No. 10-930

IN THE

Supreme Court of the United States

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

v.

ERNEST VALENCIA GONZALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Whether a district court has authority to stay capital habeas proceedings when a stay is deemed essential to ensure a capital habeas petitioner's ability to communicate with and assist his or her counsel, given that 28 U.S.C. § 2251 expressly confers that authority and 18 U.S.C. § 3599 guarantees a capital habeas petitioner's right to appointed counsel.

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INTRODUCTION

District courts have long held the authority, by statute and at common law, to stay proceedings on a pending petition for writ of habeas corpus, as well as related state judgments of sentence, to ensure the integrity of those proceedings and enable full and fair presentation of claims. Capital habeas petitioners likewise have long enjoyed an "enhanced" right to counsel, see *Martel* v. *Clair*, 132 S. Ct. 1276, 1284 (2012), which guarantees not only a right to an assigned attorney but also "necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims," *McFarland* v. *Scott*, 512 U.S. 849, 858 (1994).

The standard applied by the court of appeals in this case — that a stay of habeas proceedings is proper when a capital habeas petitioner's incompetence renders him or her incapable of essential communication with counsel — is a natural byproduct of these settled principles. It leaves discretion to enter a temporary stay with the district court, where it belongs, see *McFarland*, 512 U.S. at 858, and does not unduly hasten the incompetent habeas petitioner's death sentence when communication with counsel is vital to the presentation of his or her claims. Contrary to the characterization of Petitioner (hereafter "the State"), this limited and narrow standard is neither alarming nor revolutionary; it simply makes sense.

It is the State's proposed restriction that would work a radical restructuring of traditional habeas practice. That rule would broadly prohibit a district court from ever staying habeas proceedings, notwithstanding the court's determination that a stay is warranted to ensure the capital habeas petitioner's

right to counsel. Under the State's proposed rule, merely because a claim may be deemed "record-based" or "legal in nature" or because a "next friend" might be appointed, the district court is categorically barred from exercising its discretion to issue a stay. There is no support, either in federal statutes or elsewhere, for these proposed restrictions, and they would in any event be wholly unworkable in application. Even if the State believes (without apparent reason) that constraining a district court's discretion in this manner would somehow "improve upon" habeas practice, Pet. Br. 11, neither federal habeas law nor this Court's precedent contemplate or permit such restrictions.

Free from the distractions, this is a simple case. The court of appeals set forth the proper standard for whether a stay of habeas proceedings is warranted: when a capital habeas petitioner's incompetence precludes communication with counsel that is "*essential* to counsel's ability to meaningfully prosecute a capital habeas claim." Pet. App. A5 (emphasis added, internal quotation marks omitted). The court of appeals correctly applied that standard to find that a temporary stay (pending competency proceedings) was warranted because the capital habeas petitioner in this case, Ernest Valencia Gonzales, appeared to be incompetent and unable to engage in essential communication with his lawyers. Pet. App. A1-A9.

There is no reason to question this straightforward application of the appropriate standard, and indeed, neither the State nor its *amici* offer any basis to do so. The decision below should be affirmed.

STATEMENT OF THE CASE

For more than a decade, since November 1999, Mr. Gonzales and his counsel have sought to press his claims for habeas relief in the federal courts. Pet. App. A2-A4, B1-B7, C1-C7. In early 2006, following the conclusion of related state court proceedings, and after Mr. Gonzales had spent nearly 20 years in prison on death row, his mental health — which had been of serious concern since at least 2000 — deteriorated to the point that he could no longer communicate rationally with his appointed attorneys and could not provide to them "essential" information and insight regarding his claims.[1] Pet. App. A3, A5. Mr. Gonzales's attorneys then moved for a temporary stay of proceedings to allow for a competency determination which would include a psychiatric assessment. Pet. App. A2-A3; Mot. for Competency Determination & to Stay Proceedings, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Apr. 17, 2006), ECF No. 102. The district court initially agreed to hold a competency hearing but later denied that request on the ground that it lacked authority to grant it. Pet. App. B9, C27-C28. That holding, later reversed by the Ninth Circuit, is at issue here.

1. Over the course of the state trial and sentencing proceedings, Mr. Gonzales had been represented by nearly a dozen different attorneys at different times. Pet. App. A5. For part of the trial

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[1] The district court asserted that Mr. Gonzales's "incompetence arose several years after he had filed his amended petition." Pet. App. C28. This is not the case. Rather, appointed federal habeas counsel raised concerns about Mr. Gonzales's competence soon after representation commenced. *See* Mot. for Competency Determination & to Stay Proceedings & Attachments, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Apr. 17, 2006), ECF No. 102; Resp. Br. in Opp. 1; Pet. App. B3.

proceedings he had even represented himself — although the state courts later, in the post-conviction stage, determined that he was incompetent to do so based on a series of mental health reports from three different experts, one of them court-appointed, all indicating that Mr. Gonzales was psychotic and unable either to assist counsel or to represent himself. See Supp. Br. in Support of Pet. for Writ of Mandamus 38-40, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. July 31, 2008); Supp. Reply Br. in Support of Pet. for Writ of Mandamus 6, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. Sept. 16, 2008) (quoting state court's finding that, "pursuant to [the court-appointed expert's] finding, [Mr. Gonzales] is incompetent and cannot represent himself in this [state post-conviction] proceeding"); see also Mot. for Competency Determination & to Stay Proceedings, *supra*. Ultimately, however, the state courts ruled that state law did not require a post-conviction capital habeas petitioner to be competent to proceed. See Resp. Br. in Opp. 1; Pet. App. B3.

These habeas proceedings began after Mr. Gonzales was convicted of first-degree murder in 1991 and, thereafter, sentenced to death. Pet. App. A2. He appealed that judgment on a number of grounds, including a claim that the presiding trial judge had been biased against him. Pet. App. A5, C1-C2, C12-C16. The Supreme Court of Arizona affirmed the conviction and sentence in 1995. Resp. Br. in Opp. 1 (citing *State* v. *Gonzales*, 892 P.2d 838, 849 (Ariz. 1995)). Mr. Gonzales then filed state petitions for post-conviction relief, which were eventually denied

in 1999. Pet. App. B3. That same year, Mr. Gonzales initiated federal habeas proceedings.[2]

In this period and thereafter, Mr. Gonzales experienced continuing decline in his mental health. See Pet. App. A3. He no longer understood his legal situation, and particularly the impending sentence of death, and he grew increasingly and irrationally suspicious of his appointed counsel. See Pet. App. A3, C2; see also Supp. Br. in Support of Pet. for Writ of Mandamus, *supra*, at 30-36.

