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

REPLY BRIEF

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Division Chief Counsel

JEFFREY A. ZICK
Section Chief Counsel

JOHN PRESSLEY TODD
Assistant Attorney General
(*Counsel of Record*)
CAPITAL LITIGATION SECTION
1275 W. Washington
Phoenix, Arizona 85007-2997
john.todd@azag.gov
cadocket@azag.gov
Telephone: (602) 542-4686

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

REPLY OF THE PETITIONER

Respondent Gonzales's Brief in Opposition abandons the rationale proffered by the Ninth Circuit that 18 U.S.C. § 3599 implicitly guarantees the right of competence to assist counsel. Gonzales instead posits that 28 U.S.C. § 2251, a statute not addressed by the Ninth Circuit and that simply provides that a district court has discretionary authority to (temporarily) stay *state court* proceedings, justifies the Ninth Circuit's conclusion that the district court erred by rejecting Gonzales's request to indefinitely stay his federal habeas proceedings.[1]

Gonzales's abandonment of the Ninth Circuit's rationale is understandable because the court of appeals' reasoning does not withstand scrutiny. Section 3599 does not address or otherwise provide for the inmate's competence to assist counsel. When the words in a statute are unambiguous, further judicial inquiry is unnecessary. Congress says in the statute what it means. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Furthermore, the Ninth Circuit's holding, that pursuant to § 3599, a stay must issue where the petitioner is not competent to assist counsel and

---

[1] The Ninth Circuit relied entirely on 18 U.S.C. § 3599, but Gonzales now asserts that interpretation of § 3599 "is not the question presented in this case." Gonzales Br. 13. Again, at page 17, n.9, Gonzales argues that the authority to issue a stay "derives not from § 3599 but from § 2251. . . ."

communication by the prisoner "could potentially benefit" counsel, is directly contrary to this Court's decision in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011), when the merits of the claims were addressed in state court. In *Pinholster*, this Court held 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.

If the record under review is limited to the record before the state court, there is no possible way that the state prisoner's communication with counsel could be essential to counsel's ability to meaningfully prosecute the claim. If there is something in the record before the State Court to support the claim, counsel will be able to read that in the record. Counsel is more capable of doing that than the state prisoner. Gonzales states that the defendant can help counsel in "scouring the record." Gonzales Br. 12. Counsel does not need the state prisoner's help in "scouring the record." Counsel can read the record.

On the other hand, if the state prisoner's ability to communicate with counsel is alleged to be essential because the prisoner knows of something not in the record that supports the claim, that is irrelevant, because the record under review is limited to the record before the state court. There are two exceptions, which are not applicable here, where there can be an evidentiary hearing in Federal District Court, as set forth in 28 U.S.C. § 2254(e)(2). These are (i) a new retroactive ruling by this Court; (ii) a factual

predicate that could not have been discovered through the exercise of due diligence. Here, the District Court analyzed Gonzales's claims in detail, and found they were all known to him prior to the state post conviction proceeding and that on the main claim (judicial bias) "the record regarding this claim is complete." (Pet. App. C14.)

Gonzales's misunderstanding is clear in his discussion of the specifics of this case: "the claims of judicial bias could not be fully assessed without information and insights from the trial environment, including *off-the-record* events and exchanges, that only Mr. Gonzales could offer." Gonzales Br. 7 (emphasis added). "Off-the-record events and exchanges" cannot be part of the claim, because the claim is limited to "the record before the State Court."

In fact, the Ninth Circuit recognized that a capital habeas claim was "necessarily confined to the record," but reached the illogical conclusion that the claim could still benefit from communication between client and counsel. Citing its prior decision in *Nash v. Ryan*, 581 F.3d 1048, 1050 (9th Cir. 2009), the Ninth Circuit noted that it had previously held that "the prosecution of a capital habeas appeal, *which is necessarily confined to the record*, could benefit from communication between client and counsel." (Emphasis added.)

