No. 11-218

IN THE
Supreme Court of the United States

TERRY TIBBALS, Warden,
Petitioner,
v.
SEAN CARTER,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether capital prisoners possess a right to competence in federal habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966), when: a) the Court in *Rees* stayed a federal habeas proceeding after a judicial determination that the capital prisoner was incompetent to make a rational choice to continue or abandon further litigation; b) the Court's rejection of the capacity to rationally communicate as an element of the right to competence at execution was premised on the existence of protections ensuring reliability at earlier stages, including habeas; c) constitutional due process requires meaningful access to statutorily established federal habeas review; and d) the Court views 18 U.S.C. § 3599 as promoting quality, effective representation by counsel in capital cases.

2. Whether, after recognizing a right to competence during habeas proceedings, a stay until the habeas petitioner regains competence is the proper remedy under *Rees*, when: a) this Court has consistently recognized and protected the broad, discretionary power of federal courts to stay matters before them; b) that policy was specifically applied in *Rees*, where a twenty-nine year stay was granted to an incompetent habeas petitioner; c) practical considerations, including the nature of Mr. Carter's claims and an interest in keeping all parties actively involved in the litigation, point to a stay being the proper remedy; and d) other remedies, including a court appointed "next friend," have proven improper and unworkable.

PARTIES TO THE PROCEEDING

Petitioner, Respondent-Appellant below is:
Terry Tibbals, Warden.

Respondent, Petitioner-Appellee below is:
Sean Carter.

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JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered final judgment on May 26, 2011. A petition for the writ of certiorari was filed on August 17, 2011 and granted March 19, 2012. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions, U.S. Const. amends. V, VI, VIII, 18 U.S.C. §§ 3599, 4241, and 28 U.S.C. § 2254, are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Sean Carter's mother was diagnosed with schizophrenia prior to his birth. *Carter v. Bradshaw*, 583 F. Supp. 2d 872, 874 (N.D. Ohio 2008). At age two, he was removed from her custody after he was found tied to a couch and malnourished. *Id.* Records from this time begin to question Mr. Carter's mental faculties, and by age six he was labeled "schizoid-prone and at high risk of becoming detached from reality." *Id.* Mr. Carter spent the next ten years in foster care before becoming a ward of the state. *Id.*

After Mr. Carter was convicted and sentenced to death, he exhausted his state post-conviction relief options and brought a federal habeas petition in March of 2002. *Id.* at 873. Included in a subsequent amended petition, Mr. Carter asserted, *inter alia*, that his defense counsel did not pursue the competency issue with due diligence. *Id.* at 874. At the same time, his counsel filed a motion for a competency determination and to stay proceedings. *Id.*; J.A. 90. After an appeal, this motion was granted. 583 F. Supp. 2d at 874.

During the evidentiary hearing to determine Mr. Carter's competency to proceed with his habeas petition, Mr. Carter's expert, Dr. Robert Stinson, testified that he had diagnosed Carter with "schizophrenia, undifferentiated type, continuous course with prominent negative symptoms, as well as depressive disorder not specified, a personality disorder, and substance dependence that is in remission." *Id.* at 874–75. Mr. Carter suffers from hallucinations and distorted thinking. *Id.* at 875.

Importantly, Dr. Stinson had concerns about Mr. Carter's ability to communicate with counsel. "Dr. Stinson opined that Carter does not have a factual understanding of the proceedings." *Id.* Mr. Carter also held the belief that his execution would only go forward if he volunteered. *Id.* Mr. Carter could not name his attorneys, and believed that he was being represented during habeas by Dr. Phillip Resnick, the examining psychiatrist for the state. *Id.* at 876.

Despite an opinion from Dr. Resnick, that painted Mr. Carter's condition in a more favorable light to proceeding with the petition, *id.* at 876–77, the court found him incompetent because he could not meaningfully assist counsel. *Id.* at 881–82. This was

in part because both psychiatrists agreed that Mr. Carter was unable to give detailed answers to questions or fully elaborate his answers. *Id.* at 875–76. Further, Mr. Carter's condition appeared to be worsening. *Id.* at 881.

In issuing its ruling, the Northern District of Ohio also held that there is a right to competence during habeas proceedings, relying upon the holdings of the Ninth Circuit in *Rohan* ex rel. *Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), and this Court in *Rees v. Peyton*, 384 U.S. 312 (1966). 583 F. Supp. 2d at 877–879. After finding Mr. Carter incompetent, the court dismissed the case without prejudice, prospectively tolling the limitations period until he regained competence. *Id.* at 879, 884.

On appeal, the Sixth Circuit adopted many of the findings of the lower court and affirmed the incompetence ruling, but amended the remedy to a stay. *Carter v. Bradshaw*, 644 F.3d 329, 336–37 (6th Cir. 2011). The Sixth Circuit also held that there is a right to competence stemming from *Rees*. *Id.* at 332–34. The court noted that *Rees* created a competence standard with the aid of 18 U.S.C. § 4241, thereby requiring that a habeas petitioner understand the nature and consequences of the proceedings against him and be able to assist his counsel. *Id.*

In determining the remedy to be granted, the court emphasized the broad staying power afforded to courts, *id.* at 336, and reasoned that this disposition fell in line with 18 U.S.C. § 4241(d), which permits hospitalization of defendants during incompetency at trial. The court also noted practical considerations that warranted the issuance of a stay. *Id.* at 336–37. Further, the court considered other remedies, including a court-appointed "next friend"

and prospective tolling. Given the drawbacks of the other remedies, they were deemed to be improper. *Id.*

Accordingly, the court ordered that the case be remanded for a determination of which of Mr. Carter's claims required his assistance. *Id.* at 337. These claims were to be stayed until Mr. Carter regained competence. *Id.*

SUMMARY OF THE ARGUMENT

Mr. Carter is a prisoner condemned to death who has claimed in a federal habeas petition that he is held in violation of the Constitution of the United States. His life and liberty are at stake. The Supreme Court and Congress have recognized that federal habeas review for capital prisoners is particularly important in promoting fundamental fairness in the imposition of the death penalty. This proposition is not simply a matter of abstract theory. Between 1973 and 1995, forty percent of capital judgments in the United States reviewed in federal habeas proceedings were overturned due to serious error. However, when a capital prisoner like Mr. Carter is found mentally incompetent and is therefore unable to rationally guide or contribute to the prosecution of his cause, habeas review becomes a meaningless formality, legally, as well as morally, defunct.

