No. 10-930

In the Supreme Court of the United States

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

v.

ERNEST VALENCIA GONZALES
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital prisoner pursuing federal postconviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes: Page

In the Supreme Court of the United States

No. 10-930

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

v.

ERNEST VALENCIA GONZALES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Following a jury trial in Arizona state court, respondent was convicted of felony murder, aggravated assault, theft, armed robbery, and two counts of burglary. *State* v. *Gonzales*, 892 P.2d 838, 842-843 (Ariz. 1995), cert. denied, 516 U.S. 1052 (1996). He was sentenced to death on the murder count and to terms of imprisonment on the noncapital counts. *Ibid.* The convictions and sentences were affirmed on direct appeal; the state courts denied postconviction relief; and respondent filed a petition for federal habeas corpus relief in the United

States District Court for the District of Arizona. Pet. App. B3. His appointed counsel subsequently sought a competency hearing and a stay of the federal habeas proceedings on the ground that respondent was incompetent to assist counsel in the litigation of the case. *Id.* at B5, C2. The district court denied the motion. *Id.* at C1-C29. The court of appeals granted a writ of mandamus and ordered that the district court stay the proceedings pending a competency hearing. *Id.* at A1-A9.

1. In 1990, respondent stabbed to death Darrel Wagner, and severely injured Deborah Wagner, when the couple surprised respondent while he was burglarizing their home. *Gonzales*, 892 P.2d at 842. The State of Arizona tried respondent for felony murder and five other offenses. *Id.* at 842-843. Respondent's first trial ended in a hung jury. Pet. App. C10. Before retrial, respondent, acting pro se, moved to disqualify the trial judge. *Ibid.* Respondent claimed, based on adverse rulings and on-the-record comments from the first trial, that the trial judge was biased against him. *Ibid.* The motion was eventually referred to a different judge, who denied it. *Id.* at C10-C12.

Respondent's retrial resulted in a conviction on all counts. Pet. App. C12; *Gonzales*, 892 P.2d at 842-843. Before sentencing, respondent filed another motion to disqualify the trial judge. Pet. App. C12. A new judge (who was neither the trial judge nor the judge who ruled on the first disqualification motion) denied the motion. *Ibid.*

At sentencing, the trial court found two aggravating factors and no mitigating factors, and it imposed a sentence of death for the felony-murder conviction and various prison terms for the other crimes. *Gonzales*, 892 P.2d at 843. Respondent's appellate counsel raised sev-

eral issues on direct appeal, including the issue of judicial bias. *Ibid.* The Supreme Court of Arizona rejected the judicial-bias argument and affirmed. *Id.* at 843, 847-848. This Court denied certiorari. 516 U.S. 1052.

After the judgment became final, respondent sought state postconviction review. Pet. App. B3. His asserted grounds included, among other things, a claim of judicial bias. *Id.* at C15. The state courts denied relief. *Id.* at B3.

2. In 1999, respondent filed a petition for federal habeas corpus relief in the federal district court in Arizona. Pet. App. B3; see 28 U.S.C. 2254. The Office of the Federal Public Defender was appointed to represent him. Br. in Opp. 1. Since 1988, federal law has provided that in federal postconviction proceedings "seeking to vacate or set aside a death sentence" imposed by either a state or a federal court, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393. The provision was originally codified at 21 U.S.C. 848(q)(4), but in 2006, it was moved, without material change, to 18 U.S.C. 3599(a)(2). Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222(a), 120 Stat. 231 (2006). Counsel's appointment covers not only the district-court proceedings, but also additional proceedings, including "applications for stays of execution and other appropriate motions and procedures," as well as "such competency proceedings and proceedings for executive and other clemency as may be available." 18 U.S.C. 3599(e).

In 2000, respondent filed a 237-page amended federal habeas petition raising 60 claims, including a judicial-bias claim. Pet. App. B3; see *id.* at C10. He thereafter withdrew 13 claims so that he could pursue them in state court. *Id.* at C2. His renewed motion for state postconviction relief included a claim that he was not competent to assist his postconviction counsel. *Id.* at B3. The state court rejected that competency claim as noncognizable. *Id.* at B3-B4.