The Ninth Circuit drew the illogical conclusion that even though the claim is "necessarily confined to the record," communication between the defendant

and the attorney could still be essential. If "off-the-record events and exchanges" are excluded, because the claim is limited to "the record before the State Court," then the lawyer is perfectly capable of reading that record, and communications from the defendant are irrelevant.

The Ninth Circuit's ruling conflicts with this Court's "next-friend" jurisprudence, which recognizes that habeas cases can proceed notwithstanding the mental incapacity of petitioners. *See Whitmore v. Arkansas*, 495 U.S. 149 (1990). Additionally, the Ninth Circuit's ruling thwarts Congressional intent as evidenced by the Antiterrorism, and effective Death Penalty Act of 1996 (AEDPA), which was enacted to reduce delay in capital cases and to mandate greater deference to state court decisions.

Gonzales's reliance on § 2251 is unavailing. Section 2251, which is entitled "Stay of State Court Proceedings," authorizes the federal courts to stay *state court* proceedings during resolution of pending federal § 2254 proceedings or a pending request for appointment of counsel under § 3599(a)(2). Even if § 2251 applied to a federal court proceeding that would simply mean that in the appropriate case the federal court could stay proceedings (which it has general power to do in any case), but that fact does not answer whether such a stay is appropriate. It should not be appropriate based on incompetence of the state prisoner to help counsel, where the appeal is record-based, and the lawyer can read the record.

Gonzales fails to recognize that this case involves a *civil* proceeding that *he initiated*. A petitioner who initiates federal habeas review should pursue relief based on claims of which he and his counsel are aware: it should be dismissed if the basis for the petition is mere speculation regarding claims of which the petitioner and his counsel are currently unaware. If an incompetent petitioner regains competence and is able to provide additional relevant information, he can seek leave to amend his petition. Thus, a stay is not warranted based on a habeas petitioner's incompetence.

Finally, even assuming a *temporary* discretionary stay could be justified in some context based on the inmate's incompetence, such a stay would not be appropriate in this case because, as the district court correctly concluded, the claims at issue are record-based. Gonzales's input is clearly not essential to address claims for which there has been a merits ruling in state court and for which further evidentiary development is precluded.

ARGUMENTS

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

Gonzales makes little effort to justify the Ninth Circuit's holding that § 3599 requires that an indigent

federal habeas corpus petitioner be competent to assist counsel. In fact, notwithstanding the Ninth Circuit's reliance on § 3599 as creating a right to be competent to assist counsel, Gonzales asserts that the interpretation of § 3599 "is not the question presented in this case," and that "[t]he issue is whether courts have authority to issue a stay, not whether capital habeas petitioners enjoy a freestanding 'right to competence,' or what the contours of such a right may be." Gonzales Br. 13.

Relying on *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), and *Nash*, the Ninth Circuit held in the instant case that an indigent capital prisoner has a "*statutory right* to competence in his federal habeas proceedings." Pet. App. A2.

Gonzales's only attempt to incorporate the Ninth Circuit's analysis of § 3599 as creating a statutory right to be competent to assist counsel is his assertion that "it is eminently reasonable to construe the statutory provision for counsel in 18 U.S.C. § 3599 as warranting a stay of proceedings when the capital habeas petitioner's incompetence renders communication impossible." Gonzales Br. 17. But where the statute is not ambiguous, the court will not add provisions. *Connecticut Nat. Bank*, 503 U.S. at 254.

Gonzales's retreat from the Ninth Circuit's rationale is understandable, because the Ninth Circuit's ruling does not withstand scrutiny. The text of § 3599 does not support the Ninth Circuit's ruling. If Congress had intended for § 3599 to create a right to be

competent to assist counsel in the federal habeas context, it would have said so expressly.

Gonzales posits that § 3599 should be considered in light of the common-law understanding that a client must be competent to assist counsel. Gonzales Br. 16-17. But that common-law precept is more appropriately applied to trial proceedings that occur before a defendant's conviction becomes final. The common law did not include a right to an appeal or to federal collateral review, which is a proceeding beyond what was necessary law to protect a defendant's rights to due process.