Fortunately, the Supreme Court has provided a remedy to a significant barrier to justice by recognizing that capital prisoners possess a right to competence in federal habeas proceedings. Considering the array of options available to the Court in *Rees*, the Court's language and decision to stay the case demonstrate that mental competence is

a prerequisite to the abandonment and *continuation* of a habeas proceeding. Furthermore, the finding of a right to competence in *Rees* is bolstered by constitutional and statutory principles.

The Court's constitutional jurisprudence supports a right to competence in federal habeas proceedings in two ways. First, in *Ford v. Wainwright*, 477 U.S. 399 (1986), Justice Powell justified his rejection of the capacity to rationally communicate as an element of the right to competence at execution under the Eighth Amendment by arguing that federal collateral review and other proceedings protect the prisoner's ability to make arguments on his behalf. Since this assumption is warranted only if competence is measured and required in the context of habeas review, a rational communication competence test in habeas proceedings is necessary to justify its removal at execution. Second, the Court's longstanding due process doctrine requiring meaningful access to the courts for federal habeas review, given that the right to petition has been established by statute, strongly supports mental competence as a crucial element to meaningful access. Notably, this doctrine does not depend on the existence of a constitutional right to habeas review or to counsel.

Finally, 18 U.S.C. § 3599 creates a right to meaningful assistance of counsel in capital cases for trial defendants and habeas petitioners alike and consequently creates a right to competence in habeas proceedings. A competent petitioner is essential for § 3599 to have practical force. Petitioner's overly narrow interpretation of the statute is contradicted by the Supreme Court's decision this year in *Martel v. Clair*, 132 S. Ct. 1276 (2012), the legislative

history, and the parallel, consistent interpretive inference of a right to competence at trial from the Sixth Amendment.

If this Court recognizes a right to competence during habeas, it must remedy that right's violation.

The Supreme Court has consistently recognized and protected the power of courts to stay matters before them. This recognition has been broad: federal courts may stay trial proceedings, habeas proceedings, and state court proceedings. The limiting factor on the exercise of that power is the court's sound discretion. In the case at hand, the Sixth Circuit reached the decision to stay the case after a prudent analysis of all of the other options.

This discretion-based review embodies a policy of this Court to be deferential toward the grant of stays. The writ of habeas corpus is an exceptional remedy, but the docket-managing tool of issuing stays is not. It is an inherent power of federal courts, the exercise of which should be done with discretion, but not some more strenuous review process.

In practice, this Court has adhered to a policy of granting stays when habeas petitioners are incompetent. In *Rees*, upon finding the petitioner incompetent, his case was stayed for 29 years. *Rees* is factually and procedurally analogous to the instant case. The practice of staying cases when issues of incompetence arise is further endorsed by this Court in *Ford*, where a stay was again permitted due to incompetence. Given this Court's adherence to a policy favoring competence during habeas proceedings, the grant of a stay is proper in this case.

To bolster this decision, pragmatic considerations counsel in favor of the grant of a stay. First, a stay is the remedy best tailored to Mr. Carter's claim. In

defining the ineffective assistance of counsel claim, this Court acknowledged that a habeas petitioner's own testimony and knowledge would be crucial to realizing the claim. Second, staying the case serves the interests of justice and efficiency by keeping all parties actively involved in the pursuit of resolving Mr. Carter's claims.

Petitioner advances only one alternative remedy: a court-appointed next friend. As this Court has conceptualized that remedy, however, using it here would be an inconsistent application. This is because when the claims of the habeas petitioner are, as acknowledged in *Strickland v. Washington*, 466 U.S. 668 (1984), inherently dependent on the prisoner's own availability to offer assistance, a next friend can do no more than an incompetent and incommunicative Mr. Carter. Further, the Ninth Circuit attempted to make use of a next friend in a factually analogous situation and ultimately found that approach unworkable. Here, Petitioner's lone suggested remedy will fair no better.

This is not to say that Petitioner's concerns over respecting interests in finality and comity are unfounded. They are important concerns. That acknowledged, Petitioner explicitly states that these concerns regarding comity, finality, and federalism are not dispositive here. Further, they have been given less priority than competence during habeas. For instance, in *Rees*, this Court prioritized the competence of the prisoner over a valid and vetted state conviction. In so doing, the Court held that judgment in check for nearly three decades. Such complete regard for competence favors a stay.

Given the lack of alternatives, this Court's unwillingness to create rights without corresponding

remedies, and the general and direct precedent laying the groundwork for a stay, Respondent respectfully requests that remedy be granted here.

ARGUMENT

I. THE RIGHT TO COMPETENCE OF CAPITAL PRISONERS IN FEDERAL HABEAS PROCEEDINGS IS FOUNDED IN SUPREME COURT PRECEDENT AND CONSTITUTIONAL AND STATUTORY LAW.

For capital prisoners convicted and held in violation of the Constitution of the United States, applying in federal court for the writ of habeas corpus is often their last chance for exoneration, a new trial, or, at least, a sentence less than death. As executive clemency has become rare, "[h]abeas corpus has become a – if not the – primary vehicle for the vindication of death row inmates' constitutional rights." Hannah Robertson Miller, *"A Meaningless Ritual": How the Lack of a Postconviction Competency Standard Deprives the Mentally Ill of Effective Habeas Review in Texas*, 87 Tex. L. Rev. 267, 284 (2008). Between 1973 and 1995, *forty percent* of capital judgments in the U.S. reviewed in federal habeas proceedings were overturned *due to serious error*. *Id.* at 283.[1] Indeed, the Supreme Court

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[1] Petitioner makes much of the notion that habeas review is "secondary and limited." Pet'r's Br. 9. This truism absolutely does not lead to the conclusion that it is somehow unimportant due to its formally civil nature. Even Petitioner, by noting the "strong policy reasons" that should prevent an incompetent capital

"has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . . [and] has steadfastly insisted that there is no higher duty than to maintain it unimpaired." *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (internal quotation omitted); *see also Engle v. Isaac*, 456 U.S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Art. I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate fundamental fairness." (internal quotation omitted)). Similar to the Supreme Court, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

Considering the potential of habeas review to provide a capital prisoner another shot at life by uncovering unjust and unconstitutional abuses, "[a]