From 2003 through 2006, Mr. Gonzales refused dozens of attempted visits from his counsel and their staff — at one point accusing them of poisoning his food. Pet. App. C2; Emergency Pet. for Writ of Mandamus 24, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. May 22, 2008). He also sent numerous letters and petitions to both the state and federal

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[2] A request for appointment of habeas counsel was filed in the District Court for the District of Arizona in November 1999. Pet. App. A1, C1. The district court appointed the Office of the Federal Public Defender to represent Mr. Gonzales soon thereafter, pursuant to 18 U.S.C. § 3599 (then 21 U.S.C. § 848(q)). Pet. App. C1. An amended habeas petition was filed in 2000 setting forth notice of the claims without addressing the merits, per court order. *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. July 17, 2000), ECF No. 28. The case was stayed to allow Mr. Gonzales to return to state court to exhaust some of the claims raised in the petition. Pet. App. A2, B3-B4. The district court eventually ruled that certain claims were procedurally barred before ordering briefing on the merits. This case (as well as other capital habeas cases pending in district court) was stayed pending litigation as a result of *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Schriro* v. *Summerlin*, 542 U.S. 348 (2004). The district court subsequently dismissed certain claims on procedural grounds, but the merits of Mr. Gonzales's claims have not yet been addressed in pleadings or briefs.

courts starting in 2001,[3] which evidence what one court-appointed mental health expert, Jack Potts, M.D., described as "delusion[s] regarding electronic eavesdropping devices," "paranoi[a] regarding his environment," and "thought processes [that] are at times quite disordered."[4] See Supp. Br. in Support of Pet. for Writ of Mandamus, *supra*, at 38-40; see also Supp. Reply Br. in Support of Pet. for Writ of Mandamus & Attachments, *supra*, at 4-5.

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[3] *See, e.g.*, Supp. Reply Br. in Support of Pet. for Writ of Mandamus, *supra,* at Attach. 1, Ex. H ("Petitioners Petition Requesting To Be A Member (people's) Of the Aztec etc., Tribe's, customs, etc., and Recognized As the Same Within The United States in Addition to the U.S. Constitution"). As reflected in his written letters and petitions, Mr. Gonzales also believed he was "attached through science technology" and that "studies or projects [were] being held or conducted upon [him]" without his consent. *Id.* at Ex. A at 1. He wrote that he had "been through so much pressure mentally with confusion, deception through very evil and wicked (twisted) ways," *id.* at Ex. A at 2, and believed he was connected to the Department of Corrections through "a telephonic, science monitoring device, in which prisoners, attorneys, police, prison officials, civilians etc., are attached to [his] hearing daily," *id.* at Ex. G at 2. He also believed his "thoughts, imaginations, [and] fantasies" were being stolen. *Id.* at Ex. H. at 2.

[4] Mr. Gonzales was identified with schizotypal traits more than 25 years ago by the Arizona Department of Corrections. It appears, however, that the State did not attempt to provide any treatment to Mr. Gonzales until 2007—more than 16 years after the date of his incarceration, and only after the district court had granted an evidentiary hearing in these habeas proceedings on the question of his competency. Emergency Pet. for Writ of Mandamus, *supra*, at 17; Reply Br. in Support of Pet. for Writ of Mandamus 15, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. June 16, 2008). Thus, the deterioration of Mr. Gonzales's untreated condition over the past quarter-century, since the State first identified it, does not result from dilatory tactics or refusal.

2. In January 2006, after the *Ring*/*Summerlin* litigation was settled for Arizona capital habeas petitioners, see *supra*, note 2, the district court directed the parties to submit briefs on the merits of the claims. Soon thereafter, Mr. Gonzales's counsel moved to stay the proceedings pending a competency determination. Pet. App. A2-A3. The motion recounted counsel's efforts to communicate with Mr. Gonzales, and explained that counsel's inability to speak with him — and his apparent inability to understand counsel — precluded counsel from addressing evidentiary and other issues essential to presentation of the claims. Pet. App. A2-A3; Resp. App. (1A-10A). Among others, 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. Pet. App. A5-A6.

Both the State and the district court initially agreed that "obviously there are some [issues] that [counsel] need Mr. Gonzales to answer." Transcript of Status Hearing Proceedings, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Oct. 23, 2007), ECF No. 166 (statement of the State)); see also Resp. Br. in Opp. 2 (district court recognizing there are "*claims* where [Mr. Gonzales] potentially will provide beneficial assistance during briefing of the remaining issues" (emphasis in original)). The court cited as an example Mr. Gonzales's claim of judicial bias. See *id.*

The district court, accordingly, ordered the parties to submit updated expert reports on Mr. Gonzales's mental health and, when those reports disclosed "reasonable grounds" to suspect a psychiatric

problem, scheduled an evidentiary hearing.[5] Order, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Dec. 11, 2006), ECF No. 126; see also Pet. App. B5; Resp. Br. in Opp. 2. It also directed, at the State's request, that Mr. Gonzales be transferred to a State hospital for an extended mental health evaluation. That evaluation resulted in a report concluding that Mr. Gonzales "[has] suffered from a 'genuine psychotic disorder' and [is] 'currently ... unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. A3, C4-C6.

The scheduled competency hearing never occurred, however. While the district court credited the State hospital's psychiatric report, it determined in a written order that it lacked discretion to grant a stay, even if Mr. Gonzales was incompetent, because Mr. Gonzales's "properly-exhausted claims are record-based and/or resolvable as a matter of law." Pet. App. A2, C27-C28. The district court therefore denied the stay request, and ordered proceedings to continue notwithstanding appointed counsel's inability to communicate with Mr. Gonzales about his claims. Pet. App. C29; Resp. Br. in Opp. 2.

3. Counsel thereafter filed in the Ninth Circuit, on May 23, 2008, an emergency motion for stay of the district court's proceedings and an emergency petition for writ of mandamus. Pet. App. D1, I1.

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[5] The district court also denied the State's subsequent motion for reconsideration, rejecting the State's argument that Mr. Gonzales had not demonstrated that his assistance was necessary for counsel to complete the merits briefing on his remaining claims. State's Mot. for Reconsideration, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Dec. 21, 2006), ECF No. 127; Order, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Jan. 17, 2007), ECF No. 128.

That motion requested an order directing the district court to issue a temporary stay of proceedings, hold a hearing, and make a finding on the issue of Mr. Gonzales's competence — and then, if necessary, exercise its discretion to determine whether a stay should issue. See Emergency Pet. for Writ of Mandamus, *supra*.

The court of appeals granted mandamus relief. Pet. App. A9. Rejecting the district court's analysis, it held that federal courts have discretion to stay habeas proceedings, notwithstanding that a claim may be described as "record-based," and such discretion is properly exercised when a capital habeas petitioner becomes incompetent to communicate with his or her counsel and communication is "essential" to presentation of the claims. Pet. App. A1-A9. Because the record in this case supported a finding that Mr. Gonzales was incompetent, and it appeared that communication between him and his counsel would be essential to a full assessment and effective presentation of at least some of his claims — in particular, the claim of judicial bias[6] — the court of appeals determined that a temporary stay of proceedings, pending determination of Mr. Gonzales's competency, should issue. *Id.*

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[6] Although the court of appeals focused primarily on the judicial bias claim, habeas counsel also argued that Mr. Gonzales's insight and institutional knowledge were necessary to address whether the trial court improperly permitted the victim to make a courtroom identification of Mr. Gonzales and to remain in the courtroom at key points in the trial, and whether the trial court improperly relied on pecuniary gain and the creation of grave risk of harm to another as aggravating factors. Brief on Implications of Present Incompetency on Rohan Proceedings, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Jan 10, 2008), ECF No. 184.