Furthermore, this Court adopted a standard for competence to be executed that does not include a right to competence to assist counsel. This Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986), 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." *See id*. 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 *Ford* standard would be rendered meaningless if a capital prisoner has a right to be competent to assist counsel. That is because inmates would presumably be entitled to be competent to assist counsel in arguing that he is *Ford* incompetent. That would automatically change the *Ford* standard from being

aware "of the punishment [he is] about to suffer and why [he is] to suffer," to he is "able to assist in his own defense." The *Ford* standard was in place when Congress enacted § 3599 (in 1988), yet Congress gave no indication that it was legislatively overruling *Ford* or otherwise attempting to preempt the field in the area of competence to be executed. Accordingly, § 3599 should not be interpreted to require competency to assist counsel.

II. GONZALES'S ALTERNATIVE GROUNDS FOR UPHOLDING THE NINTH CIRCUIT'S RULING ARE UNPERSUASIVE.

Gonzales relies on § 2251 as providing the district courts with the authority to stay capital § 2254 proceedings. Gonzales Br. 10, 13-15, 17 n.9, 18, 28. This reliance on § 2251 as authority to indefinitely stay his federal habeas proceedings is puzzling because § 2251, which is entitled "Stay of State court proceedings," expressly relates to state court, rather than federal habeas, proceedings.[2] The text of the statute grants federal courts the power to "stay any proceeding *against the person detained in any State court or by or under the authority of any State* for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251(a)(1) (emphasis added). Notably, neither the Ninth Circuit nor Respondent Carter cited to

[2] The entire text of 28 U.S.C. § 2251 is contained in the Appendix to this Reply.

§ 2251 or otherwise suggested that it provides a rationale for indefinitely staying federal habeas proceedings when a state prisoner is incompetent to assist counsel.

Moreover, post-AEDPA amendments to § 2251 *reduced* the federal courts' authority to stay even state court proceedings. In 1994, this Court held that § 2251 provided jurisdiction for the federal courts to stay state court proceedings once a capital prisoner invoked his statutory right to appointed counsel. *McFarland v. Scott*, 512 U.S. 849, 858 (1994). In 2006, Congress amended § 2251 to permit only a 90-day stay of state proceedings upon appointment of counsel for a capital prisoner. PL 109-177, March 9, 2006, 120 Stat. 192 amending 28 U.S.C. § 2251(b)(2)(3). Congress also altered the holding of *McFarland*, adding that "[f]or purposes of this section, a habeas corpus proceeding is not pending until the application is filed." 28 U.S.C. § 2251(a)(2). Thus, unless a habeas application is filed within 90 days of the appointment of capital counsel, the federal courts are without jurisdiction to stay the state-court proceedings. Gonzales's reliance on § 2251 as authority for staying his federal proceeding is misplaced.

Gonzales posits that "[f]ederal courts indisputably have discretion to stay proceedings related to a pending petition for writ of habeas corpus, including a state sentence of death." Gonzales Br. 13 (citing *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). Although the State agrees that federal courts generally have inherent equitable authority to temporarily stay

cases on their docket, that fact is not relevant to whether an inmate's incompetence to assist counsel is an appropriate basis for a stay. Exercise of authority to grant a stay must be a "proper exercise of their discretion." *Rhines*, 544 U.S. at 276. What constitutes a proper exercise of discretion is the issue before this Court, not whether district courts have general authority to grant stays.

The Brief for Petitioner notes that § 3359 could not have implied a right to competence, because this would have granted an important right to state prisoners that was not available to those who could not pay for their own attorney. Ryan Br. 15. Gonzales argued that the relevant statute was not § 3359 but § 2251. Since this analysis shows § 2251 is not relevant, the argument in Petitioner's brief remains unrefuted.