3. a. In 2006, after the case had returned to federal court and shortly before respondent's opening merits brief was due, his counsel filed a motion for a competency determination and a stay. Pet. App. A2, B5. Counsel based the motion on *Rohan* v. *Woodford*, 334 F.3d 803 (9th Cir.), cert. denied, 540 U.S. 1069 (2003), in which the court of appeals had held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him [the] statutory right to assistance of counsel" currently codified at 18 U.S.C. 3599(a)(2). *Rohan*, 334 F.3d at 819; see Pet. App. B5. Counsel asserted that "due to a progressive deterioration in [respondent's] mental health he had lost the ability to rationally communicate with his counsel and assist them" and that respondent's "assistance was essential to a number of his remaining habeas claims." *Id.* at A3.

Based on counsel's representations, the district court permitted the parties to have mental health experts examine respondent. Pet. App. C3. The parties' psychiatrists reached conflicting conclusions. *Ibid.* Respondent's expert concluded that respondent was not competent to understand his current legal situation or to assist counsel and that there was a good chance he would re-

main incompetent even if medicated. *Id.* at C4. The State's expert concluded that respondent was competent and was faking his symptoms, noting that respondent had "verbalized his desire to be found incompetent[] (and thereby delay or avoid death by lethal gas)." *Id.* at C3-C4. The State's expert could not, however, exclude the possibility of a mental disorder, and she recommended a period of locked observation and, if the symptoms persisted, medication. *Id.* at C4.

On the State's motion, respondent was transferred to the Arizona State Hospital for further evaluation. Pet. App. C5. At the end of a 90-day assessment period, the supervising psychologist expressed reservations about whether respondent was malingering, but nonetheless concluded that respondent had a "genuine psychotic disorder" and was "currently unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding." *Ibid.* The psychologist became convinced of the genuineness of respondent's symptoms after observing improvement when respondent was put on antipsychotic medication. *Ibid.* But the medication had been discontinued at respondent's request, after he complained of side effects including back pain and restlessness. *Id.* at B5-B6, C5.

b. After further briefing, the district court denied respondent's request for a stay and a competency determination. Pet. App. C29. The court concluded that respondent's potential incompetence did not entitle him to a stay of the habeas proceedings. *Id.* at C7-C29. The court reasoned that, unlike the ineffective-assistance-of-counsel claim that had been at issue in *Rohan*, respondent's "properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel." *Id.*

at C27-C28; see *id.* at C7-C27. With respect to respondent's judicial-bias claim in particular, the district court determined that respondent's counsel "are in a position to argue[] the merits of this claim without further input from" respondent. *Id.* at C16. The court observed that the record on the judicial-bias claim "is fully developed"; that "additional, relevant facts do not exist that are within [respondent's] private knowledge"; and that, in any event, respondent's failure to allege or prove such facts in state court precluded further factual development in federal court. *Ibid.* (citing, *inter alia*, 28 U.S.C. 2254(e)(2)).

Because the district court concluded that none of the exhausted claims could benefit from respondent's assistance, it did not need to reach the issue of whether respondent was, in fact, sufficiently competent or whether he could be medicated in order to make him so. See Pet. App. C6, C28-C29. The district court did note, however, that its "review of the record * * * shows that [respondent] possesses at least a limited capacity for rational communication," as he had "agree[d] to meet with mental health experts in support of his motion to determine competency and stay the proceedings" and "was at times able to communicate rationally" with the State's experts. *Id.* at C28 & n.14. The district court also noted that "the likelihood exists that [respondent's capacity for rational communication] can be maximized through the use of anti-psychotic medication." *Id.* at C28.

4. a. Respondent asked the court of appeals for an emergency stay of the district court proceedings and an emergency writ of mandamus. Pet. App. E1-E2. The court of appeals granted a temporary stay and ordered briefing. *Ibid.*; see *id.* at F1-F2 (denying reconsideration); *id.* at G1-G2 (amended order). It later stayed the

appellate proceedings pending its resolution of two cases that, it explained, "involve related issues that are likely to affect our decision in the present case." *Id.* at H2.