SUMMARY OF ARGUMENT

A stay of federal capital habeas proceedings is proper when a petitioner's incompetence leaves him or her unable to communicate with counsel and such communication is essential to the prosecution of habeas claims. Neither the State nor its *amici* provide any basis for stripping a district court's authority to grant a stay if a claim might be described as "record-based" or "legal in nature," or when a "next friend" might be appointed. Likewise, they offer no reason to doubt that a stay was warranted in this case based on the findings below.

1. District courts may exercise broad discretion to stay habeas proceedings including a state's death sentence. 28 U.S.C. § 2251. Federal statutes likewise afford capital habeas petitioners an "enhanced" right to qualified legal counsel, *Martel*, 132 S. Ct. at 1284, which this Court has read to include "a right for that counsel meaningfully to research and present a defendant's habeas claims," *McFarland*, 512 U.S. at 858; see also 18 U.S.C. § 3599. These two principles, taken together, leave no room for doubt that a district court has discretion to stay habeas proceedings when appropriate, in its view, to guarantee a capital habeas petitioner a "meaningful" right to counsel. *McFarland*, 512 U.S. at 858.

Nothing in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, compels, or even supports, a contrary result. That statute does not insist that concerns over finality and speedy resolution trump all other interests, as the State and its *amici* assert, and nowhere does it reveal an intent to undermine a district court's traditional discretion to enter stays or a capital habeas petitioner's right to meaningful

assistance of counsel. Quite the opposite, given that AEDPA now renders a capital habeas petitioner's first petition his or her singular opportunity to secure relief in federal court, it is all the more necessary, as this Court has recognized, to ensure that the petitioner's rights are fully protected. Respecting a court's traditional discretion to stay habeas proceedings "in the interests of justice" to protect the petitioner's ability to communicate with counsel is fully consonant with that goal. See *Martel*, 132 S. Ct. at 1287.

2. Consistent with these principles, the court of appeals correctly held that a stay is proper if communication between the capital habeas petitioner and his or her counsel is impossible due to incompetence but would be "'essential to counsel's ability to meaningfully prosecute' [the] habeas claims." Pet. App. A5. This standard comports with other competency-based protections afforded during trial and at the time of execution, and it strikes the right balance in the habeas context.

The State, however, urges a rule that would do the opposite. It contends that district courts should be barred from exercising their discretion to enter a stay of habeas proceedings when claims may be described as merely "record-based" or "legal in nature," or when a "next friend" might be appointed. Not one of these proposals is supported by statute or this Court's precedent, and none is consistent with traditional habeas practice. Such restrictions would require courts to engage in artificial line-drawing that not only would be arbitrary, denying relief to similarly situated capital habeas petitioners merely because one individual's claims might be deemed more "record-based" than another's, but almost certainly would prove unworkable in practice. Such

distinctions — among them, for instance, questions of fact, questions of law, and mixed questions of law and fact — already frustrate litigants and courts in a wide variety of legal contexts.

The standard applied below, permitting a stay when the district court deems that communication is essential between an incompetent capital habeas petitioner and his or her counsel, avoids these problems. It allows courts to take into account the unique circumstances of each case and exercise their discretion to issue or to deny a stay based upon all relevant considerations, which often include first-hand observation of the petitioner. Experience, moreover, dispels the State's unfounded fears that the standard will pose a risk of abuse or indefinite delays in future cases, as the Solicitor General recognizes.

3. A stay was warranted in this case because Mr. Gonzales is incompetent and unable to communicate with counsel according to multiple psychiatric assessments — including court-appointed experts — and his participation is essential to the prosecution of his habeas claims. In particular, his claim of judicial bias depends especially upon his ability to communicate; his appointed federal habeas attorneys were new to the case, and no one but Mr. Gonzales could properly assist them in scouring the record, placing a first-hand gloss on it, and developing a full and complete picture of what happened. There is no basis, apart from the conclusory assertions of the State and the Solicitor General, to disturb this holding.

Stays of capital habeas proceedings as a result of incompetence are sure to be infrequent both because of the high bar set in incompetency proceedings and the "essential communication" standard recognized

below. Here, however, the standard was satisfied, and temporary postponement was thus entirely proper. The decision below should be affirmed.

ARGUMENT

I. DISTRICT COURTS HAVE BROAD DISCRETION TO STAY HABEAS PROCEEDINGS AND TO ENSURE A CAPITAL HABEAS PETITIONER'S ABILITY TO COMMUNICATE WITH COUNSEL.

The State and the Solicitor General argue that the federal habeas right-to-counsel provision, 18 U.S.C. § 3599(a)(2), should not be interpreted to create a "right to competence," with an associated "right ... to a stay of [habeas] proceedings if [the capital habeas petitioner] is not competent to assist his counsel." U.S. Br. 2; accord Pet. Br. 3-4. However, that is not the question presented in this case. The 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. The Court need not reach that question in order to uphold the discretionary, and temporary, stay of proceedings issued in this case. Accord *McFarland*, 512 U.S. at 858 ("This conclusion by no means grants capital defendants a right to an automatic stay of execution. Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court.").

1. Federal courts indisputably have discretion to stay proceedings related to a pending petition for writ of habeas corpus, including a state sentence of death. That discretion, traditionally recognized as within a court's inherent authority, *e.g.*, *Rhines* v. *Weber*, 544

U.S. 269, 275 (2005) (citing *Landis* v. *N. Am. Co.*, 299 U.S. 248, 257 (1936)); *Rees* v. *Peyton*, 386 U.S. 989 (1967), was codified by federal statute:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may … 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).

This provision is the necessary starting point for any assessment of the scope of a district court's discretion to stay habeas proceedings. Notably, it states no limitation on the court's authority, either with respect to the nature of the case or reason for the stay, but instead "dedicates the exercise of stay jurisdiction to the sound discretion of a federal court." *McFarland*, 512 U.S. at 858.

The statute also expressly contemplates issuance of a stay to ensure that a capital habeas petitioner is afforded the benefit of consultation with counsel. While subsection (a)(1) of § 2251 authorizes issuance of a stay *after* a habeas petition has been filed and is pending, subsection (a)(3) extends that same authority to proceedings *before* a petition is filed in one particular circumstance: "[i]f a State prisoner sentenced to death applies for appointment of counsel pursuant to [18 U.S.C. §] 3599(a)(2) ... that court may stay execution of the sentence of death [for up to] 90 days after counsel is appointed ...." 28 U.S.C. § 2251(a)(3).

This provision establishes, beyond doubt, that the general stay jurisdiction conferred by 28 U.S.C. § 2251(a)(1) includes authority to issue a stay of execution to ensure that a capital habeas petitioner

has an adequate opportunity to obtain representation and that counsel, in turn, has a "meaningful[ ]" opportunity "to research and present a defendant's habeas claims." *McFarland*, 512 U.S. at 857-58.[7] There is no reason, and certainly no basis in the statute, to preclude a court from exercising this authority when the capital habeas petitioner's inability to consult with counsel arises not from financial indigence, as in *McFarland*, but rather from mental incapacity.

2. That district courts have discretion to stay proceedings in these situations is independently confirmed by 18 U.S.C. § 3599. That section, incorporated by reference in 28 U.S.C. § 2251(a)(3), "grants indigent capital defendants a mandatory right to qualified legal counsel." *McFarland*, 512 U.S. at 854. It also sets forth specific qualifications that an appointed attorney must generally possess, including experience handling felony trials and appeals within the federal system. 18 U.S.C. § 3599(b)-(e).