Gonzales's argument about district court discretion is ironic because the district court *denied* his request for a stay in a carefully detailed ruling explaining why (even assuming there is a right to competence to assist counsel) a stay is not appropriate in this case. (Pet. App. B and C.) The Ninth Circuit did not take issue with the factual findings of the district court that Gonzales's remaining claims are record-based and instead found a statutory (§ 3359) basis for a right to be competent to assist counsel, even in a record-based review. Therefore, to the extent this case is viewed through the lens of an abuse of discretion standard, the district court's ruling, rather than that of the Ninth Circuit, should be upheld.

Moreover, Gonzales's argument that the federal courts' general authority to issue stays justifies the Ninth Circuit's ruling fails because stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes." Those purposes include "reduc[ing] delays in the execution of state and federal criminal sentences, particularly in capital cases," (citation and internal quotation marks omitted), and "[furthering] the principles of comity, finality, and federalism," *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *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.").

Gonzales unpersuasively urges that "[a] stay of proceedings in these circumstances is, moreover, fully consistent with AEDPA." Gonzales Br. 18. An indefinite stay pending restoration of competency, however, is clearly inconsistent with AEDPA's purposes and thwarts, rather than furthers, principles of comity, finality, and federalism.

Gonzales makes little effort to reconcile the Ninth Circuit's ruling with the clear limits on extra-record information this Court has reiterated in *Pinholster*:

> "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.

Gonzales asserts that, because evidentiary hearings are available under limited circumstances, client input remains significant, *Pinholster* notwithstanding. Gonzales Br. 25. He also posits that "the decision whether to seek an evidentiary hearing in the first place – and thus whether a claim can fairly be called 'record-based' – cannot always be made in a vacuum, without a full picture of what the client knows." *Id*. at 24.

Gonzales's argument fails because a speculative assertion that an evidentiary hearing *might be* warranted based on as yet *unknown* information could be made in almost every case. A stay based solely on the inmate's inability to assist counsel makes no more sense than a stay based on the possible testimony of an unavailable third-party witness, which would clearly be inappropriate.

Even the American Bar Association Amicus Brief, filed in support of Respondents Gonzales and Carter, admits that the default rule is that the habeas proceeding should go forward even though the petitioner is incompetent, unless the petitioner makes a "*particularized showing*" (emphasis added) that the petitioner's competence is relevant:

> Many issues raised in collateral proceedings *can be adjudicated without the prisoner's participation*, and these matters *should be litigated according to customary practice*. However, collateral proceedings should be suspended if the prisoner's counsel makes a *substantial and particularized showing*

> that the prisoner's impairments would prevent a fair and accurate resolution of specific claims.

ABA Br. 15 (quoting ABA Task Force at 674) (citing, *inter alia, Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (2004)); *Catoe*, 597 S.E.2d at 787 ("[*T*]*he default rule is that [post-conviction review] hearings must proceed even though a petitioner is incompetent*. . . .").

Under 28 U.S.C. § 2254, federal habeas review is generally a record-based review of state court proceedings that took place while an inmate was competent.[3] Contrary to Respondent's assertion, an inmate's competence while pursuing federal review of state-court proceedings does not implicate the due process concerns present during trial, and is not necessary to provide meaningful review.

Finally, Gonzales's assertion that competence to assist counsel is essential in pursuing habeas relief ignores that a federal habeas proceeding is an optional proceeding *initiated by the inmate*, presumably based on information and claims available at the time the proceeding is initiated. In fact, an application for federal habeas relief under § 2254, although a civil

---

[3] Gonzales asserts that the Arizona courts ruled that Gonzales did not have a right to be competent during post-conviction proceedings. That ruling, however, addressed only Gonzales's right to be competent during *successive* post-conviction proceedings. Pet. App. B3-B4.

proceeding in nature, is significantly different from a normal civil Complaint. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, the Plaintiff needs only allege a "short and plain statement of the claim showing that the pleader is entitled to relief." In contrast, the state prisoner in an action under § 2254 must "specify all the grounds for relief available to the petitioner" and must "state *the facts supporting* each ground." R. Gov. Habeas Corpus Cases 2(c) (emphasis added); *see also Mayle v. Felix*, 545 U.S. 644, 649 (2005).

