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Nos. 11-218 & 10-930

IN THE

Supreme Court of the United States

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

Petitioner,

v.

ERNEST VALENCIA GONZALES,

Respondent.

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Tenth Circuits

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..................................... 1

ARGUMENT 3

I. A District Court's Inherent Authority to Stay Habeas Proceedings Should Not Be Limited in the Manner Proposed by Petitioners and the United States 3

II. District Courts Will Ably Exercise Their Inherent Authority to Issue Stays 9

   A. District Courts Have Little Difficulty Detecting Feigned Incompetency................... 10

   B. District Courts Will Deny Meritless Stay Motions at the Earliest Possible Stage... 12

   C. District Courts Will Revisit Stay Orders When Appropriate 13

CONCLUSION 15

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Anderson v. Kentucky, 376 U.S. 940 (1964) 15

Brady v. Maryland, 373 U.S. 83 (1963).................. 8

Carter v. Bradshaw, 644 F.3d 329 (6th Cir. 2011).. 2, 15

Clinton v. Jones, 520 U.S. 681 (1997) 3

Cooper v. Oklahoma, 517 U.S. 348 (1996) 11, 13

Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004)... 8

Cullen v. Pinholster, 131 S. Ct. 1388 (2011).......... 7

Ford v. Wainwright, 477 U.S. 399 (1986) 10

In re Gonzales, 623 F.3d 1242 (9th Cir. 2010)... 2

Graves v. Cockrell, 351 F.3d 143 (5th Cir. 2003)... 8

Hollis v. United States, 687 F.2d 257 (8th Cir. 1982)... 5

Holmes v. Buss, 506 F.3d 576 (7th Cir. 2007)... 2, 9

Landis v. North American Co., 299 U.S. 248 (1936)... 3

Massaro v. United States, 538 U.S. 500 (2003)... 5, 7

Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003)... 8

Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965)......... 7

Rees v. Superintendant of Virginia State Penitentiary, 516 U.S. 802 (1995)................... 15

Rees v. Peyton, 384 U.S. 312 (1966)....................... 3

Rees v. Peyton, 386 U.S. 989 (1967)..................... 15

Rhines v. Weber, 544 U.S. 269 (2005).................... 3

Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003).. 3

Schriro v. Landrigan, 550 U.S. 465 (2007)........... 12

Sell v. United States, 539 U.S. 166 (2003)........... 14

United States v. Grant, 446 F. App'x 473 (3d Cir. 2011) 6

United States v. Harris, 408 F.3d 186 (5th Cir. 2005).. 6

United States v. Smith, 348 F. App'x 636 (2d Cir. 2009) 12

United States v. Thompson, 528 F.3d 110 (2d Cir. 2008) 12

United States v. Williams, 998 F.2d 258 (5th Cir. 1993).. 12

STATUTES

18 U.S.C. § 4241(a)... 10

18 U.S.C. § 4241(b)... 11

18 U.S.C. § 4241(d) 13

18 U.S.C. § 4241(d)(1) 14

28 U.S.C. § 2255 7

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 7

OTHER AUTHORITIES

4 William Blackstone, *Commentaries* 25 (1769)... 3

1 Sir Matthew Hale, *The History of the Pleas of the Crown* 35 (Prof'l Books Ltd. 1971) (1736) 3

John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), 11 How. St. Tr. 474, 478 (1816)... 11

Virginia Aldigé Hiday & Padraic Burns, *Mental Illness and the Criminal Justice System, in A Handbook For the Study of Mental Health* 478 (Teresa L. Scheid & Tony N. Brown, eds., 2d ed. 2010), *available at* http://hmid.basijmed.ir/ public/hmid/books/mental%20health/A_Handbook_for_the_Study_of_Mental_Health__Social_Contexts__Theories__and_Systems___2nd_edition.pdf 13

INTEREST OF *AMICI CURIAE*

Amici curiae are a group of seven former federal circuit and district court judges who have substantial experience adjudicating habeas petitions and issues surrounding the competency of criminal defendants.[1] The attached Appendix contains a list of the *amici*, along with biographical information for each. *Amici* are interested in this case because of their years of dedicated service to the country and their commitment to its Constitution and laws.

Amici urge the Court to affirm the decisions below and to hold that a district court has the inherent authority to stay habeas proceedings if it determines that the inmate is incompetent and the inmate's assistance is essential to the presentation of the habeas claims.