One of those related cases was eventually dismissed as moot. See Pet. 6 n.2. The other, *Nash* v. *Ryan*, 581 F.3d 1048 (9th Cir. 2009), cert. dismissed, 130 S. Ct. 1757 (2010), was decided several months later. In *Nash*, the court of appeals held that "the statutory right to competence in capital habeas cases that we recognized in *Rohan* applies to appeals," such that a prisoner "who lacks the ability to communicate rationally, and who seeks to raise claims on appeal that could potentially benefit from such communication is entitled to a stay of the appeal until [he] is found competent." *Id.* at 1055.

b. In October 2010, the court of appeals granted a writ of mandamus in this case, holding that respondent "is entitled to a stay pending a competency determination." Pet. App. A2; see *id.* at A9. The panel reasoned that "*Nash* squarely controls this case, foreclosing the district court's conclusion that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions." *Id.* at A5 (citing *Nash*, 581 F.3d at 1050). The proper "claim-specific inquiry," the panel stated, "'should be whether rational communication with the [prisoner] is essential to counsel's ability to meaningfully prosecute'" the claim. *Ibid.* (quoting *Nash*, 581 F.3d at 1054).

The court of appeals concluded that respondent's judicial-bias claim satisfied that test. The court noted that respondent "had eleven different attorneys over the course of his trial and sentencing, and was self-represented for part of that time." Pet. App. A5. Respondent's "claim of judicial bias," the court continued, "cen-

ters on events regarding which 'counsel may need to communicate with [respondent] to understand fully the significance and context' of key facts so that counsel can pursue the most persuasive arguments." *Ibid.* (quoting *Nash*, 581 F.3d at 1048) (internal alterations omitted).

DISCUSSION

This case does not warrant this Court's review at this time. Although the court of appeals took an overly broad view of the circumstances in which a competency-related stay is appropriate in a capital habeas proceeding, the question presented arises infrequently, and the decision in this case does not conflict with the decision of any other court of appeals. Additionally, resolution of the question presented may be affected by the Court's decision in another case this Term concerning 18 U.S.C. 3599, *Martel* v. *Clair*, No. 10-1265 (argued Dec. 6, 2011), which could illuminate the scope of the statute's protections. It would at the very least be premature to grant review in this case while *Clair* is still pending, and the interlocutory posture of the petition suggests that denying certiorari, rather than holding the petition for *Clair*, would be the most appropriate course.

I. SECTION 3599 NEITHER REQUIRES NOR CATEGORICALLY FORECLOSES COMPETENCY-RELATED STAYS

Petitioner contends (Pet. 7-19) that the court of appeals erred in construing Section 3599 to require an indefinite stay of a capital prisoner's federal habeas proceedings when the prisoner is not competent to assist his counsel. Petitioner is correct that neither Section 3599 nor any other provision of federal law affirmatively requires that result. At the same time, however, no federal statute entirely withdraws district courts' inherent authority to grant discretionary stays of habeas pro-

ceedings, which would presumably include the authority to grant limited competency-related stays in certain circumstances.

A. Section 3599 Does Not Guarantee A Right Of Competence To Assist Postconviction Counsel

1. This Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence. See, *e.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991); *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007).[1] Congress, however, "created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings" when it enacted 18 U.S.C. 3599 (formerly 21 U.S.C. 848(e)). *McFarland* v. *Scott*, 512 U.S. 849, 851 (1994). Section 3599(a)(2) provides that "[i]n any post conviction proceeding under" 28 U.S.C. 2254 or 2255 "seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)." Counsel appointed under the statute must generally meet certain experience requirements, 18 U.S.C. 3599(b)-(d), and will, unless replaced, represent the litigant throughout a variety of judicial and other proceedings, 18 U.S.C. 3599(e).

Section 3599 does not, however, expressly create a right to be competent to assist counsel in federal capital

---

[1] The Court is currently considering whether the Constitution guarantees a right to counsel on collateral review when such review is the first opportunity for the prisoner to raise a particular claim of error. See *Martinez* v. *Ryan*, No. 10-1001 (argued Oct. 4, 2011).

postconviction proceedings. The only mention of "competency" in Section 3599 appears in the list of proceedings in which appointed counsel will represent the habeas applicant, which includes "such competency proceedings * * * as may be available." 18 U.S.C. 3599(e). But Section 3599 does not itself make "available" any new categories of "competency proceedings." And the federal statute governing competency determinations, 18 U.S.C. 4241, does not apply to capital postconviction proceedings. That statute permits a district court to grant a competency hearing, either *sua sponte* or at the request of either party, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Capital postconviction proceedings occur neither "prior to the sentencing of the defendant" nor "after the commencement of probation or supervised release."