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prisoner from foregoing his last chance at relief, recognizes that habeas review plays an important role in our constitutional system. *Id.* at 6, 17-18, 29. Although a habeas proceeding is formally civil, "it is realistically and functionally a stage in the criminal process, differing only in who initiates the proceeding. Focusing on this ontological distinction belies the reality that the criminal justice system invests tremendous resources in postconviction proceedings to ensure the accuracy and reliability of capital sentencing . . . ." Miller, *supra*, at 291 (footnote omitted).

competency requirement in . . . federal habeas proceedings is necessary to ensure that collateral review functions as it is designed." Miller, *supra*, at 298. Simply put, absent recognition of such a right, "the state might kill a prisoner who has severe mental illness yet is innocent and unable to identify exculpatory evidence and communicate the reasons why the evidence matters." Christopher Seeds, *The Afterlife of* Ford *and* Panetti*: Execution Competence and the Capacity to Assist Counsel*, 53 St. Louis U. L.J. 309, 343 (2009). Competent prisoners play a critical role, where incompetent prisoners cannot, in discovering and interpreting evidence of defects in trial. Between 1991 and 2009, more than 100 prisoners were exonerated from death row, and only approximately twenty-five percent of exonerations were based on DNA evidence. *Id.* at 345.

In light of these concerns, it is fortunate that a right to competence in federal habeas proceedings is founded in Supreme Court precedent and supported by constitutional and statutory law.

A. The Language and Context of the Court's Decision in *Rees v. Peyton* Demonstrate That Incompetence of a Capital Prisoner Is a Barrier to the Abandonment and Continuation of Federal Habeas Proceedings.

A close examination of the Court's actions and decision-making process in *Rees* lends strong support to a right to competence theory. *Rees* involved the federal habeas case of a capital prisoner who directed his counsel to withdraw his petition and forego further legal proceedings. Since there was significant

doubt as to Mr. Rees's mental competence, the Court ordered the district court to make a competence determination and employ this standard: "whether he has 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." 384 U.S. at 314 (emphasis added).

The district court concluded that Mr. Rees was incompetent under the test. Phyllis L. Crocker, *Not to Decide Is to Decide: The U.S. Supreme Court's Thirty-Year Struggle With One Case About Competency to Waive Death Penalty Appeals*, 49 Wayne L. Rev. 885, 913 (2004). After deliberations, the Supreme Court stayed the proceedings. 386 U.S. 989 (1967). The Court took no further action on the case for almost thirty years, and finally dismissed it in 1995 after Mr. Rees died of natural causes in a federal medical center. Crocker, *supra*, at 935.

Rees supports a right to competence in federal habeas proceedings for several reasons. First, the opinion itself demonstrates that the Court's concern extended beyond the narrow question of whether an incompetent prisoner should be able to abandon a federal habeas petition. If the Court's concern was so limited, then the Court's standard would not have considered whether the prisoner could make a rational choice with respect to *continuing*, as well as abandoning, litigation. The Court's choice of language "suggests that if the district court found Rees incompetent, the Court could decide that litigation would not proceed at all because he would not be able to make rational choices as it continued."

Crocker, *supra*, at 907. It is now well-accepted in the federal courts that the Supreme Court's order of a competency hearing in *Rees* and its subsequent stay of proceedings when Mr. Rees was found incompetent established competence as a prerequisite to abandoning habeas proceedings. *Id.* at 888; *see also Carter*, 644 F.3d at 338 (Rogers, J., dissenting) ("Rees . . . plausibly stand[s] for the proposition that habeas petitioners must be competent in order to *terminate* a habeas proceeding." (emphasis in original)). Considering the Court's placement of the word "continuing" next to "abandoning" in its standard, there is no reason why a parallel conclusion does not follow: competence is likewise a prerequisite to continuing habeas proceedings.

Second, an examination of the Court's decision-making process and correspondence with counsel bolsters this conclusion. With the aid of the record in this case, one can gain insight into the array of options available to the Court and which options the Court accepted and rejected in its decision to stay the proceedings. After the district court declared Mr. Rees incompetent, counsel for Mr. Rees and the state submitted memoranda advising the Court on how to proceed. Crocker, *supra*, at 914. *Both* sides agreed that the Court should not allow Mr. Rees to withdraw his petition due to his mental state, but their proposals diverged otherwise. Mr. Rees's counsel asked the Court to grant the petition for writ of certiorari and stay the habeas proceedings:

> [He] maintained that to deny the petition for writ of certiorari, or grant it without a stay, would require a response by Rees. Given that the district court found that Rees was

> incompetent to decide to abandon or *continue* the litigation, [counsel] argued, it was untenable to take any action that would require a response from Rees because any decision he might make would be influenced by his mental illness.

Id. at 915 (emphasis in original) (footnote omitted). On the other hand, much like Petitioner in the instant case, the state "urged the Court to dispose of the case either by granting or denying the petition, and contended that *in no event should the Court stay the proceedings*." *Id.* at 915 (emphasis added). The Court could have granted the petition for certiorari and appointed a "next friend" to litigate the habeas issues on Mr. Rees's behalf. However, Mr. Rees's counsel had urged the Court to reject this approach because Mr. Rees was unable to rationally consult with counsel. *Id.* at 899, 917.[2]

In light of the options before it, the Court's ultimate decision to stay the case strongly suggests a

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[2] Petitioner seems to say that Model Rules of Professional Conduct R. 1.14(a) *compels* an attorney to continue court proceedings on behalf of an incompetent client (one who lacks the ability to rationally assist counsel) as if the client had not been found incompetent. Pet'r's Br. 18. If this strange conclusion were true, this Rule, which is general in application, compels an attorney to subvert the Constitution by forcing a legally incompetent defendant to stand trial. Of course, the Rule simply requires an attorney to maintain a normal attorney-client relationship with the client, as far as reasonably possible, when the client's capacity is diminished.

vindication of the position of Mr. Rees's counsel and a rejection of the state's argument. The Court refused, as the state contended, to reject the petition for certiorari without consideration of Mr. Rees's legal claims or to decide the case on the merits. Those actions would have either blocked the possibility of habeas relief altogether or required Mr. Rees to make rational choices about whether and how to continue litigation when the district court had declared him incompetent to do so. The Court also could have appointed a next friend to litigate the case if it found that Mr. Rees's inability to rationally make decisions or communicate would be immaterial to a resolution of the matter. Notably, the Court rejected this course as well. Therefore, it is reasonable to conclude that by staying the proceedings, the Court found that incompetence of the petitioner is a barrier to 1) abandonment of the petition, AND 2) continuation of litigation. In other words, Mr. Rees had a right to competence in the federal habeas proceeding.