SUMMARY OF ARGUMENT

All parties agree that a district court possesses the inherent authority to stay a federal habeas proceeding if it determines that the inmate is incompetent. Ryan Br. 20; Tibbals Br. 31; U.S. Br. 29-30; Gonzales Br. 1; Carter Br. 12. But Petitioners and the United States urge a narrow view of that authority. Arizona would limit district courts' authority to issue stays to habeas petitions raising a claim of actual innocence. Ryan Br. 20. Ohio, following the lead of the United States, advocates a broader approach but would still

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties have consented to the filing of this brief.

limit district courts' authority to issue stays to habeas proceedings where a fact-finding hearing is necessary. Tibbals Br. 31; U.S. Br. 29-30.

Those proposed limits on district courts' inherent authority are unjustified. The question of whether to stay *any* case – including a habeas proceeding – is a matter best left to the sound discretion of district courts. District courts already possess wide discretion in adjudicating claims of incompetence – and, where appropriate, issuing stays – in federal criminal trials and in habeas proceedings under *Ford v. Wainwright*. And they have exercised that discretion ably.

Here, therefore, the better rule is one that does not arbitrarily limit district courts' inherent authority to issue stays. Rather, the proper rule is the one adopted below: district courts should have the inherent authority to issue stays when a habeas petitioner's incompetence prevents communication with counsel and that communication is "essential" to the presentation of the petitioner's claims. *In re Gonzales*, 623 F.3d 1242, 1245 (9th Cir. 2010); *accord Carter v. Bradshaw*, 644 F.3d 329, 337 (6th Cir. 2011) (stay appropriate for all claims that "essentially require [the inmate's] assistance"). As Judge Posner put it, "[w]hatever the nature of the proceeding, the test [of whether to stay the proceeding on competency grounds] should be whether the defendant (petitioner, appellant, etc.) is competent to play whatever role in relation to his case is necessary to enable it to be adequately presented." *Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007). That rule recognizes that there are a wide variety of scenarios in which a habeas petitioner's incompetence will stifle his counsel's ability to

adequately present his claims. And the rule properly places the question of whether to issue a stay in the sound discretion of the district court – discretion which, *amici* submit, district courts will continue to exercise wisely.

ARGUMENT

I. A District Court's Inherent Authority to Stay Habeas Proceedings Should Not Be Limited in the Manner Proposed by Petitioners and the United States.

District courts have the inherent authority to stay habeas proceedings "where such a stay would be a proper exercise of discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *accord Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (recognizing a district court's "broad discretion to stay proceedings"). Incompetency has long been recognized as a valid reason for staying criminal proceedings. *See Rees v. Peyton*, 384 U.S. 312, 313-14 (1966); 4 William Blackstone, *Commentaries* 25 (1769); 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 35 (Prof'l Books Ltd. 1971) (1736) (pre-1676 manuscript), quoted in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 807 (9th Cir. 2003).

Petitioners and the United States, however, would severely curtail district courts' discretion to stay habeas proceeding on competency grounds. Their pro-

posed rules are unjust. Were one of those rules adopted, there would be many situations in which an incompetent inmate would be unable to secure habeas relief despite having a meritorious claim.

Arizona argues that district courts' discretion to stay habeas proceedings should be limited to habeas petitions that assert actual innocence. Ryan Br. 20-21. That proposed rule must be rejected because, as even the United States concedes, there are many habeas claims in addition to actual innocence for which a habeas petitioner's participation is "crucial."[2] U.S. Br. 29. Frequently, therefore, Arizona's rule will prevent inmates from successfully presenting meritorious habeas claims because the inmate is incompetent. Arizona's rule is thus incompatible with the central function of habeas in ensuring that criminal punishment is meted out in accord with the laws of the United States.

The clearest examples of meritorious habeas claims that could not be brought without a competent inmate's assistance arise from habeas petitions asserting ineffective assistance of counsel. That is because ineffective-assistance claims regularly require

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[2] Even Respondent Tibbals apparently would not limit stays to cases of actual innocence. Rather, like the United States, Ohio appears to take the view that in cases involving factfinding where "the prisoner's participation is essential to a dispositive evidentiary question," the court "might stay its proceedings 'to afford the prisoner the opportunity to regain his competence (either naturally or through medication).'" Tibbals Br. 31 (quoting U.S. Br. 16). As discussed below, this standard wrongly limits stays to only those habeas proceedings in which on-the-record fact-finding will occur.

the habeas court to conduct "additional factual development" beyond the cold trial record:

> The evidence introduced at trial . . . [is] devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.