This Court held in *McFarland* that the provision of counsel pursuant to 18 U.S.C. § 3599 would be rendered largely inconsequential if it did not include "a right for that counsel meaningfully to research and

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[7] Subsection (a)(3) of 28 U.S.C. § 2251 was, in fact, enacted in response to *McFarland*. H. R. Rep. No. 109-333, at 109-10 (2005). That opinion interpreted the statute to authorize district courts to issue a pre-habeas petition stay of execution, even though the provision did not then explicitly provide such authority, in order to vindicate the capital habeas petitioner's right to counsel conferred by 18 U.S.C. § 3599(a)(2) (then 21 U.S.C. § 848(q)(4)(B)). *See McFarland*, 512 U.S. at 857-58. Subsection (a)(3) expressly conferred that authority, and imposed limitations on the length of the stay. *See* Pub. L. No. 109-177, 120 Stat. 192, 251 (2006).

present a defendant's habeas claims," and therefore § 3599 must be interpreted to include that right. 512 U.S. at 858. The same must be said for counsel's ability to communicate with his or her client. Appointment of counsel offers no real benefit to a capital habeas petitioner unless that counsel has a "meaningful[ ]" opportunity to communicate and consult with the client to develop and assess the claims to be presented on the client's behalf in light of the client's insights and views. *Id.* In other words, the right to counsel encompasses the capacity to communicate.

When a capital habeas petitioner's incompetence renders that communication impossible, the right of representation expressly guaranteed by § 3599 is jeopardized, as are the fairness and integrity of the habeas proceedings. In those rare and limited circumstances, district courts can and should (subject to discretionary considerations discussed below, *infra* pp. 20-30) issue a stay of proceedings to fulfill the statutory promise of representation.

Recognition of this authority is consonant with constitutional guarantees and common law practice. While the Sixth Amendment does not of its own force grant a general right to counsel in all post-conviction proceedings, other constitutional provisions — such as, among others, the Fifth Amendment — do offer some protection for capital habeas petitioners, and should at the least prohibit execution of a sentence against a petitioner who is arbitrarily denied safeguards otherwise available to similarly situated individuals. See, *e.g.*, *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 289 (1998) (opinion of O'Connor, J.). Further, it was well recognized at common law that, if a person becomes insane after trial and judgment, and therefore unable to press a

claimed defense, execution must be stayed. See, *e.g.*, 4 William Blackstone, Commentaries *24-25 (1769) ("[I]f, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, he might have alleged something in stay of judgment or execution.").[8] Particularly in light of these constitutional and common law principles, 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.[9]

In fact, the State and Solicitor General concede this point. They agree that a stay may be appropriate when an "inmate's input is essential to further the federal habeas corpus litigation." Pet. Br. 14; U.S.

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[8] *See also McNally* v. *Hill*, 293 U.S. 131, 136 (1934) ("To ascertain its meaning and the appropriate use of the writ [of habeas corpus] in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute.").

[9] In failing to recognize a district court's broad discretionary authority under 28 U.S.C. § 2251, the State argues that interpreting 18 U.S.C. § 3599 in this way "would result in disparate treatment of indigent and non-indigent [capital habeas petitioners]." Pet. Br. 15. The State's argument rests on a fundamental misunderstanding of the district court's authority to issue stays. That authority derives not from § 3599 but from § 2251, which applies in proceedings involving all capital habeas petitioners—whether indigent or not. Section 3599 simply confirms that this discretion extends to circumstances in which counsel is appointed by the court. In any event, the point is entirely academic, as the State has cited no cases (nor could it) in which a condemned state prisoner, having initiated federal habeas proceedings, is represented by retained counsel.

Br. 29 (conceding that a stay may be appropriate "for a limited period to afford the prisoner the opportunity to regain his competence").

3. A stay of proceedings in these circumstances is, moreover, fully consistent with AEDPA. The primary purpose of AEDPA was to reduce delays and promote finality, not to prevent a full and fair federal habeas hearing. *Rhines*, 544 U.S. at 276. Indeed, when AEDPA was passed, Congress preserved federal courts' broad discretionary powers to stay proceedings pursuant to 28 U.S.C. § 2251. Given this express preservation of stay authority, it cannot be the case, as the State and its *amici* appear to contend, see Pet. Br. 19; U.S. Br. 27, that a stay may be deemed invalid merely because it delays resolution of the habeas petition and final execution of sentence.

Congress also re-enacted, post-AEDPA and post-*Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 816 (9th Cir. 2003) (recognizing a district court's discretion to stay proceedings where the capital habeas petitioner is incompetent to communicate with counsel), the statutory right to counsel at 18 U.S.C. § 3599. See Pub. L. No. 109-177, 120 Stat. 192, 222 (2006). That statute, this Court has said, reflects Congress's recognition "that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 859.

While AEDPA was undoubtedly intended to advance "interests in finality and speedy resolution of federal [habeas litigation,]" it does not do so at all costs. *E.g.*, *Rhines*, 544 U.S. at 277-79. Rather, these interests must be balanced against others reflected in the statute, *id.*, including the need — recognized in both 18 U.S.C. § 3599 and 28 U.S.C. § 2551 — to ensure that capital habeas petitioners have access to,

and can "meaningfully" benefit from, the assistance of qualified counsel. *McFarland*, 512 U.S. at 858. Far from honoring AEDPA's purposes, a categorical bar against stays to address a petitioner's incompetence to communicate with counsel would violate the plain language of the statute, which "dedicates the exercise of stay jurisdiction to the sound discretion of a federal court," *McFarland*, 512 U.S. at 857-58.

A categorical bar would subvert Congress's overarching goal of guaranteeing "'fundamental fairness in the imposition of the death penalty.'" *Martel*, 132 S. Ct. at 1285 (quoting *McFarland*, 512 U.S. at 855). Capital habeas petitioners often have but one opportunity to pursue relief in the federal system.[10] Recognizing a court's authority to stay habeas proceedings, when appropriate to ensure that such opportunity is fully available, is entirely consistent with — and, indeed, effectively mandated by — AEDPA and this Court's precedents. See, *e.g.*, *Martel*, 132 S. Ct. at 1285; *Rhines*, 544 U.S. 278-79; *McFarland*, 512 U.S. at 858.[11]

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[10] *See, e.g.,* 141 Cong. Rec. H4086 (daily ed. Feb. 8, 1995) ("The bill before us today balances the need for finality and accountability with a firm regard for due process of law and full constitutional protections … Convicted criminals, particularly murderers on death row, will generally get only one opportunity to raise their claims in Federal court using habeas corpus petitions." (Statement of Rep. Bill McCollum (Fl.))).

[11] The Solicitor General incorrectly suggests that district courts lack authority to conduct competency hearings. U.S. Br. 22-23. In addition to a court's inherent authority to conduct such examinations, this Court recognized in *Rees* v. *Peyton*, 384 U.S. 312, 312 (1966), that general federal competency statutes may be relied upon by district courts when competency issues arise in federal habeas litigation.