B. The Right to Competence in Capital Federal Habeas Proceedings Emanates from the Eighth Amendment and the Court's Decision in *Ford v. Wainwright*.

At common law, mental competence of defendants was generally required from trial to execution, and the capacity to rationally communicate a defense was a core element of the competence standard. Seeds, *supra*, at 314–16; *see also* 4 W. Blackstone, Commentaries *24–*25 ("[I]f, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the

English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."). Another key element of competence at common law was the prisoner's capacity to understand the legal proceedings and their impact on his own life. *Id.* at 309. While the former rationale furthered the reliability of the legal process and autonomy of the defendant or prisoner, the latter upheld the dignity of the justice system and ensured that any sentence imposed would truly serve a retributive goal. *Id.* at 316–17 & n.31.

The Supreme Court's constitutional jurisprudence has recognized the importance of both elements in requiring competence to stand trial. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (defining the trial standard). The Court has also clearly recognized a right to competence at the execution stage under the Eighth Amendment. *Ford*, 477 U.S. at 401. However, since the majority did not adopt a specific standard of competence in *Ford*, Justice Powell's concurring opinion has long been viewed to articulate the substantive standard. Seeds, *supra*, at 310.

Justice Powell concluded in *Ford* that the standard for competence at execution should be limited to whether the prisoner is aware of the punishment he is about to suffer and understands why he will suffer it. 477 U.S. at 422 (Powell, J., concurring). He justified a rejection of the common law rational communication element by explaining that modern protections in trials, appeals, and state and *federal collateral review* had become sufficiently extensive to ensure reliability and the defendant's ability to assist in his defense. *Id.* at 420–21.

Justice Powell's reasoning in *Ford* seems to take for granted that a right to competence measured by

the ability to communicate a defense rationally is protected by legal proceedings prior to execution, including habeas review. Otherwise, how could he conclude that the risk of unreliability or inaccuracy, stemming from the petitioner's inability to assist in his cause, has become slight by the time of execution? Indeed, the Court, including Justice Powell, has recognized a heightened requirement of reliability in capital cases. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Since courts typically require exhaustion of collateral relief before they entertain claims of incompetence for execution:

> Justice Powell must have been assuming that prisoners on the threshold of execution have already taken advantage of these post-conviction opportunities, leaving little risk that some critically important fact has been obscured throughout these proceedings or that a previously unknown defect in the conviction or sentence could yet emerge. These assumptions are warranted, of course, only if a prisoner's impaired capacity to assist in post-conviction litigation would have been identified during the post-conviction proceedings, leading the courts to take appropriate precautionary action.

Richard J. Bonnie, *Mentally Ill Prisoners On Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1178 (2005). Therefore, to the extent Justice Powell supplies the substantive standard, a rational communication competence test in habeas proceedings is necessary to justify its removal at execution. *See Rohan*, 334 F.3d at 811. The Eighth Amendment as interpreted in *Ford*

compels this result, especially since the "accuracy of the collateral-review process is an assumption upon which the entire capital punishment system rests," Miller, *supra*, at 284, and incompetency can develop *after* sentencing and before execution.

C. Constitutional Due Process Requires Competence in Capital Federal Habeas Proceedings by Mandating Meaningful Access to the Courts Once the Right to Petition Is Created by Statute.

A constitutional due process right to competence in federal habeas proceedings does not depend on the recognition of a constitutional right to initiate such proceedings or to counsel. Congress has established a right to challenge state convictions and sentences in federal habeas corpus proceedings. *See* 28 U.S.C. § 2254. The Due Process Clause often attaches once a statute creates the initial right of action. For instance, Article III of the Constitution places at the discretion of Congress the very existence of the inferior court system of the United States. U.S. Const. art. III, § 1. Congress has decided to create inferior courts by statute and establish causes of action with federal court jurisdiction. No one would argue that since the federal district courts were born of statute, they may ignore the requirements of constitutional due process. Similarly, the Supreme Court has consistently held that due process requires meaningful access to federal habeas review. This line of case law urges the conclusion that meaningful access to federal habeas review in turn requires the mental competence of the petitioner.

In *Bounds v. Smith*, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. 817, 828 (1977). The Constitution requires that inmates generally enjoy "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825 (cited with approval in *Lewis v. Casey*, 518 U.S. 343, 351 (1996)). Without legal resources or any other alternatives, the inmates in *Bounds* lacked the basic tools that they would need to present and support their claims. The Court qualified *Bounds* in *Lewis*, 518 U.S. at 349 (actual injury requirement), but *Lewis* supports the holding in *Bounds* and acknowledges that inmates must possess "the tools . . . [they] need in order to attack their sentences, directly or collaterally." *Id.* at 355. A long line of Supreme Court cases similarly recognizes the due process right to meaningful access to the courts in habeas proceedings and appeals. *See, e.g.*, *Johnson v. Avery*, 393 U.S. 483 (1969) (invalidating state prison regulation barring inmates from assisting other prisoners in preparation of federal habeas petitions because the regulation effectively blocked illiterate and poorly educated prisoners from access to habeas review); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that the Due Process Clause and Equal Protection Clause require states to ensure inmates' access to trial transcripts when state law provides for direct appellate review); *Ex parte Hull*, 312 U.S. 546 (1941) (holding that the state and its officers may not abridge or impair a petitioner's right

to apply to a federal court for a writ of habeas corpus).

If the Supreme Court has found as a constitutional matter that meaningful access to the courts may depend on access to adequate law libraries or similar tools, how can an incompetent prisoner, with no mental capacity to use reason to prepare or assist arguments on his behalf, possibly enjoy meaningful access to the courts? Law libraries (*Bounds*), collaboration with other prisoners (*Johnson*), and court transcripts *(Griffin*) are unfortunately of no comfort to such a mentally incompetent prisoner. Considering that federal habeas proceedings raise questions that can benefit uniquely from the petitioner's participation (*see* § I(E), *infra*), a competent petitioner who can at least rationally engage is essential for the proceedings to constitute more than a meaningless ritual.