Massaro v. United States, 538 U.S. 500, 505 (2003). Thus, an inmate's input can be crucial in presenting ineffective-assistance claims; it is often necessary for an inmate to assist counsel in uncovering and establishing the "additional factual development," *id.*, necessary to litigate the claim. Consider these examples:

- In *Hollis v. United States*, 687 F.2d 257 (8th Cir. 1982), habeas relief was granted on the ground that trial counsel had been ineffective in failing to appeal a conviction. Critical to the court's decision to grant the writ was the inmate's testimony that he "informed his attorney of his wish to appeal his sentence" and the attorney ignored it. *Id.* at 259. Had the inmate been incompetent and unable to testify, the court may have denied habeas relief on

the ground that the inmate had intentionally waived his right to appeal.

- In *United States v. Harris*, 408 F.3d 186 (5th Cir. 2005), habeas relief was granted on the ground that trial counsel had been ineffective in refusing to allow the inmate to testify at trial. The trial transcript revealed that the inmate's counsel had asked him in open court whether he wished to testify and the inmate had said no. But in granting habeas relief, the court credited the testimony of the inmate at a habeas hearing that the inmate had "told his lawyer that he wanted to testify, but was told, '[n]o, there is no need. We've got this case won.'" *Id.* at 192 (brackets in original). Had the inmate been incompetent and incapable of testifying in the habeas hearing, the court would have been presented only with trial transcript showing that the inmate had declined to testify. The court never would have learned that the inmate's statement on the record came only after counsel had impermissibly refused his request to testify.

- In *United States v. Grant,* 446 F. App'x 473 (3d Cir. 2011), habeas relief was granted on the ground that trial counsel had been ineffective in failing to advise the inmate that he would be sentenced as a career offender if he pleaded guilty. One way that the inmate established that the ineffective assistance caused him prejudice was by testifying that he would have gone to trial had he known that he would be sentenced as a career offender. Plainly, that testimony would not have been available if the inmate had been incompe-

tent. Nor could an incompetent inmate have informed the court of what trial counsel had advised.

Although they provide many of the clearest examples, ineffective-assistance claims are not the only types of habeas claims for which an inmate's participation is crucial. There are many other circumstances in which a meritorious habeas claim can be brought only when the inmate is sufficiently lucid to assist his counsel. Indeed, as the United States recognizes (U.S. Br. 29), even after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there are circumstances under which a state prisoner is entitled to an evidentiary hearing. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-01 (2011). And federal prisoners are routinely entitled to evidentiary hearings in proceedings brought under 28 U.S.C. § 2255. *See, e.g.*, *Massaro*, 538 U.S. at 505; *see also* U.S. Br. 29. An inmate's participation may be a critical to preparing for and conducting such an evidentiary hearing.

For instance, an inmate's testimony at a habeas hearing has often been the key to the successful presentation of a habeas claim. *See, e.g.*, *Pearce v. Cox*, 354 F.2d 884, 902 (10th Cir. 1965) (an inmate's testimony demonstrated that his guilty plea was not voluntarily entered). In *Tibbals*, for example, were the inmate competent, he could provide his own account of his "experiences, thoughts, and capacities of perception" at the time of his trial – bolstering his claim that he was incompetent to be tried. Carter Br. 32.

Even where an inmate does not testify himself, he still may assist his counsel in identifying witnesses

and other evidence for a habeas hearing. Consider, for example, habeas claims asserting a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* claims often require habeas counsel to present detailed evidence outside the trial record, and an inmate may provide insight into how to present that evidence. The inmate himself may identify the witnesses or other evidence necessary to establish a *Brady* violation. *Cf. Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) ("prima facie case of a *Brady* violation" established by declarations made by fellow inmate and prison warden); *Graves v. Cockrell*, 351 F.3d 143 (5th Cir. 2003) (successive habeas petition asserting *Brady* violation allowed to proceed where the prosecutor disclosed the existence of exculpatory evidence in a "media interview"). Or the inmate may corroborate or provide context to improperly withheld evidence, assisting his attorneys in showing that the *Brady* violation was material. *Cf. Monroe v. Angelone*, 323 F.3d 286, 298-317 (4th Cir. 2003) (habeas relief granted for *Brady* violation after court undertook detailed analysis of ten pieces of previously undisclosed exculpatory evidence). In either case, a meritorious *Brady* claim involving additional fact-finding may go unrecognized where an incompetent inmate is unable to assist his counsel. The rule urged by Arizona therefore should be rejected.