Thus, if the necessary factual information is not currently available, such information cannot provide a basis for relief and is not necessary to resolve properly-asserted claims. Moreover, there is no injustice in requiring the inmate to go forward with proceedings *he initiated* because, if information develops at some point after the petition has been filed, the petition can be amended if the information "relates back" to previously asserted claims. *See Mayle*, 545 U.S. at 646-47; Fed. R. Civ. P. 15(c)(2).

Because federal habeas proceedings are optional proceedings initiated by an inmate seeking relief from a presumptively valid state court conviction and sentence, Gonzales's speculative assertion that an evidentiary hearing *may* be required simply does not justify a stay pending restoration of competency. As the Seventh Circuit observed, it is "odd to think that someone who initiates a [federal habeas] proceeding can then freeze it by claiming to be mentally

incompetent." *Holmes v. Buss*, 506 F.3d 576, 578 (7th Cir. 2007).

A. The Ninth Circuit's And Gonzales's Proposed Rule Is Untenable And Creates An Incentive For Inmates To Decline To Cooperate With Counsel.

The Ninth Circuit's holding – that a capital habeas proceeding can be indefinitely stayed pending an inmate's restoration to competency if there are claims that "could potentially benefit" from the inmate's input, even in a record-based review – is untenable, particularly as applied by the Ninth Circuit. The circuit court's application of that standard to review of record-based claims demonstrates the standard's implausibility. In fact, under the Ninth Circuit's rationale, almost every case would be subject to an indefinite stay any time a habeas petitioner is found to be incompetent to assist counsel, which would clearly be incompatible with the dictates of AEDPA.

Gonzales urges a more restrictive standard than that employed by the Ninth Circuit and suggests that district courts be ordered to employ an "essential communication" standard in deciding whether a stay is appropriate.[4] Gonzales Br. 13, 21. Gonzales further

[4] Gonzales repeatedly asserts that the Ninth Circuit employed the "essential communication" standard in this case and in *Nash*. However, while the Ninth Circuit referenced such a standard, a careful reading of the opinion reveals that the Court

(Continued on following page)

suggests that the stay at issue here is "temporary" and the State's concerns are addressed to a certain extent because "courts monitor petitioners under these stays through periodic status reports and (in appropriate cases) treatment directives." *Id*.

Preliminarily, Gonzales's characterization of the stay as "temporary" ignores that he has *refused to take medication* that might restore him to competency. His refusal to take prescribed medication makes it highly unlikely that a stay based on his incompetence will be "temporary," and his case is more likely to be "consigned to habeas corpus limbo," possibly indefinitely. *See Holmes v. Levenhagen*, 600 F.3d 756, 762 (7th Cir. 2010).

Gonzales's "essential communication" standard – as he applies it – is similarly untenable to the extent it is viewed to require a stay of proceedings initiated by a habeas petitioner, when such a stay is predicated on a speculative claim that unknown information may lead to a colorable claim for relief. Gonzales's standard, like that employed by the Ninth Circuit, would result in indefinite stays in almost every case in which the petitioner is incompetent to assist counsel, and in fact creates an incentive for an inmate to exaggerate symptoms of incompetence and, if found to be incompetent, to refuse to take medication that might assist in restoring competency.

---

decided the case under the "potentially beneficial" standard. Pet. App. A2-A6.

Gonzales argues that "communication with counsel may still be essential to the presentation of a capital habeas petitioner's claims in at least two ways." Gonzales Br. 24. First he contends that the inmate may have non-record information that "bears on" the strength of the claims or the manner in which they should be presented. Second, he argues that "the fundamentals of the attorney-client relations" and "[r]ules of professional conduct obligate attorneys to consult broadly and frequently with their clients and expressly as to strategic and tactical matters." *Id*. 24, 26.