A potential counterargument derives from the Court's apparent judgment that meaningful access to the courts does not require a constitutional right to counsel in habeas proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding no constitutional right to counsel in state habeas proceedings). However, it is perfectly consistent with this judgment to conclude that meaningful access does at least require the mental competence of the petitioner. *Finley* depended heavily on the reasoning in *Ross v. Moffitt*, 417 U.S. 600 (1974), which is instructive. Although the Court in *Moffitt* found no constitutional right to counsel on appeals for discretionary review, the Court acknowledged that a defendant should at least be provided an "*adequate opportunity to present his claims fairly*." *Id.* at 616 (emphasis added). Because habeas petitions often

seek to raise "heretofore unlitigated issues," the preparation to make a "meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review." *Bounds*, 430 U.S. at 827–28.[3] Thus, in this context, an adequate opportunity to present claims fairly depends on the petitioner's mental competence.

D. 18 U.S.C. § 3599 Creates a Statutory Right to Competence by Providing for the Meaningful Assistance of Counsel to Capital Prisoners in Federal Habeas Proceedings.

Statutory law also supports a right to competence in federal habeas proceedings. The Court's willingness in *Rees to* look to the statutory standard for competence at trial, 18 U.S.C. § 4241, for aid in crafting a standard for the post-conviction stage demonstrates the importance of examining other statutes that provide support for this conclusion. In fact, the Ninth Circuit in *Rohan* held that there is a statutory right to competence in habeas proceedings, with competence depending on the petitioner's capacity to communicate rationally, much as it does

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[3] *Finley* did not "[a]cknowledge[e] the discretionary nature of habeas review." *See* Pet'r's Br. 20. Rather, *Finley* recognized that legislatures can create a right to habeas review (Congress and many states have done so), and separately discussed *Moffitt*, which was a case about the distinct scenario of *discretionary appeals* (such as before state high courts or the Supreme Court of the United States).

in the trial standard. 334 F.3d at 813; *accord Holmes v. Buss*, 506 F.3d 576, 578–79 (7th Cir. 2007) (accepting the holding in *Rohan* and concluding that the standard for competence should be the same "whatever the nature of the proceeding"). The court's holding stemmed from its interpretation that 21 U.S.C. § 848(q)(4)(B) (repealed and replaced by the materially identical 18 U.S.C. § 3599 in 2006), which provides a mandatory right to counsel for capital prisoners in federal habeas proceedings, implies a right to meaningful assistance of counsel. The court reasoned:

> Counsel's assistance . . . depends in substantial measure on the petitioner's ability to communicate with him. And if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.

334 F.3d at 813. Notably, the Supreme Court has employed the *same interpretive logic* to infer a right to competence in trial from the Sixth Amendment right to counsel. *Id.* That the text of the Sixth Amendment does not include the words "meaningful" or "effective," U.S. Const. amend. VI, has not defeated this inference, nor is there any reason the absence of such words should defeat the parallel inference from § 3599.

Rohan's interpretation of § 3599 comports with the Supreme Court's treatment of the statute. In *McFarland* the Court stated that Congress's passage of § 3599's predecessor "reflects a determination that

quality legal representation is necessary in capital habeas corpus proceedings in light of the 'seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" 512 U.S. at 855 (quoting 18 U.S.C. § 3599(d)). As the statute demonstrates, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *Id.* at 859. In *Martel v. Clair*, a unanimous Court took a broad view of § 3599 as enacting a "set of reforms to improve the quality of lawyering in capital litigation." 132 S. Ct. 1276, 1285 (2012). § 3599's predecessor displaced 18 U.S.C. § 3006A for *all* capital cases and therefore provided "enhanced rights of representation" to habeas petitioners concomitant with those of trial defendants. *Id.* at 1284. The *unanimous* Court inferred from the statute a *standard not found directly in the text* and justified this decision by pointing to the "myriad ways that § 3599 seeks to promote *effective representation* for persons threatened with capital punishment." *Id.* at 1285 (emphasis added).[4] The Supreme Court could not have provided a much clearer vindication of *Rohan*'s conclusion that § 3599 requires the meaningful assistance of counsel.

Rohan's interpretation also comports with the available legislative history. Floor statements supporting the right to counsel provision of § 3599's

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[4] The Court in *Martel* discusses provisions in the statute promoting effective assistance not mentioned in Petitioner's brief, including increased attorney compensation and increased funds for investigative and expert services. *Id.* at 1285.

predecessor demonstrate Congress's intent to ensure meaningful representation in capital cases. For instance, Representative Conyers emphasized that the statute fills the need, in light of the "high rate of error being found in capital cases," to provide experienced, skilled attorneys who can handle these complex and highly specialized cases and afford maximum protection to the constitutional rights of their clients. 134 Cong. Rec. H7259–02 (Sept. 8, 1988). The statement by Representative Gekas is not to the contrary. *Contra* Pet'r's Br. 13. He stated his desire to "expand [rights] to the extent that the qualifications of the counsel shall be without question." 134 Cong. Rec. H7259–02. He also sought to accord the defendant the "rights which I feel are already his" – that is, "to object to the persona of the counsel appointed or to the background or experience of that attorney." *Id.* The "dilatory tactic" remark simply followed a discussion of § 3599(d), which cures a competing concern regarding savvy defendants delaying litigation by unreasonably objecting to the qualifications of counsel. *Id.* By contrast, Rep. Gekas's statement did not endorse the farcical notion that prisoners who lack the mental capacity to communicate rationally are likely to perpetrate a shrewd conspiracy to find a "back door" to habeas relief through dilatory tactics. *Contra* Pet'r's Br. 38–40.

The provision of AEDPA foreclosing ineffective assistance of habeas counsel as a *ground for relief* in a federal habeas proceeding challenging a state conviction, 28 U.S.C. § 2254(i), does not defeat this conclusion. Inferring a right to meaningful assistance of counsel from § 3599 is fully consistent with this AEDPA provision. Congress is perfectly

capable of choosing the *degree* to which it seeks to advance a policy. The fact that Congress has determined that ineffective assistance of habeas counsel is not a ground for relief in the collateral attack of a conviction does not mean that Congress wanted § 3599 to lack practical substance or meaning. Requiring competence of the petitioner is necessary to ensure that habeas counsel can do her job and to effectuate § 3599's purpose; establishing ineffective assistance of habeas counsel as a novel ground of relief is not.

E. Sean Carter is Protected by the Right to Competence, and His Competent Assistance is Necessary to an Adequate Opportunity to Present His Claims.