II. A STAY IS APPROPRIATE WHEN A CAPITAL HABEAS PETITIONER'S INCOMPETENCE PRECLUDES ESSENTIAL COMMUNICATION.

Because district courts have authority to issue a stay of execution to ensure effective attorney-client communication, this case concerns only the standard by which that discretion should be exercised. But on that question, the parties in this case agree: A stay is properly granted when a capital habeas petitioner's incompetence renders him or her incapable of communicating with counsel and such communication is "essential" to the prosecution of his claims. See Pet. Br. 14 (acknowledging that a stay is proper if capital habeas petitioner's input is "essential"); accord U.S. Br. 29 ("crucial").

The parties diverge, however, on what this standard means in practice. Mr. Gonzales would leave the standard's application to the district court's discretion; the State and the Solicitor General would not. Instead, they argue that a district court must end the inquiry and cannot grant a stay if the claims might be described as "record-based" or "legal in nature" or when a "next friend" might be appointed, because, in those cases (they assert), communication between a capital habeas petitioner and counsel are never essential. But nothing in the statute or this Court's precedents supports such categorical limitations, which would be unreasonable and unworkable in practice.

A. The District Court's Discretion To Stay Habeas Proceedings Is Properly Assessed By An "Essential Communication" Standard.

The rule urged by Mr. Gonzales fits comfortably within existing habeas practice and precedent. This Court has held, in *McFarland* v. *Scott*, that a stay of habeas and state execution proceedings should issue when necessary to ensure "that counsel [has the opportunity] meaningfully to research and present a defendant's habeas claims." 512 U.S. at 858. That is precisely the situation here. When a capital habeas petitioner's incompetence prevents communication with counsel and those communications are deemed essential to presentation of the claims, the capital habeas petitioner's inability to communicate deprives counsel of a "meaningful[]" opportunity to present his or her client's case and thus warrants a stay. *Id.*

The "essential communication" standard also comports with two competency-based safeguards that bookend a capital habeas petitioner's passage through the courts. First, at trial, both the Constitution and statute prevent the defendant from being tried if he or she lacks "sufficient present ability to consult with his lawyer" and cannot assist in his or her own defense. *Dusky* v. *United States*, 362 U.S. 402, 402 (1960); see also 18 U.S.C. § 4241(a). Later, at the conclusion of all proceedings, the Constitution forbids executing a condemned prisoner who is unable to understand the nature or reasons for his execution. *Panetti* v. *Quarterman*, 551 U.S. 930, 957-59 (2007); *Ford* v. *Wainwright*, 477 U.S. 399 (1986).

The competency threshold for imposing a stay during federal habeas proceedings properly falls along this spectrum. Post-conviction habeas

proceedings do not implicate the same due process protections as those applied during an initial trial. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-57 (1987); see also *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1315 (2012). But, at the same time, a capital habeas petitioner's statutorily conferred right to present a habeas petition in federal court and to assistance of counsel for that petition necessitate a broader standard for imposing a stay than is applied before execution, after all avenues of relief have been lost or abandoned. Cf. *Ford*, 477 U.S. at 422 & n.3 (Powell, J., concurring) (competency at execution need not include the "ab[ility] to assist in [one's] own defense").

For this same reason, there is no tension between Mr. Gonzales's position and *Ford*. Pet. Br. 17 (arguing that this Court has "limited a capital prisoner's right to competency in post-conviction proceedings" to the right recognized in *Ford*); U.S. Br. 19 (same). *Ford* addresses a different doctrine (the Eighth Amendment), with different considerations (such as whether retribution is served, *Panetti*, 551 U.S. at 958), and at a different stage of the proceedings (execution). Here, by contrast, the integrity of the federal habeas proceedings is at issue. The structure and legislative history of AEDPA make clear that the integrity of these proceedings was a centerpiece of that legislation and of significant value to a Congress that recognized the risks in placing stringent limits on the prosecution of habeas claims in the federal courts.[12]

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[12] The Solicitor General's concern that a holding authorizing a stay would "supersede" (U.S. Br. 20) questions arising under *Ford* is a wholly circular argument that there should be no stay because that would cause delay. In any event, a stay here would not change the *Ford* analysis once the proceeding has reached that stage.

In short, setting the standard at whether communication is essential for presentation of the claims readily conforms with other competency standards and strikes the appropriate balance, just as *McFarland* implicitly recognizes.

B. The District Court's Discretion Cannot Be Artificially Constrained To Exclude Certain Categories Of Cases.

Despite acknowledging that a stay may be proper where a capital habeas petitioner's communication with counsel is "essential" or "crucial" to his or her claim, the State maintains that district courts should be categorically barred from staying *any* case where the claims can be described as merely "record-based" or "legal in nature" or where a "next friend" might be appointed. Pet. Br. 14; U.S. Br. 29. But these artificial constraints find no support in the pages of the United States Code or this Court's decisions and are, in fact, flatly inconsistent with both. See, *e.g.*, *McFarland*, 512 U.S. at 858.

1. That A Claim May Be Described As "Record-Based" Or "Legal In Nature" Does Not Render Communication Between Counsel And Client Meaningless Or Non-Essential In All Cases.

The State rests much of its protest on the contention that a district court ought to be foreclosed from exercising its discretion to stay habeas proceedings whenever the claims may be labeled as "record-based" or "legal in nature." Pet. Br. 14, 16; see also U.S. Br. 16, 31. This contention falls flat, however, because its premise — that communication between counsel and client is *per se* unnecessary in such circumstances — is demonstrably false. Even in

cases that can be so described, communication with counsel may still be essential to the presentation of a capital habeas petitioner's claims in at least two ways.

First, the client may have information that, although not available from the record itself, bears upon the relative strength of the claims or the manner in which they should be presented. Such information provides a gloss on the existing record that may well demonstrate, to the attorney if not the client, how best to proceed.

Examples are easy to imagine. For starters, 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. See U.S. Br. 29. But even when the record is rightly deemed closed, a client's insight may still be essential to the proper consideration of his or her claims. Doctrines governing ineffective assistance of counsel or judicial bias claims, for instance, incorporate presumptions that regularly require *ex post* supposition about what may have motivated someone else's decisions at trial. See, *e.g.*, *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1407 (2011) (courts required to "entertain the range of possible 'reasons'" for counsel's conduct). For such inquiries, the client is best positioned to assist counsel in rebutting hypotheses — for example, about supposed tactical reasoning — that he or she knows to be wrong, thereby helping the parties and the court to avoid an erroneous "*post hoc* rationalization of [others'] conduct." *Wiggins* v. *Smith*, 539 U.S. 510, 526-27 (2003).

The rules of exhaustion are also illustrative. For example, where an attorney argued a claim in an

untranscribed proceeding, a capital habeas petitioner may have information showing that particular claims were actually exhausted in state court or that exhaustion should be excused, even though the existing record does not reflect those facts. *Martinez*, 132 S. Ct. at 1318, 1320 (noting that "[in]effective assistance claims often depend upon evidence outside the trial record" and holding that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"); see also, 28 U.S.C. § 2254(b)(1)(B)(ii) (exhaustion may be excused where "circumstances exist that render such process ineffective to protect the rights of the applicant"). Such intelligence is particularly important when preparing or seeking to amend a habeas petition, or when deciding whether to seek a stay to exhaust remaining state claims under *Rhines*.