2. The court of appeals erred in concluding that Section 3599 nevertheless implicitly guarantees an additional right of competence to assist counsel (and, in turn, a right for capital prisoners unable to meet that competency standard to stay their habeas proceedings). Even at trial, the right to counsel (which is guaranteed by the Sixth Amendment) and the right to competency (which is guaranteed as part of a criminal-trial defendant's general due-process and fair-trial rights) are separate. Compare, *e.g.*, *Turner* v. *Rogers*, 131 S. Ct. 2507, 2516 (2011) (characterizing right to appointed counsel for indigent defendant in a criminal trial as a Sixth Amendment right), with *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975) (characterizing competency at criminal trial as a

due process right). And in the postconviction setting in particular, a prisoner's competency to consult personally with an attorney has never been an inflexible prerequisite to litigating his habeas claims. To the contrary, courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who "is unable to litigate his own cause due to mental incapacity." *Whitmore* v. *Arkansas*, 495 U.S. 149, 165 (1990).

A prisoner's right to competency in the postconviction context has traditionally been quite limited. The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against "carrying out a sentence of death upon a prisoner who is insane." *Panetti* v. *Quarterman*, 551 U.S. 930, 934 (2007) (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986)). That prohibition, however, does not imply a right of competence to assist counsel in the litigation of a collateral attack on the original conviction and sentence. First of all, a claim of incompetence to be executed generally does not become ripe "until *after* the time has run to file a first federal habeas petition." *Id.* at 943 (emphasis added). Furthermore, a prisoner may be competent to be executed even if he is not competent to communicate with counsel. Justice Powell's controlling opinion in *Ford* v. *Wainwright*, *supra*, explained that the standard for competency to be executed requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be "able to assist in his own defense." 477 U.S. at 422 & n.3 (Powell, J., concurring in part and concurring in the judgment); see *Panetti*, 551 U.S. at 949 (stating that Justice Powell's concurrence in *Ford* is the controlling opinion).

Had Congress intended for Section 3599 to create not only a new right to counsel, but also a new right of competency, in the postconviction context, it would have said so expressly. Not only the Constitution, but also the laws of a number of States, permit execution of an otherwise competent prisoner even if he is not "able to assist in his own defense." *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the "prevailing test" in the States did not require competence to assist counsel as a prerequisite to carrying out a death sentence). The right recognized by the court of appeals, however, would as a practical matter frequently supersede those constitutional and state-law rules. If a district court is required to stay a capital prisoner's first habeas petition when he cannot assist counsel, the court will also have to stay the prisoner's execution. See *Lonchar* v. *Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."). Congress gave no express indication that, by guaranteeing a right to postconviction counsel, it intended to occupy the field in the area of competency as well.

3. Neither respondent nor the court of appeals has provided any specific evidence, textual or otherwise, that Congress implicitly intended to take such a transformative step. The court of appeals, in its seminal case recognizing the statutory right of competence to assist counsel in postconviction proceedings, focused extensively on common-law concepts of competency during and after trial. See *Rohan* v. *Woodford*, 334 F.3d 803, 807-812 (9th Cir.), cert. denied, 540 U.S. 1069 (2003); see also Br. in Opp. 21-23. But whatever the common law on

that issue may have been, it does not illustrate the meaning of a statute that establishes only a right to counsel. As the court of appeals acknowledged, "the right to competence has met with a mixed constitutional reception," as this Court has recognized a defendant's right of competence to assist in his defense at trial but has not required a similar degree of competency before a lawfully convicted prisoner may be executed. *Rohan*, 334 F.3d at 808-809. Nothing in Section 3599 gives a postconviction right of competence a more favorable reception—or even suggests that Congress intended to create a statutory right of competence at all.