So too should Ohio's proposed rule be rejected. Ohio, following the views expressed by the United States, contends that a district court has no equitable discretion to grant a stay in a habeas proceeding that will not involve "an evidentiary hearing." Tibbals Br. 31; U.S. Br. 29-30. That view, while not as constricted as Arizona's, is still flawed. A habeas peti-

tioner may have critical information to offer his counsel even where his habeas proceedings will not encompass further on-the-record fact-finding. The facts of *Ryan* provide a useful example. Respondent Gonzales was *pro se* for part of his criminal trial, and ultimately had eleven different lawyers over the course of his trial and sentencing. In that situation, Gonzales is by far the best-situated person to provide his habeas counsel with a complete account of what occurred at the trial, including his allegations of judicial bias. *Cf. Holmes*, 506 F.3d at 580 ("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 and other documentation provide."). To be sure, the precise facts of Gonzales's case may not often be replicated, but they are illustrative of the variety of unpredictable scenarios district courts may be presented with. There is no reason to strip district courts of the discretion to enter stays in such situations where they are warranted.

II. District Courts Will Ably Exercise Their Inherent Authority to Issue Stays.

The rules advocated by Petitioners and the United States appear motivated by a concern that district courts lack the ability and knowledge to adjudicate stay motions. Petitioners fear that district courts will accede to the "dilatory tactics" of inmates feigning incompetency, *see* Ryan Br. 19; Tibbals Br. 28, and the United States worries that district courts will issue "indefinite stays" that needlessly prolong collateral review, *see* U.S. Br. 30.

But as *amici* know from first-hand experience, the concerns of Petitioners and the United States are unfounded. In reality, district courts will exercise their discretion to issue stays prudently. District courts are unlikely to be fooled by feigned incompetency; courts will deny frivolous incompetency claims at the earliest possible point; and courts will revisit indefinite stay orders to ensure that they are still needed.

This Court can be assured that district courts will exercise their inherent authority competently because district courts already possess considerable experience with incompetency claims. District courts routinely adjudicate claims of incompetency brought by federal criminal defendants facing trial and by former federal prisoners serving a term of supervised release. *See* 18 U.S.C. § 4241(a). And district courts regularly determine whether capital inmates (in both state and federal penitentiaries) meet the minimum standards of competency required for executions. *See Ford v. Wainwright*, 477 U.S. 399 (1986). District courts have amassed considerable practical experience in deciding incompetency claims in those settings, and courts use that experience to manage claims of incompetency in the habeas context.

A. District Courts Have Little Difficulty Detecting Feigned Incompetency.

Petitioners argue that were the decisions below upheld, "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the death sentence." Ryan Br. 19 (quotation marks omitted); *see also* Tibbals Br. 28. But for such "dilatory tactics" to succeed, habeas petitioners would have to feign incompetency. As *amici*

can attest, district courts are unlikely to be fooled by false incompetency claims.

Criminal defendants have feigned incompetency for hundreds of years, and for just as long, courts have successfully identified these charlatans. *See Cooper v. Oklahoma*, 517 U.S. 348, 365-66 (1996) (citing sources). As Sir John Hawles, Solicitor-General to King William III, remarked, "there is a great difference between pretences and realities, and *sana* and *non sana memoria* hath been often tryed in capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it." John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), 11 How. St. Tr. 474, 478 (1816), *quoted in Cooper*, 517 U.S. at 365. So too today – neither Petitioners nor the United States have cited a single case in which a criminal defendant successfully fooled medical professionals and the court into concluding (incorrectly) that he was incompetent.

That is because district courts cut through feigned incompetency by carefully scrutinizing the evidence submitted in support of the claim. District courts also order psychological evaluations in which experts evaluate the inmate. *See* 18 U.S.C. § 4241(b). As this Court has recognized, "it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care." *Cooper*, 517 U.S. at 365. Thus, just as district courts are rarely fooled by criminal defendants falsely claiming incompetency to avoid trial – or capital inmates falsely claiming incompetency in *Ford* hearings to forestall their executions – courts are unlikely to be

fooled by inmates feigning incompetency to drag out habeas proceedings.

B. District Courts Will Deny Meritless Stay Motions at the Earliest Possible Stage.

Another reason that "dilatory tactics," Ryan Br. 19, are unlikely to succeed is that district courts are practiced in denying stay motions at the earliest possible point in the proceedings. A motion to stay proceedings on incompetency grounds presents several opportunities for district courts to weed out frivolous claims early.