That a district court's consideration of § 2254(d)(1) claims is generally limited to the state-court record does not mean, as the State contends, that client participation is automatically meaningless even in those cases. Pet. Br. 14-15 (citing *Pinholster*, 131 S. Ct. 1398). The examples above describe just a few situations in which a client's communication with counsel would be essential notwithstanding *Pinholster's* holding that evidentiary hearings are available in only limited circumstances. Further, the prospect of obtaining an evidentiary hearing remains open. See *Pinholster*, 131 S. Ct. at 1411 n.20. An evidentiary hearing might be warranted in order to assess the substantive validity of the claims once § 2254(d) has been found to be satisfied. See *id.* at 1412 (Breyer, J., concurring in part and dissenting in

part) (giving examples). A client's participation, it practically goes without saying, will be essential to at least some such hearings and cases.

This is not to say that a district court must issue a stay upon finding the capital habeas petitioner incompetent and communication between capital habeas petitioner and counsel are essential. See *McFarland*, 512 U.S. at 858 ("Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court."). For example, if a capital habeas petitioner has a history of voluntarily taking medication but refuses that medication during the course of habeas proceedings for the purpose and with the express intention of manipulating the process and preventing final adjudication, a stay could be properly denied as an exercise of discretion. See also *infra* at pp. 27-30 (proper appointments of a next friend).

Second, the positions of the State and the Solicitor General ignore the fundamentals of the attorney-client relationship. Rules of professional conduct *obligate* attorneys to consult broadly and frequently with their clients and expressly as to strategic and tactical matters. See, *e.g.*, American Bar Association, Model Code of Prof'l Conduct R. 1.4 (Communication); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1008 (2003) ("[There is an] obligation of counsel at every stage of the case to keep the client informed … and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement [but even those that do not] should nonetheless be fully discussed with the client beforehand.").

Such consultation may be required, for example, before counsel decides: whether to drop a particular claim that appears baseless (cf. *Rees* v. *Peyton*, 384 U.S. 312 (1966)); whether to seek a stay to further exhaust certain claims (*e.g.*, *Rhines*, 544 U.S. 269); or whether to seek an appeal or a certificate of appealability (*e.g.*, *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983)). A bright-line rule that would, in many cases, require an attorney to proceed without ethically mandated client consultation undermines these basic canons of professional responsibility. Congress should not be assumed to have intended such a seemingly irrational result *sub silentio*.

The point for these purposes is not to delineate all possible instances in which client communication may be essential even though the claims could also be considered "record-based" or "legal in nature," but only to show that the categories are not mutually exclusive. The State's groupings do not establish that client communication would be necessarily meaningless for all cases that fall within them, and, as such, they provide no basis for restricting a district court's discretion *ex ante*.

Such a standard also would be unworkable in practice. Courts already struggle mightily to decide when a question is one of "law" or "fact," or "mixed." See, *e.g.*, *Miller* v. *Fenton*, 474 U.S. 104, 113-14 (1985) (noting "the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis"). The State's proposed line-drawing merely imports those difficulties into yet another context and, contrary to the State's own wishes, promises inevitable satellite litigation as to these complex questions. The better and more workable approach is the one that Congress

already reflected in the statute — namely, to leave the decision whether to impose a stay of habeas proceedings to the district court's discretion. See 28 U.S.C. § 2251; accord *McFarland*, 512 U.S. at 858.

2. That A "Next Friend" Might Be Appointed Does Not Render Communication Between Counsel And Client Meaningless Or Non-Essential In All Cases.

The State and the Solicitor General also point to the potential appointment of a "next friend" as another cure-all for any incompetent capital habeas petitioner's inability to communicate with counsel. Pet. Br. 16-17 (citing *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990)); U.S. Br. 25, 27, 30-31. The upshot of this position — that the mere existence of "next friend" standing as a concept renders communication between counsel and client meaningless or non-essential in all cases — is simply wrong.

First, there will be many circumstances in which a "next friend" is unavailable. As this Court has explained, "'next friend' standing is by no means granted automatically" and requires, among other things, that one be "truly dedicated to the best interests of the person on whose behalf he seeks to litigate … [and] have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64. These requirements should be all the more difficult to meet in situations where a capital habeas petitioner's incompetence prevents effective communication not just to assist counsel but with everyone, including persons with whom he has a "significant relationship."

Second, until a "next friend" is actually appointed, a stay may still be necessary to ensure that counsel

has a meaningful opportunity to present the claims. A "next friend" may be permitted to make many of the strategic decisions otherwise left to the client, but, until appointment, counsel has no authority to make those decisions on his or her own. See *supra* § II.B.1.

Finally, even if a "next friend" is appointed, it may remain necessary to communicate with the capital habeas petitioner personally because "he alone possesses" essential information relevant to the claims. *Rohan ex rel. Gates*, 334 F.3d at 816. Indeed, because a next friend "cannot get inside [an incompetent client's] head any more than his counsel can," it is "difficult to see what purpose appointing [one] even serves in this context." *Id.*

For his part, the Solicitor General does not expressly join the State's attempt to stretch the "next friend" doctrine to resolve this case. Instead, the Solicitor General offers an inventive proposal of his own: Counsel can serve as a sort of de facto "next friend," either permanently or at least temporarily while another is located, by making decisions and strategic choices for the client in the interim. U.S. Br. 30-31. This suggestion fares no better than the State's. The attorney-client relationship does not, by itself, satisfy the prerequisites for "next friend" status, particularly when, as here, counsel is appointed and lacks any pre-existing relationship with the client. See, *e.g.*, *Centobie* v. *Campbell*, 407 F.3d 1149 (11th Cir. 2005). The Solicitor General's sheer speculation that counsel might find ways to "establish facts outside the record that bear on a potentially meritorious claim" without the client's input, U.S. Br. 30, could be a factor in deciding whether to issue a stay, but it is certainly not an

across-the-board substitute for potentially essential input from the client himself.[13]

None of this is to say that potential appointment of a "next friend" is not an option to be considered or that it would have no bearing on the stay issue. Appointment of a "next friend" is one of several options, along with a stay of proceedings, that a court might consider when faced with an incompetent capital habeas petitioner. And, if a "next friend" is appointed and that appointment does in fact render further communication between the client and counsel non-essential, nothing would prevent the district court from properly lifting the stay. At bottom, the focus remains on whether client-counsel communication is essential, but not feasible. If so, "next friend" appointments are not a panacea; they are but another option in the district court's tool box.

C. The "Essential Communication" Standard Is The Most Practical And Workable.

The only other objection offered against the standard applied in this case is that it will encourage false claims of incompetency and result in "indefinite [delays] and protracted litigation in federal habeas cases [across the nation]." States Amicus Br. 2; see also Pet. Br. 19. These concerns are dramatically overblown. Far from "widespread," States Amicus Br.

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[13] The Solicitor General's supporting contention that defense counsel might call the client's former attorneys or others to testify as to the client's knowledge or preferences, U.S. Br. 30, creates more questions than it answers. Those persons would likely be prohibited from testifying, especially in front of the State, because of attorney-client privilege, and in any event would not necessarily have knowledge of the present facts and current preferences of the client.