The court of appeals also suggested that principles of constitutional avoidance support the inference of a right to competency in Section 3599. *Rohan*, 334 F.3d at 813-814. In its view, a "substantial constitutional question[]" exists whether due process requires a right of competency as a necessary adjunct any time a statute grants a right to counsel. *Id.* at 813. But this Court's decision in *Pennsylvania* v. *Finley*, 481 U.S. 551, 554-559 (1987), casts doubt on such a due process right. The respondent in *Finley* argued that he had been denied due process when postconviction counsel, appointed pursuant to state law, had withdrawn on appeal without following the procedures described in *Anders* v. *California*, 386 U.S. 738 (1967). See 481 U.S. at 557-558. This Court rejected that argument, concluding that "the State has made a valid choice to give prisoners the assistance of [postconviction] counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Id.* at 559. The Court explained that in the postconviction context, "the Constitution does not put the

State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders*." *Ibid.* Similarly, here, Congress could make a "valid choice" to provide counsel to indigent capital prisoners seeking postconviction relief without providing an additional right to competency to assist that counsel.

Finally, the court of appeals relied on this Court's actions in *Rees* v. *Peyton* as "support[ing]" its interpretation of Section 3599. *Rohan*, 334 F.3d at 815; see 384 U.S. 312 (1966) (per curiam); 386 U.S. 989 (1967); *Rees* v. *Superintendent of the Va. State Penitentiary*, 516 U.S. 802 (1995); see also Br. in Opp. 11-13. In that case, Melvin Rees, a state capital prisoner, filed a habeas corpus petition in federal district court challenging his murder conviction. *Rees*, 384 U.S. at 312-313. The district court denied relief; the court of appeals affirmed; and Rees's counsel, with Rees's consent, filed a petition for a writ of certiorari. *Id.* at 313. Roughly a month later, however, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Ibid.* Counsel advised the Court that "he could not conscientiously accede to these instructions" because he feared that Rees was incompetent. *Ibid.* This Court, "in aid of the proper exercise of [its] certiorari jurisdiction," ordered the district court to determine whether Rees had "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313-314. Following the Court's instructions, the district court determined that Rees was incompetent. *Rohan*, 334 F.3d at 815 (citing district court docket). This

Court, apparently over the State's objection, then ordered that the case be "held without action on the petition for certiorari until further order." 386 U.S. at 989. The petition remained held until 1995, when the Court dismissed it, apparently because Rees had passed away. 516 U.S. at 802; see *Rohan*, 334 F.3d at 815 n.8.

Rees is not instructive on the meaning of Section 3599. The case substantially predates the 1988 enactment of Section 3599's predecessor, and neither the court of appeals nor respondent has identified any evidence that Congress had *Rees* in mind when it passed the statute. The only connection between *Rees* and federal statutory law is a "Cf." citation by this Court suggesting that the district court, in carrying out the instruction to hold a competency hearing, might follow procedures similar to the federal statutory procedures for determining trial competence. See 384 U.S. at 314 (citing 18 U.S.C. 4244, 4245 (1964)).

In any event, *Rees* does not address the situation presented by this case. *Rees* did not concern competency to *litigate* a federal habeas petition, but instead competency "to *withdraw* a certiorari petition." *Godinez* v. *Moran*, 509 U.S. 389, 398 n.9 (1993) (emphasis added). The Court's disposition of *Rees* therefore should not be taken to suggest that a prisoner has a right to stay his habeas proceedings indefinitely on the ground that he is not able to assist in the litigation. To the contrary, the Court has since suggested that if a habeas applicant meets the incompetency standard set forth in *Rees*, the case might be litigated without his participation by a "next friend." See *Whitmore*, 495 U.S. at 166 (using *Rees* to define the standard for determining when a prisoner's mental incapacity might permit "next friend" habeas litigation).

B. District Courts Have Inherent Authority To Grant Limited Competency-Related Stays In Certain Cases

1. Although Section 3599 does not mandate that a district court stay a capital prisoner's habeas proceedings when he is incompetent to assist counsel, neither does it preclude the possibility of such a stay. Even in the habeas context, "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (citations omitted). Section 3599 neither expressly nor implicitly withdraws that authority.