The right to competence in federal habeas proceedings, grounded in Supreme Court precedent, the Constitution, and federal law, protects Mr. Carter in the instant case. The district court below held a competency evidentiary hearing and found Mr. Carter incompetent because he lacks the mental capacity to assist in his cause. *Carter*, 583 F. Supp. 2d at 881–82. The Sixth Circuit affirmed this finding under abuse of discretion review. *Carter*, 644 F.3d at 334. The district court also found that the presentation of many of Mr. Carter's claims could benefit from his ability to rationally assist counsel, since "he alone is in the position to inform habeas counsel what he actually observed during trial and his recollection of communications with defense counsel regarding his family and social background to develop mitigating evidence." 583 F. Supp. 2d at 880. Similarly, the Sixth Circuit recognized, "[o]nly

Carter knows critical parts of the factual basis for [his ineffective assistance of counsel] claims. . . . Carter alone has evidence of the interactions between him and his trial and appellate attorneys, and that evidence is inaccessible as long as he remains unable to communicate with his habeas attorneys." 644 F.3d at 335–36. *Cf. Strickland v. Washington*, 466 U.S. 668, 690–91 (1984) ("A convicted defendant making a claim of ineffective assistance must *identify the acts or omissions of counsel* that are alleged not to have been the result of reasonable professional judgment. . . . *Inquiry into counsel's conversations with the defendant may be critical* to a proper assessment of counsel's investigation decisions, just as it may be *critical to a proper assessment of counsel's other litigation decisions*." (emphasis added)); Miller, *supra*, at 290 ("[A showing of prejudice as required under *Strickland*] is impossible to make without the investigation of missing evidence, the collection of extra-record facts, and the creation of the defendant's social history – all of which could have an impact on the ultimate verdict, and none of which are easily obtained without cooperation from a competent defendant.").[5]

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[5] Petitioner's unsupported assertion that "the outcome of a habeas proceeding generally turns on issues of law, which do not require the petitioner's input," Pet'r's Br. 24, is directly contradicted by *Strickland* and the realities of habeas review. Furthermore, the habeas petitioner is not simply "one source of information," Pet'r's Br. 30, like a third-party witness. The petitioner himself is central and primary to the development of his own claims.

Furthermore, basic identification of facts is only half the battle when it comes to essential assistance from the client. Incompetent individuals such as Mr. Carter are "unable to identify exculpatory evidence and *communicate the reasons why the evidence matters*." Seeds, *supra*, at 343 (emphasis added); *see also Nash v. Ryan*, 581 F.3d 1048, 1053 (9th Cir. 2009) ("[C]ounsel may . . . need to communicate with his client to understand fully the significance and context of those facts so that he may pursue the most persuasive arguments . . . ."); *Holmes*, 506 F.3d at 580 ("[A petitioner] 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."). Since Mr. Carter has been found unable to assist his counsel in any of these respects due to his mental incapacity, his right to competence in the present federal habeas proceedings must be enforced with the proper remedy.

II. THIS COURT'S PRECEDENT AND PUBLIC POLICY COUNSEL THAT ISSUING A STAY UNTIL MR. CARTER REGAINS COMPETENCE IS THE PROPER REMEDY.

Upon recognizing Mr. Carter's right to competence during his habeas proceedings, the issuance of a stay until Mr. Carter regains competence is the proper remedy. This Court has recognized that federal courts have a broad power to stay cases before them. This is because granting this remedy is a discretionary power incidental to their power to manage their docket. *Rees* bolsters this

jurisprudential foundation and embodies an effort by this Court to allow stays when competence is in issue. Apart from precedential arguments demanding a stay, are practical advantages to be gained, especially in light of the only other remedy proposed by Petitioner: a court-appointed "next friend."

A. This Court Has Recognized and Protected the Broad Power of Courts to Manage Their Own Docket by Granting a Stay.

The precedent defining the contours of the staying power indicates its issuance is proper here. This is for two reasons. First, the precedent in this Court establishes a staying power well-suited to be exercised in this case. Second, the standard of review for issuance of stays shows further willingness to allow courts to possess a broad staying power.

1. Prior Rulings by This Court Establish That a Stay Is Appropriate Here.

Federal courts have a broadly-defined, discretionary power to stay cases on their dockets. In *Landis v. North American Co.*, Justice Cardozo, speaking for the Court, stated, "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its own docket . . . ." 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55.

Acknowledging the breadth of this power, the Court has stressed it outside the trial. It has been

explicitly protected in the context of habeas corpus, even after AEDPA. *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (stating that district courts do have authority to issue stays when it is a proper exercise of discretion, and AEDPA does not deprive courts of that right). Further, this Court in *McFarland v. Scott* recognized that the power extends beyond federal claims and permits courts to stay state court proceedings. 512 U.S. 849, 858–59 (1994).[6]

Here, the Sixth Circuit's exercise of its staying power was well-founded. The court issued its decision to stay after a painstaking analysis of other options, including dismissing the case, 644 F.3d at 334–35, or appointing a next friend, *id.* at 335–36. After weighing pragmatic considerations, as well as specifically looking at the precedent in *Rees* and guidance from sister circuits, the court stayed Mr.

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[6] Petitioner argues that 18 U.S.C. § 4241 provides no staying power. Pet'r's Br. at 26-27. This is irrelevant; 18 U.S.C. § 4241(d) (2006) protects the incompetent from trial proceedings damaged by that incompetence, and the Sixth Circuit merely relied on this to show a stay here would be consistent with other practices. 644 F.3d at 336-37. The court recognized the power is inherent and its language shows this. *See* 644 F.3d at 336. The court first acknowledged its power under *Landis* and *McFarland*, and then observed that the exercise of the power in this case "would fall in line with section 4241(d) . . . ." *Id.* Petitioner seeks to use the Sixth Circuit's willingness to place its remedy in the context of other remedies as a limitation on the power. *Landis* makes clear that the staying power is too broad for that sort of circumscription.

Carter's case. *Id.* at 333, 337. This prudence by the Circuit Court demonstrates a strong adherence to the mandate of *Landis* that courts maintain a balanced approach in granting stays.

2. The Standard of Review for the Grant of a Stay Also Indicates This Is the Proper Remedy.

The broad power afforded courts to manage their docket is also embodied in the deferential standard of review granted to courts who exercise their staying power. "District courts do ordinarily have authority to issue stays . . . where such a stay would be a proper exercise of discretion . . . ." *Rhines*, 544 U.S. at 276. Where Petitioner seeks to characterize a stay as a "drastic remedy" and one that, in this case, "would run afoul of both congressional intent and long-accepted principles of federal habeas jurisprudence," Pet'r's Br. at 25, the fact remains that AEDPA "does not deprive district courts of [the authority to grant stays.]" *Rhines*, 544 U.S. at 277.