6, and far from causing "lengthy delays," *id.*, claims of incompetency are in fact infrequently raised — even in those circuits which expressly allow them — and are often quickly resolved.

Although potentially available in any circuit,[14] incompetency claims of the type presented in this case are quite rare, as the Solicitor General has acknowledged. U.S. Cert. Br. 18. From June 2003 (when these claims were first recognized) until September 2010, federal courts handled 701 capital habeas cases. Resp. Supp. Br. 3 n.3. Yet, incompetency claims were raised in only 34 of those cases — less than five percent. *Id.* These claims are not only few in number but also rarely result in a stay; all told, only 1.5% of all capital habeas cases nationwide were stayed as a result of incompetency claims. Further, in a survey of the fourteen States that joined the merits *amicus* brief in support of the State, only *one* such stay (from Alabama) was granted in over *seven* years — representing a mere 0.65% of all capital habeas cases in those States over that period.[15] In fact, incompetency claims of this type have *never* been filed in nine of those fourteen States. And, the four states with the largest death row populations — whose criminal systems would seem to face the greatest threat from these potential claims

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[14] All circuits that have confronted the issue have either expressly held or implicitly assumed this is the case, or have at least declined to hold that it is not. U.S. Cert. Br. 18.

[15] From June 2003 through September 2010, there were 153 capital habeas cases filed in these States, and in only nine of those cases did the capital habeas petitioner seek a stay based on incompetency. Furthermore, those stays were sought in only five (Utah, Nevada, Oklahoma, Alabama, and Arkansas) of the fourteen States.

— are conspicuously absent from the States' Amicus Brief on the merits.[16]

These stays are, moreover, not "indefinite," as the State and the Solicitor General suggest. To the contrary, they are by nature *temporary* — only in effect during the period of incompetency. Courts monitor petitioners under these stays through periodic status reports and (in appropriate cases) treatment directives. *E.g.*, *Holt* v. *Woodford*, No. 1:97-cv-06210 (E.D. Cal. Nov. 21, 2008); see also *White* v. *Ryan*, No. 08-cv-08139 (D. Ariz. Sept. 29, 2010). In fact, these court-ordered treatment plans have facilitated competence restoration to avoid an indefinite stay;[17] when a capital habeas petitioner regains the ability to communicate with counsel, the stay is properly lifted, as courts have not hesitated to do. See, *e.g.*, Mot. to Amend Pet., *Grant* v. *Workman*, No. 5:10-cv-00171 (W.D. Okla. June 1, 2012); *Hill* v. *Calderon*, No. 4-94-CV-641 (N.D. Cal. Jan. 6, 2012).

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[16] As of 2010, California (683), Florida (390), Texas (330), and Pennsylvania (218) not only individually have the largest death row populations, but combined they house more than half of all death row prisoners in the United States. *See* Report by U.S. Justice Dep't Bureau of Justice Statistics, "Capital Punishment 2010: Statistical Tables" (Dec. 20, 2011). Three of these states (Florida, Texas, and Pennsylvania) joined the *amicus* brief in support of certiorari, but none subsequently joined the *amicus* brief in support of the State here. The fourth state (California) joined neither the *amicus* brief in support of certiorari nor the *amicus* brief on the merits.

[17] Antipsychotic medications are an accepted, often essential treatment for many psychoses including delusional disorder and schizophrenia. *See* American Psychiatric Association et al. Amicus Br. 9-10, *Sell* v. *United States*, No. 02-5664, 2003 WL 176630 (U.S. Jan. 22, 2003). The newer antipsychotic drugs have proven effective for many more people and have even more favorable side-effect profiles. *See id*.

Courts also have access to numerous procedural tools to mitigate any delay. In at least half of the total 34 competency claims brought nationwide between June 2003 and September 2010, judges made a competency determination without a full hearing, based on psychiatric reports or other available evidence. *E.g.*, *Paul* v. *United States*, 534 F.3d 832, 853 (8th Cir. 2008). In addition, both parties sometimes stipulate to the incompetence of the capital habeas petitioner.[18] Even the State recently stipulated to the incompetence of a capital habeas petitioner who was then granted a stay. See *White*, No. 08-cv-08139.

What is more, courts can dismiss claims on procedural grounds or on a finding of dilatory or improper purpose, without need for any competency determination. *E.g.*, *Lisle* v. *McDaniel*, No. 2:03-CV-1005 (D. Nev. July 19, 2006); *Stanley* v. *Calderon*, No. 2:95-cv-1500 (E.D. Cal. Mar. 1, 2006). Courts also have significant leeway to assess malingering and can deny motions for competency hearings upon a finding of malingering. *E.g.*, *id.*; *Ferguson* v. *Secretary for Dep't of Corr.*, 580 F.3d 1183, 1221 (11th Cir. 2009). Indeed, courts are well-equipped to identify malingering.[19]

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[18] *See, e.g., Jones* v. *Wong*, No. 2:97-cv-02167 (E.D. Cal. Aug. 28, 2009); *Holt,* No. 1:97-cv-06210; *Millwee* v. *Ayers*, No. 2:99-cv-07220 (C.D. Cal. Nov. 21, 2008); *McPeters* v. *Ayers*, No. l:95-cv-05108 (E.D. Cal. Sept. 18, 2007); *Card* v. *Hardison*, No. 1:93-cv-00030 (D. Idaho Oct. 20, 2006).

[19] For a review of common techniques used to identify malingering in judicial proceedings and their efficacy, *see* Gary B. Melton, et. al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, at 54 (2d ed. 1997); *see also* Richard Rogers, *Clinical Assessment of Malingering and Deception*, at 131 (2d ed. 1997); L. Elizabeth

When a competency hearing is actually held, the claims are generally resolved without substantial difficulty or delay. See, *e.g.*, *Rogers* v. *McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 (D. Nev. Mar. 24, 2008). Even in the cases cited by the States as presenting particularly egregious examples of "[c]ompetency litigation," the lengthiest delay was less than three years and, in any event, was not attributable solely to the incompetency claim. States Amicus Br. 7-9.

There is, in short, simply no evidence that the mere availability of these claims has resulted in "generating lengthy competency litigation … across the nation." *Id.* at 2. That is hardly surprising in light of the judiciary's experience with claims under *Ford* v. *Wainwright*. While many predicted that those claims would overwhelm the federal courts, resulting in lengthy or indefinite delays of every execution, experience has shown that they are raised rarely and have caused no material disruption in the federal process or undue delays in execution. See *Panetti*, 551 U.S. at 934-935, 948-949 (noting that "a State 'should have substantial leeway to determine what process best balances the various interests at stake'" (quoting *Ford*, 477 U.S. at 427 (Powell, J., concurring))). The same is true of incompetency claims of the type at issue here as they are both infrequent and essential to guarantee the integrity of habeas proceedings. They should and must be available to address the few true cases of incompetence.

Chamblee, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 Fla. St. U.L. Rev. 335, 363-367 (2004).

III. A STAY WAS PROPERLY ENTERED IN THIS CASE.

Under the standard set forth above — the same applied by the court of appeals — a stay of proceedings was plainly appropriate in this case.

