines v. Dretke*, No. 03-11137, 2004 WL 2913069 (5th Cir. Dec. 16, 2004).[3]

Competency litigation has often proven to be lengthy. In Florida, for example, a death-sentenced inmate named Ferguson relied on *Rohan* to challenge his competence to proceed. *Ferguson v. Dep't of Corrections*, No. 1:95-cv-00573 at doc. no. 58. It took twenty months to resolve whether Ferguson was competent, which, in turn, postponed disposing of the second amended petition for approximately the same period. *Id*. at doc. nos. 57, 58, 107, 108.

In *Clayton v. Luebbers*, the litigation to determine whether Clayton was in fact competent lasted over two years. *Clayton v. Luebbers*, No. 4:02-cv-08001, doc. nos. 79 and 104. It included a seven month sojourn at the United States Medical Center for Federal Prisoners. *Clayton*, 515 F.3d at 789. The evaluator took ten months from the order for an evaluation to issue her report. *Clayton*, No. 4:02-cv-08001, doc. nos. 79 and 104. Clayton took another five months to renew his motion for a stay based on his alleged incompetence to proceed with his habeas petition. *Id*. at doc. nos. 93 and 104.

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[3] The Northern District of Oklahoma, however, ruled that no right to be competent to proceed in federal habeas exists. It rejected the Ninth Circuit's reading of § 3599 to create such a right because the statute's plain language does not support it. *Cole v. Workman*, No. 08-CV-0328-CVE-PJC, 2011 WL 3862143 at *15-17 (N.D. Okla. 2011).

In *Dansby v. Norris*, No. 02-cv-04141, 2009 WL 485418 (W.D. Ark. Feb. 26, 2009), the district court, citing *Clayton*, "assume[d] that competency is required, without answering whether an inmate must be competent to proceed in a habeas action." *Id*. at *2. That was over three years ago. The competency issue remains unresolved. *Dansby v. Norris*, No. 4:02-cv-04141, doc. nos. 140 and 167.

In Utah, death row inmate Ronald Lafferty asked the federal district court to stay his habeas action, alleging that he is incompetent to proceed. *Lafferty v. Turley*, No. 2:07-cv-00322, doc. no. 89. The district court has stayed the case and held the legal question of Lafferty's right to be competent in abeyance pending a determination of his actual competence. *Id*. at doc. no. 104, 164.[4] That issue remains unresolved. Consequently, Lafferty's federal habeas case has not materially advanced to a final resolution for two and one-half years.[5] *See, e.g., Carter*, Pet. App. 27a-28a (nearly three years of litigation from the date of the motion for competency determination until the final order on Carter's competency); *Holmes v. Davis*, 00-cv-04177-SEB-DML, doc. nos. 3 and 115 (over four

[4] The order for no. 164 is under seal and does not appear on the PACER docket.

[5] The district court did require Lafferty to file a reply in support of whatever habeas claims his counsel determined did not require his input. *Id*. at doc. no. 164. Otherwise, nothing has been done on the merits since the district court stayed the case in November 2009 pending the competency determination.

years of litigation from remand in *Buss*, 506 F.3d 576, until final order on competency determination).

And a determination of incompetence will not always end a death-sentenced petitioner's resistance to his habeas case moving forward. They may also oppose the States' efforts to restore them to competence so that the case may proceed, as Gonzales attempted to do. He argued that, not only should district court stay his federal habeas case because he was incompetent to proceed, but also that he could never be restored to competence by forcible medication. According to him, his case did not meet this Court's criteria for forcible medication to restore competence in *Sell v. United States,* 539 U.S. 166 (2003). *Gonzales*, Pet. App. B5-7. If successful, such a maneuver would both impede the States' right to carry out their lawful sentences and prohibit the States from removing the impediment.

As these examples show, litigation related to whether a death-sentenced petitioner is competent to proceed in the habeas case he initiated can be lengthy. And as shown, a death-sentenced petitioner has every incentive to delay – permanently, if possible – the resolution of his case.

But any time a federal court delays its review of a state judgment, it necessarily infringes on a state's interest in carrying out that judgment. Where the delay does not further the legitimate federal interest in correcting "extreme malfunctions" in state judicial systems that result in constitutional violations, it is

an unreasonable incursion into the States' compelling interests. *See In re Blodgett*, 502 U.S. 236, 239 (1992). As Arizona and Ohio have shown, a habeas petitioner can provide little, if any, assistance to their federal habeas counsel. *See also Cole*, 2011 WL 3862143 at *16-17 (recognizing that Cole's assistance was of little use because the federal court's review was limited to the record developed in state court and other sources of information existed for anything beyond that record).

Competency stays and competency litigation delays are particularly unacceptable because they arise from a series of Ninth Circuit decisions that improperly read a right to competency in habeas proceedings into a federal statute that provides nothing of the sort. And the Sixth Circuit has followed suit by misapplying a statute that governs competency procedures in federal criminal prosecutions to federal habeas review of a state judgment. The law does not and should not permit a death-sentenced petitioner to first initiate then halt, perhaps forever, the determination of whether his presumptively valid sentence is unconstitutional. This Court should therefore confirm that the atextual right to be competent to proceed in federal habeas does not in fact exist.

CONCLUSION

For the reasons argued, the Court should reverse the Ninth and Sixth Circuits' decisions.

Respectfully submitted,

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