An analysis of the strength of the claims or the manner in which they should be presented does not, however, implicate the types of legal judgment calls that require client input – even at trial. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (noting that it is "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling arguments" that benefits the defendant). The strength of claims or the manner in which they should be presented turns on evidence and rulings that are in the record. Extra-record information cannot be said to be "essential" to this type of analysis.

The "fundamentals of the attorney-client relationship" similarly do not compel the conclusion that client input is "essential" to pursuing federal habeas relief. Arizona's ethical rules require "reasonable communication" with a client. *See* ER 1.4, Ariz. Sup. Ct. R. 42. As with the ABA Model Rules of Professional Conduct, the only client decisions that an attorney

must leave to a defendant are the decision to plead guilty, waive a jury trial, or testify. ER 1.2(a), Ariz. Sup. Ct. R. 42. *See also Jones*, 463 U.S. at 753 n.6 (noting that under the ABA Model Rules of Professional Conduct, "[i]n a criminal case, the lawyer shall abide by the client's decision, . . . as to a plea to be entered, whether to waive a jury trial, and whether the client will testify"). These types of decisions are not implicated in federal collateral review.

Under circumstances where a client's capacity to consider decisions concerning representation is diminished, an attorney's obligation is to maintain a normal client-lawyer relationship "as far as reasonably possible." ER 1.14(a), Ariz. Sup. Ct. R. 42. Where a client's diminished capacity may harm his case, the attorney is obligated to take "reasonably necessary protective action." ER 1.14(b), Ariz. Sup. Ct. R. 42. Consistent with that directive, an attorney representing a federal habeas petitioner who is incompetent to assist counsel can ethically pursue claims that have been initiated in the hopes of obtaining relief for the client. Given the context of non-mandatory federal habeas proceedings, a lawyer's ethical obligations are not implicated by acting reasonably based on the information that is currently available. An attorney's ethical obligations do not compel the conclusion that a federal habeas case cannot move forward when an inmate is incompetent to assist counsel; instead an attorney can act ethically by acting essentially as a "next-friend" pursuing relief on behalf of the client. *See Whitmore*, 495 U.S. at 152.

Gonzales rejects the suggestion that an attorney can act as a "next friend" because they lack "any pre-existing relationship." The case he relies on for this proposition, however, involved an attorney who was acting against the stated interests of a death row inmate who declared his wishes to waive all further legal proceedings. *Centobie v. Campbell*, 407 F.3d 1149 (11th Cir. 2005) (*per curiam*). In the normal habeas proceeding, the attorney is seeking to further the inmate's attempt to *obtain relief*.

B. There Is No Plausible Basis For Granting A Stay Even Under Gonzales's Proposed Standard.

Assuming there could be a situation in which a temporary stay is somehow warranted based on an inmate's incompetence to assist counsel, such a stay would not be appropriate in the instant case. As noted previously, the district court expressly found that Gonzales's remaining claims are "record-based and involved purely legal issues and therefore would not potentially benefit from his ability to communicate rationally with counsel." Pet. App. B7. The district court explained in particular why Gonzales's input was not necessary to resolve his judicial bias claim. *Id*. C10-26. The district court examined in detail each of the claims made by petitioner, claims number 9, 13, 17, 29, 30, and 34, and showed as to each claim that the record was complete, that the claim involved a pure legal issue, that there could be no newly discovered evidence because the petitioner was an

eyewitness to the events at issue, or the claims were withdrawn and were not before the court, and that no actual innocence claim had been raised. With respect to the judicial bias claim, that the Ninth Circuit relied on, the district court specifically found that "the record regarding this claim is complete," and supported that conclusion with a detailed analysis. *Id*. C14. The Ninth Circuit completely ignored that analysis by the district court, and asserted that "Gonzales has raised at least one claim [judicial bias] that could potentially benefit from rational communication with Counsel. . . ." *Id*. A6. The detailed analysis by the district court is far more persuasive than the bare conclusion by the Ninth Circuit.