1. The court of appeals properly concluded that a temporary stay should issue pending a determination of competency by the district court. Moreover, on the current record, the State cannot seriously contest that Mr. Gonzales was "incompetent" and unable to communicate rationally with his counsel. A neutral psychiatric expert from the State hospital, tasked with conducting an extended evaluation of Mr. Gonzales, concluded that Mr. Gonzales "has a 'genuine psychotic disorder' and is 'currently unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. C5. The district court itself, although it did not make a formal finding of incompetence (because it incorrectly concluded that it lacked discretion to grant the stay in any event), assumed in the proceedings below that Mr. Gonzales was in fact incompetent, and in a submission to the court of appeals described the "consensus" opinion of reviewing psychiatrists (albeit "tentative") as "that in the absence of medication [Mr. Gonzales] was largely incapable of communicating rationally with counsel." See Pet. App. B6. Notably, neither the State nor the Solicitor General argues to the contrary.[20]

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[20] While the district court did note that "the record indicate[s] [that Mr.] Gonzales possesses a limited capacity for rational communication[s,]" U.S. Br. 6 (citing App. C28 n.14), these flashes of coherence were temporary in nature and were not deemed sufficient to render him "competent" as a general matter or, more specifically, capable of communicating with his counsel. *See* Pet. App. C6; *cf. Holmes* v. *Buss*, 506 F.3d 576, 581 (7th Cir.

Thus, the record in this case strongly supports the lower court's determination that at least a *prima facie* showing in this regard had been made. Particularly given the dearth of contrary evidence or argument on this point, the court of appeals properly concluded that Mr. Gonzales should for that reason be presumed incompetent on appeal, pending further proceedings before the district court.

2. Communication between Mr. Gonzales and his attorneys was also properly deemed essential by the court of appeals. Mr. Gonzales's counsel in the federal habeas proceeding, who had not previously represented him, could not be expected to fully assess the merits of Mr. Gonzales's claims for relief based solely on the cold record, and without his participation. Nor was there any person with whom they might have consulted to gain insights into his perspective or any additional information he might have had. Mr. 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. Thus, there was no individual — other than Mr. Gonzales himself — who would be expected to have a thorough and complete understanding of the factual issues relevant to the claims. Cf. *Holmes* v. *Buss*, 506 F.3d 576, 580 (7th Cir. 2007) ("The petitioner was at his trial; his current lawyers were not. He may — if mentally competent — be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript or other documentation provide.").

2007) ("There are lucid intervals in the petitioner's responses to the judge's questions, but there are also wild and whirling words, which the judge seems to have ignored.").

Direct communication with Mr. Gonzales is particularly necessary with respect to his claim of judicial bias, a serious claim that implicates due process and, if successful, constitutes a structural error affecting the entire proceeding.[21] While the factual predicate of that claim is grounded in statements made by the state court judge on the record, that transcript does not and cannot reflect other aspects of the proceedings — for example, the conduct of prosecutors and the judge, and their off-the-record remarks — that would also bear on the claim. This information is highly relevant in this case, and perhaps pivotal, given the ambiguous reference to an "indication" in the state record that the judge was "antagonistic" to Mr. Gonzales throughout those proceedings. See Pet. App. C10-C13.

Even the prosecutor in Mr. Gonzales's trial acknowledged that "there is some type of attitude problem between Judge Howe and the defendant. I'm not sure why it started, how it started or what effect it has had on this trial. Every time we appear in court, they snap and snarl at each other." Pet. App. C-11. Mr. Gonzales's current counsel have no way to obtain corroborative or other crucial information other than through their client. This fact alone is sufficient to establish, as other courts have recognized in similar situations, see, *e.g.*, *Holmes*, 506

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[21] *See, e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 283 (1993) (distinguishing an instructional error from "[structural] errors such as judicial bias or denial of counsel" (modifications in original) (quoting *Rose* v. *Clark*, 478 U.S. 570, 579 n.7 (1986))); *Tumey* v. *Ohio*, 273 U.S. 510, 514-15 (1927).

F.3d at 579-80, that client communication is essential to full and fair adjudication of the habeas petition.[22]

Apart from a single, unsupported assertion that client communication was not essential in this case, neither the State nor the Solicitor General offers any real argument on this point or any reasoned explanation for why the court of appeals was incorrect in its analysis. Instead, both attempt to mischaracterize the opinion below, arguing that the decision was "based on speculation" and that communication need only "potentially benefit" counsel. Pet. Br. 20; U.S. Br. 31. But this ignores what the panel actually held: "communication with [Gonzales] is *essential* to counsel's ability to meaningfully prosecute Gonzales's habeas claims." Pet. App. A5 (internal quotation marks omitted, emphasis added); see also *id.* ("counsel may … *need* to communicate with [Gonzales] to understand fully the significance and context of key facts") (internal quotation marks omitted, emphasis added). Notwithstanding their bald assertions that this conclusion was error, the State and the Solicitor General offer no basis to disturb it.[23]

3. No other factors identified by the district court militated against entry of a stay. The district court did not find, for instance, that Mr. Gonzales had somehow abused the habeas process. To deny a stay in this situation — where all relevant considerations

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[22] Indeed, because these claims may depend on information outside the existing record, they cannot properly be described as "record-based," and a stay would be appropriate even under the standard suggested by the Solicitor General.

[23] In earlier proceedings in this case, the State acknowledged that "obviously there are some [issues] that [counsel] need Mr. Gonzales to answer." *See* Resp. Br. in Opp. 2 n.1.

point in favor of a stay — would necessarily have constituted an abuse of discretion, as the court of appeals recognized.

Indeed, the district court expressly refused to exercise its discretion at all. It concluded, rather, that a stay is "categorically unavailable" (Pet. App. A5) when a capital habeas petitioner's claim may be described as "record-based" or "resolvable as a matter of law." Pet. App. A2. That conclusion, as discussed earlier, reflects a material misunderstanding of the statutory discretion committed to courts to stay habeas proceedings and of the standard on which that discretion should be exercised — *i.e.*, the "essential communication" standard. "Had the district court undertaken the [proper] … inquiry," the court of appeals correctly noted, it "would have been compelled to conclude that 'communication with [Gonzales] is essential to counsel's ability to meaningfully prosecute' Gonzales's habeas claims." Pet. App. A5 (modification in original) (internal citation omitted).

This case squarely presents the rare circumstance where a capital habeas petitioner's inability to communicate deprives counsel of a meaningful opportunity to present the case. Because such communication is essential to fair adjudication of at least one of Mr. Gonzales's claims, moving forward with the proceedings despite the current breakdown in communication would frustrate the intent of Congress under 18 U.S.C. § 3599, jeopardize fulfillment of counsel's fundamental professional ethics obligations, and undermine the integrity of the federal habeas process. A temporary stay was

appropriately directed by the court of appeals, and that decision should be affirmed.[24]

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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[24] If the Court agrees with the "essential communication" standard, but cannot adopt the Ninth Circuit's analysis under that standard, the Court should vacate the judgment below with instructions to remand to the district court. The district court indisputably did not apply the proper standard in assessing the stay request and should decide in the first instance whether, as an appropriate exercise of its discretion, a stay is warranted under that standard.