Put differently, review of this docket-managing tool is deferential because it is not the "extraordinary remedy" that the writ is and to which Petitioner attempts to liken it. Pet'r's Br. at 4, 27. In requesting a stay of his habeas proceeding, Mr. Carter merely asks for a common remedy so that he might have a shot at the extraordinary one, consistent with Blackstone's statement that, "if, after judgment, [a condemned man] becomes of nonsane memory, execution shall be stayed: for peradvaenture says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something

in stay of judgment or execution." 4 William Blackstone, Commentaries *24–*25 (1769).

Certainly courts should be judicious in granting this remedy: sound discretion demands it. This requirement, however, does not circumscribe the power to anything narrower than ordinary discretion with awareness of AEDPA's goals.

B. This Court Has Also Specifically Endorsed the Use of the Staying Power in the Competence Context.

Complimenting the broad power of courts to manage their docket is the precedent of *Rees* itself. In *Rees,* despite reconsidering the case several times over the three decades after initially holding the case, Crocker, *supra*, at 921–35, each time this Court declined to alter the stay. *Id.* In fact, the case was not discharged until 1995 after Rees died. 516 U.S. 802, 802 (1995); Crocker, *supra*, at 935.

Mr. Carter's case is in line with *Rees*. He has been declared incompetent and cannot "make a rational choice with respect to *continuing* or abandoning further litigation." 384 U.S. at 314 (emphasis added); 583 F. Supp. at 872 (finding Mr. Carter incompetent). This is all *Rees* asks from an incompetent party seeking a stay.

Petitioner's remedy argument differentiating *Rees* is a non-starter: the particular choice an incompetent person makes is not dispositive. It would be anomalous to allow an incompetently made decision to end habeas litigation to be afforded a stay, but the incompetently made decision to go forward to be denied the same remedy. Given his established incompetence, need Mr. Carter only ask this Court to

withdraw his petition to be granted the remedy he seeks? Presumably not. This is because the question in *Rees* was not whether the petitioner was deciding to withdraw his petition,[7] but was a broader inquiry: is he incompetent and in a position "to make a rational choice with respect to continuing or abandoning further litigation[?]" 384 U.S. at 314. *Rees* puts the brakes on a habeas proceeding before the decision to continue or abandon can be made.[8]

Despite a fully vetted state conviction, this Court stayed Rees's analogous case.[9] In so doing, a clear pathway for issuing a stay in this case was created.[10]

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[7] Petitioner frames the crux of *Rees* this way by omitting "mak[ing] a rational choice with respect to continuing [his habeas claim]" from the declaration of the Court. Pet'r's Br. at 25; 384 U.S. at 314.

[8] *See also* Gabriel J. Chin & Sara Lindenbaum, *Reaching Out to Do Justice: The Rise and Fall Of the Special Docket of the U.S. Supreme Court* 48 Hous. L. Rev. 197, 263 (2011) (indicating that toward the end of Rees's life, he may have regained competency). As the author notes, "If Rees was competent and still wanted to withdraw the petition, it could be withdrawn. If he wanted to challenge the conviction and potentially obtain a reversal, the petition could have been decided on the merits." *Id.* The point being, regardless of the choice an incompetent habeas petitioner makes, the stay freezes the proceeding at a point before the choice is made.

[9] This wasn't a once-issued statement either. *Ford* supports the importance of competence in the post-conviction setting. 477 U.S. at 410; *see also* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 Wash & Lee L. Rev. 259, 272-79 (2009) (likening

C. In Addition to Precedent, Practical Considerations Support Issuance of a Stay.

Two pragmatic considerations are served by staying this case until Mr. Carter is deemed competent. First, the nature of his claim depends on his knowledge and fundamental fairness demands allowing him to share that knowledge. Second, staying the case keeps all parties actively involved.

1. A Stay Is The Proper Remedy Because Mr. Carter's Claims Are Only Able to Be Litigated by Him.

By its very nature habeas review explores matters that exist outside the trial record. *See Machibroda v. U.S.*, 368 U.S. 487, 494–95 (1962) (holding that the court erred in rejecting petition without holding an evidentiary hearing to discover more about occurrences outside the courtroom). In the specific context of ineffective assistance of counsel (IAC), litigating the claim requires meaningful contact between counsel and petitioner. As *Strickland* states, "The reasonableness of

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Rees and *Ford* and labeling them the two lines of cases addressing post-conviction incompetency).

[10] Petitioner labels this pathway a back door to relief for capital prisoners. Pet'r's Br. at 38. To the degree this argument survives the findings of the district court regarding Mr. Carter's very real incompetence, it should be noted that protections are routinely afforded capital petitioners where they are denied to other petitioners. *See, e.g.*, 18 U.S.C. § 3599.

counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. 668, 691 (1984). Accordingly, "[I]inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . . ." *Id.*

In light of the upshot from *Strickland*, Mr. Carter's claims, especially his IAC claims, cannot be properly brought without his help. Further, providing a stay will more adequately allow the exploration of the factual record and the vindication of any meritorious claims. In resolving this issue, the *Rohan* court observed,

> "By forcing [the petitioner] to proceed notwithstanding his incompetence, the trial court would effectively prevent him from ever presenting that evidence to a federal tribunal. That prospect is difficult indeed to square with 'the humanity of the English law' and its recognition that 'had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.'"

334 F.3d at 818–19 (citing 4 Blackstone at *24–25).

Rohan is reinforced by *McFarland* which emphasizes the requirement of counsel as a guarantee of "fundamental fairness" during capital habeas proceedings. 512 U.S. at 859. Coextensive with the guarantee of counsel is the idea that counsel can develop a factual record: that record has no chance of being developed without the facts in Mr. Carter's head. Executing Mr. Carter with those facts unknown forgets *Jones v. Cunningham*'s warning that habeas corpus "has never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against

erosion of their right to be free from wrongful restraints upon their liberty." 371 U.S. 236, 243 (1963). This protection requires a full factual record.

2. Staying the Case Keeps All Parties Actively Involved in the Resolution of Mr. Carter's Claims Which Serves the Interests of Justice and Efficiency.