The Ninth Circuit stated its holding as follows: "In *Nash* we held that the prosecution of a habeas appeal that is record-based and resolvable as a matter of law can benefit from communication between client and counsel," and that this requires an indefinite stay in a case where a client is not competent to aid counsel. Pet. App. A2. This Court should reject that illogical conclusion. If the record is "record based and resolvable as a matter of law" then counsel can read the transcript, and communication from the client is unnecessary.

Although Gonzales continues to assert that communication between Gonzales and his attorneys relating to this claim is "essential," his proffered rationale includes "the number of attorneys who previously represented him." The relevant inquiry on federal habeas review, however, does not turn on

information about the different attorneys who represented Gonzales, but rather on whether the Arizona Supreme Court properly applied controlling law as established by this Court – in this instance *Liteky v. United States*, 510 U.S. 540 (1994).[5] *See* 28 U.S.C. §§ 2254(d), 2254(e). And, because the state courts addressed Gonzales's judicial bias claim on the merits, under *Pinholster*, extra-record information is not relevant to the determination whether the Arizona courts properly applied *Liteky*.

This Court has long recognized that the criminal trial "is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trials.'" *McFarland*, 512 U.S. at 859 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Even before the enactment of AEDPA, this Court acknowledged that when direct review of a criminal case comes to an end, "a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot*, 463 U.S. at 887.

This Court has further noted that, in the post-conviction context, a balance of competing interests

---

[5] Gonzales raised this claim in his habeas petition prior to any alleged inability to communicate with counsel. Moreover, he was represented by the same attorney, Morton Rivkind, at both of his state trials. (Doc. 47, at 3-5; *Gonzales v. Stewart*, CIV 99-2016-PHX-SMM (filed Nov. 3, 2000).

between the prisoner and the State "surely tips in favor of the State." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist*., 528 U.S. 152, 162 (2000) (discussing how the status of the defendant changes dramatically following the guilty verdict). Generally, by the time the state capital prisoner seeks federal habeas review, he has had opportunities for direct appeal as well as state post-conviction collateral review. And, it is undisputed that Congress's intended purpose in enacting AEDPA "was to reduce delays and promote finality" while allowing petitioners a fair opportunity for review of their federal claims. Gonzales Br. 18. Consistent with those dictates, an attorney representing an inmate who is incompetent to assist counsel can pursue relief on behalf of the client by acting as his attorney or "next-friend" to pursue claims that are presently available. If an incompetent inmate is restored to competency, he can seek leave to amend his federal habeas petition where appropriate.

CONCLUSION

The Ninth Circuit's opinion should be vacated, its stay lifted, and the case remanded to the district court to decide the merits of Gonzales's habeas petition.

Respectfully submitted,

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Division Chief Counsel

JEFFREY A. ZICK
Section Chief Counsel

JOHN PRESSLEY TODD
Assistant Attorney General
(*Counsel of Record*)
CAPITAL LITIGATION SECTION
1275 W. Washington
Phoenix, Arizona 85007-2997
john.todd@azag.gov
cadocket@azag.gov
Telephone: (602) 542-4686

APPENDIX

§ 2251. Stay of State court proceedings

(a) In general. –

(1) Pending matters. – A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding *against the person detained in any State court* or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(2) Matter not pending. – For purposes of this section, a habeas corpus proceeding is not pending until the application is filed.

(3) Application for appointment of counsel. – If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, *but such stay shall terminate not later than 90 days after counsel is appointed* or the application for appointment of counsel is withdrawn or denied.

(b) No further proceedings. – After the granting of such a stay, any such *proceeding in any State court* or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as

> valid as if no habeas corpus proceedings or appeal were pending.

(Emphasis added.)