First, when an inmate moves for a stay, a district court need not even order a medical evaluation where it finds that there is no basis for doing so. *See, e.g.*, *United States v. Smith*, 348 F. App'x 636, 637 (2d Cir. 2009); *United States v. Williams*, 998 F.2d 258, 262-63 (5th Cir. 1993).

Second, even when a district court orders a medical examination, the court need not hold an evidentiary hearing. Rather, district courts may, in their discretion, make competency determinations solely on the basis of a psychiatric report. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *United States v. Thompson*, 528 F.3d 110, 121-22 (2d Cir. 2008). In practice, evidentiary hearings on competency issues are regularly denied where the psychiatric report shows little sign of severe mental deficiencies.

Third, in those cases where the evidence of incompetency is sufficient to warrant an evidentiary hearing, district courts will issue stays only in those cases where they are truly warranted. District courts will likely require the inmate's attorneys to demonstrate

his incompetence by a preponderance of the evidence. *Cf.* 18 U.S.C. § 4241(d); *Cooper*, 517 U.S. at 362. And as scholars have recognized, only a small minority of incompetence claims succeed in practice. *See* Virginia Aldige Hiday & Padraic J. Burns, *Mental Illness and the Criminal Justice System*, *in A Handbook For the Study of Mental Health* 478, 490 (Teresa L. Scheid & Tony N. Brown eds., 2d ed. 2010).[3]

Thus, as *amici* know by experience, the notion that frivolous incompetency claims will inevitably delay habeas proceedings, *see* Ryan Br. 19; Tibbals Br. 28, is simply wrong. District courts are able to weed out frivolous incompetency claims without undue expense or delay, denying the weakest claims without a medical examination or on the basis of a written psychiatric report. When incompetency claims have sufficient support to warrant an evidentiary hearing, district courts weigh the evidence carefully and grant a stay only when necessary. Petitioners' fears of "dilatory tactics," Ryan Br. 19, are therefore illusory.

C. District Courts Will Revisit Stay Orders When Appropriate.

The United States argues that district courts should be denied the authority to issue "indefinite stays." U.S. Br. 30; *see also* Tibbals Br. 27-32. But that position is contradictory. The United States recognizes that stays are sometimes warranted to prevent the injustice of adjudicating habeas claims while

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[3] *Available at* http://hmid.basijmed.ir/public/hmid/books/mental%20health/A_Handbook_for_the_Study_of_Mental_Health__Social_Contexts__Theories__and_Systems___2nd_edition.pdf.

the petitioner is incompetent. U.S. Br. 29-30. If time passes and the inmate remains incompetent, the injustice does not wane. Arbitrarily ending an existing stay is just as unjust as refusing to grant a stay in the first place. Thus, district courts' inherent authority to stay habeas proceedings should not be constrained by arbitrary limits on a stay's duration. As *amici* know, district courts do not issue stays lightly, and courts revisit stay orders as appropriate.

When a district court makes a finding of incompetence, the common practice is to issue a stay of moderate duration – typically "not to exceed four months," 18 U.S.C. § 4241(d)(1) – in order to "determine whether there is a substantial probability that in the foreseeable future [the incompetent inmate] will attain the capacity to permit the proceedings to go forward," *id.* Thus, district courts do not rush to issue "indefinite stays"; they first take care to determine whether a limited stay is appropriate to restore the inmate to competency.

In addition, district courts may order that an inmate be medicated with antipsychotic drugs in an effort to restore the inmate to competency. *See Sell v. United States*, 539 U.S. 166, 169 (2003). Thus, "indefinite stays" are necessary only when an inmate's mental infirmities are so profound that he is beyond the reach of modern medicine – and only a very limited number of cases fall into that category.

Last, even if an inmate is so incompetent that a district court must issue a stay that does not recite a definite end point, there is every reason to believe that district courts will revisit the stay order periodically, inquiring about the status of the inmate and

testing whether the stay is still necessary. That is precisely the approach that this Court took in *Rees v. Peyton*, 386 U.S. 989 (1967). This Court exercised its inherent authority to stay Rees's habeas proceedings "until further order of the Court" – that is, indefinitely. *Id.* at 989; *see also Anderson v. Kentucky*, 376 U.S. 940 (1964) (staying a direct appeal on competency grounds "indefinitely"). This Court then periodically inquired into Rees's status. *See Rees v. Superintendant of Va. St. Penitentiary*, 516 U.S. 802 (1995). In the rare case in which that kind of stay is required, courts will not neglect their duty to ensure that the stay is as limited as possible under the circumstances. *See, e.g.*, *Carter*, 644 F.3d at 337.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decisions below.

Respectfully submitted,

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