Of course, a district court's discretion to grant a stay in a case like this is "circumscribe[d]" by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *Rhines*, 544 U.S. at 276. Stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes," one of which "is to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Ibid.* (citation and internal quotation marks omitted). It is difficult to see how an indefinite competency-related stay, or a competency-related stay of a habeas petition that could fairly be litigated without the capital prisoner's assistance, could be squared with that purpose. Cf. *id.* at 277 (declining to endorse stay procedure in which a petition could be "stayed indefinitely"). But AEDPA would not necessarily foreclose, for example, a stay for a limited period, in a case where the capital prisoner's participation appeared crucial, in order to afford the prisoner the opportunity to regain his competence (either naturally or through medication). Cf. *ibid.* (permitting habeas stays to allow for state-court review of unexhausted claims on showing of "good cause"). In

such a circumstance, the district court would presumably have discretion to strike an appropriate balance between the capital prisoner's interest in pursuing his habeas claims and the State's (and AEDPA's) "strong interest in proceeding with its judgment." *Gomez* v. *United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam).

2. In this case, the district court declined to stay respondent's habeas proceedings because it concluded that his claims were purely record-based and could be fairly litigated by counsel without respondent's personal involvement. Pet. App. C14, C16, C27-C28. The court of appeals reversed, based on its view that respondent was entitled to a stay if he were incompetent to litigate his judicial-bias claim, which it believed "could potentially benefit" from respondent's involvement despite being limited to the written record. *Id.* at A5-A6.

The court of appeals erred in concluding that respondent had such a right. The court of appeals did not disturb the district court's finding that respondent's habeas claims were fully developed and could be litigated even if respondent were not competent to assist counsel. See Pet. App. C7-C27. Under those circumstances, the court of appeals had no warrant for ordering a stay. Even assuming the district court could, consistent with AEDPA, grant a limited stay, declining to do so would not constitute an abuse of its equitable discretion.

II. REVIEW OF THE COURT OF APPEALS' INTERLOCUTORY DECISION IS UNWARRANTED

Despite the error in its analysis, the court of appeals' interlocutory decision does not warrant this Court's review at this time. First, in the eight years since the Court declined to review the court of appeals' original

decision addressing the question presented, see *Rohan*, 540 U.S. 1069, no circuit conflict has developed, and the issue appears to have arisen infrequently. Second, the Court is already set to issue a decision this Term that is likely to address the scope of Section 3599, and the courts of appeals should have a chance to consider that decision before the Court decides the question presented here. Finally, the question presented here may be mooted by further proceedings in this case.

1. There is no circuit conflict on the question presented. No court of appeals has expressly disagreed with the conclusion that a capital prisoner has a statutory right under 18 U.S.C. 3599 to be competent to assist counsel during postconviction proceedings. Indeed, no court of appeals other than the Ninth Circuit has squarely addressed the issue.

The Eighth and Eleventh Circuits (as well as the Fifth Circuit, in an unpublished opinion) have declined to decide the question because the issue has thus far arisen only in cases where the record has indicated the capital prisoner's competence. See *Ferguson* v. *Secretary for Dep't of Corrections*, 580 F.3d 1183, 1222 & n.55 (11th Cir. 2009), cert. denied, 130 S. Ct. 3360 (2010); *Paul* v. *United States*, 534 F.3d 832, 848 (8th Cir. 2008), cert. denied, 130 S. Ct. 51 (2009); *Clayton* v. *Roper*, 515 F.3d 784, 790 (8th Cir.), cert. denied, 555 U.S. 1003 (2008); *Mines* v. *Dretke*, 118 Fed. Appx. 806, 812-813 (5th Cir. 2004) (unpublished). The Seventh Circuit has simply assumed that Section 3599 creates a competency right (and has stayed postconviction proceedings as a result) in a case where the State of Indiana "declined to challenge" that assumption. *Holmes* v. *Buss*, 506 F.3d 576, 578 (2007); see *Holmes* v. *Levenhagen*, 600 F.3d 756, 763 (7th Cir. 2010). And the Sixth Circuit has held,

in accord with the court of appeals' decision here, that a district court should stay postconviction proceedings when a capital prisoner is incompetent to assist counsel, although it located the right in the federal competency-hearing statute, 18 U.S.C. 4241, rather than in Section 3599. *Carter* v. *Bradshaw*, 644 F.3d 329, 332-333, 336 (2011), petition for cert. pending *sub nom. Tibbals* v. *Carter*, No. 11-218 (filed Aug. 17, 2011);[2] compare *Blair* v. *Martel*, 645 F.3d 1151, 1155 (9th Cir. 2011) (concluding that Section 4241 does not apply to a prisoner seeking federal habeas relief).

Moreover, it is not clear that the question presented has such exceptional importance that certiorari would be warranted in the absence of a circuit conflict. It appears that federal courts have stayed very few habeas cases on competency grounds. States' Amicus Br. 8-10; Reply Br. 3-4. And in no case has a court granted such a stay for a federal capital prisoner. Should such stays become more common, this Court will have future opportunities to address the question presented.

2. Even if the question presented otherwise merited review, the Court should wait to address it. The Court has already granted certiorari in a case for this Term,

---

[2] The State's petition for a writ of certiorari in *Carter* contends that the Sixth Circuit erred in construing *Rees* to provide capital prisoners with a right to competency under Section 4241. Pet. at 11-23, *Carter*, *supra*, No. 11-218 (Aug. 17, 2011). For the reasons stated in the text, *infra*, the government believes that review of any petition presenting a question concerning competency stays of capital habeas proceedings would be premature. But if the Court were to decide that the issue warrants further review, this case provides a better vehicle, because it would allow the Court to address not only the *Rees* argument, but the Section 3599 argument as well. See Reply at 4 n.1, *Carter*, *supra*, No. 11-218 (Nov. 11, 2008) (observing that Section 3599 is not at issue in that case).

Martel v. *Clair*, No. 10-1265 (argued Dec. 6, 2011), that may shed light on the scope and meaning of the right to counsel under Section 3599. *Clair*, which (like this case) comes to the Court from the Ninth Circuit, concerns the proper standard for substitution of counsel appointed pursuant to Section 3599. Pet. at i, *Clair*, *supra* (No. 10-1265). The petitioner in *Clair* has cited the Ninth Circuit's decision in this case, as well as the precedents the decision relied on, and contends that the issues in the two cases are related. *Id.* at 17; see Cert. Reply at 3-4, *Clair*, *supra* (No. 10-1265); Pet. Br. at 31 n.16, *Clair*, *supra* (No. 10-1265).

The Court's analysis in *Clair* may affect analysis of the question presented here. The warden petitioner in *Clair* argues, in part, that the standard for substituting counsel under Section 3599 should be narrow because Section 3599 itself is narrow. Pet. Br. at 17-39, *Clair*, *supra* (No. 10-1265). In the warden's view, Section 3599 does not contain a guarantee of effective assistance of counsel similar to the Sixth Amendment's. *Ibid.* In contrast, the respondent (Clair) asserts that the district court erred by failing to conduct an inquiry in response to his motion to substitute counsel, which alleged, among other things, "a 'total breakdown' of communication between attorney and client." Resp. Br. at 35, *Clair*, *supra* (No. 10-1265); *id.* at 6-9, 34-36 (describing counsel's alleged failures to follow up on evidentiary leads and to cooperate with Clair's investigator, despite Clair's instruction); see also Tr. of Oral Argument at 23-24, *Clair*, *supra* (No. 10-1265) (counsel for warden acknowledging that counsel would have to defer to the prisoner on certain "basic" decisions, such as whether to file a habeas petition). The Court's response to those arguments would have significant bearing on the scope of the right

guaranteed by Section 3599, which could in turn inform consideration of the question presented here.

3. It would thus be premature to grant plenary review in this case while *Clair* is still pending. And because this case is in an interlocutory posture, the most expedient course would be to deny certiorari and allow the lower-court proceedings to continue, rather than to cause further delay by holding the case for *Clair*. The district court has not yet addressed the question of respondent's competence. Pet. App. C28. A determination that respondent can, in fact, competently assist counsel would eliminate any need for this Court to review the question presented. And if he is found to be incompetent, the district court and court of appeals could take into account this Court's eventual decision in *Clair* in determining whether a stay is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
DEBORAH WATSON
Attorney

FEBRUARY 2012