Staying is a useful remedy for both sides, as it keeps all parties actively pursuing the adjudication of Mr. Carter's claims. The district court granted a dismissal and prospective tolling of AEDPA. This created the problematic outcome that at some point Mr. Carter could regain competence but Petitioner would not know and may be caught off guard by the new, still timely petition. 644 F.3d at 337. *Rohan* acknowledged this point, as well, by urging the government to stay up-to-date on the habeas petitioner's mental condition. 334 F.3d at 803. Granting a stay keeps these parties actively interested in pursuing Mr. Carter's claims.

A stay also keeps the court actively involved in resolving these claims. 644 F.3d at 337. During *Rees*'s pendency, this Court kept track of Rees's competence and considered whether to rehear the case. Crocker, *supra*, at 921–935. This was possible because the Court retained the case. Should this Court follow the well-lit path of *Rees*, the interests of justice will be served by parties and a court well-prepared to resolve Mr. Carter's claims efficiently.

D. A Next Friend Will Be Unable to Adequately Protect Mr. Carter's Interests.

Supporting the arguments of Mr. Carter for a stay is the lack of alternative remedies. While, in some cases, a next friend might adequately protect the interests of a litigant, when that litigant's claims crucially depend on the habeas petitioner's own knowledge – as they do in this case – a next friend will not be helpful. First, a next friend is in no better position to advance Mr. Carter's claims than Mr. Carter because they inherently depend upon his assistance alone. Second, experience counsels against a next friend: *Rohan* tried Petitioner's suggestion and it proved unworkable.

1. This Court's Conception of a Next Friend Was Not Intended to be Used Here.

The imagined role of a next friend during habeas indicates that its use here is inconsistent with its justification. Without doubt, § 2242 cognizes the role of a next friend in habeas litigation. 28 U.S.C. § 2242 (2006). However, that section makes no mention of the proper time to appoint one.

The proper appointment of a next friend arises in a situation where the next friend can better advocate for the petitioner than the petitioner can for himself by reason of inaccessibility, incompetence, or other disability. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). This is because the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate. *Id.* at 163. Further, "the next friend must have more than merely 'a generalized interest in constitutional governance.'" 644 F.3d at 334 (citing *Whitmore*, 495 U.S. at 164).

A next friend cannot pursue the best interests of the habeas petitioner if the claim necessarily

depends on facts that can only be known by the petitioner. *See Strickland*, 466 U.S. 668, 691 (1984). In its survey of possible remedies, the Sixth Circuit noted, "Only Carter knows critical parts of the factual basis for these claims . . . Really a next friend could no more than speculate as to the evidence Carter may know . . . ." 644 F.3d at 336. Going further, the court said, "Even Carter's most ardent supporters might be subjectively dedicated to litigating on his behalf, but as long as they lack the facts that are vital to Carter's claims, they cannot be dedicated in the sense necessary . . . ." *Id.* at 336.

Appointing a next friend in this case, then, does nothing more than appoint someone with a generalized interest in governance, directly violating the instruction of *Whitmore*. 495 U.S. at 164; *see also* 334 F.3d at 818 (commenting that only the habeas petitioner's "private knowledge" could truly support his IAC claim because of his "unique position to testify about the extent of his trial counsel's efforts"); *Holmes v. Buss*, 506 F.3d 576, 580 (7th Cir. 2007) (noting that a habeas petitioner can better contribute to his attorney's strategy concerning claims of IAC because he was present for the trial, his habeas counsel was not, and he may retain "a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide.").[11]

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[11] To combat the loss of information, Petitioner would substitute the testimony of those in the court room and trial counsel. Pet'r's Br. at 30. That ignores the observation of *Strickland* that information provided by the habeas petitioner would be the foundation of the claim. 466 U.S. at 691. The reason that

2. Using a Next Friend to Litigate Such Claims Has Proven Unworkable.

The Ninth Circuit put the usefulness of a next friend in habeas litigation like Mr. Carter's to the test in *Rohan*. There, the district court was instructed to conduct an evidentiary hearing, and if it found incompetence, was to stay the proceedings until competence returned. 334 F.3d at 806. After finding the petitioner incompetent, the court instead appointed Rohan as a next friend. *Id.* "Rohan soon reported that she, too, was unable to pursue Gates's habeas claims effectively because she could not communicate rationally with him. She renewed the request to stay further proceedings." *Id.* Given the statements of those who have interacted with Mr. Carter,[12] it appears that a next friend will have no better luck than Rohan pursuing Mr. Carter's claims.

Certainly there are times when it is appropriate to appoint a next friend. Those are times when the claim *can* be pursued by the next friend. In *Clark v. Louisiana State Penitentiary*, a next friend successfully litigated a habeas petition predicated on wrongful jury instructions on behalf of an incompetent prisoner. 697 F.2d 699 (5th Cir. 1983);

Strickland held as it did is because an IAC claim goes beyond the courtroom to include private discussions between attorney and client. *Id.* To expect trial counsel to act as the only witness to his or her own ineffectiveness guts *Strickland*'s right and does not comport with notions of "fundamental fairness." *McFarland*, 512 U.S. at 859.

[12] *See* J.A. 21.

Crocker, *supra*, at 917 n. 194. A next friend was capable of pursuing that litigation because all of the factual record for proving an improper jury instruction claim was available to them; it is not dependent upon locked-away information. The next friend concept is grounded in the idea that their addition permits something to go forward where it could not otherwise. Appointing a next friend in this case would do no more than Mr. Carter, as an incompetent person, could do himself.

As Petitioner correctly notes, the issuance of the stay is dependent on this Court's correct recognition of the right to competence during habeas. Given the ineffectiveness of the next friend remedy, and this Court's steadfast insistence on rights having corresponding remedies,[13] the only proper remedy to redress a violation of Mr. Carter's right to competence is a stay of proceedings.

E. Comity and Finality Are Not Undermined by Granting a Stay When This Court Has Made Clear That the Right to Competence Supersedes These Considerations.

Comity and finality with respect to state court convictions are not meaningfully undermined by deciding Mr. Carter's petition should be stayed. Without hesitation, it must be admitted that comity

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[13] As *Marbury v. Madison* notably states, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. 137 (1803).

and finality are important forces in shaping of habeas policy. *See* Justin J. Wert, *Habeas Corpus in America* 182–85 (2011). That said, in the context of competence in the post-conviction setting, this Court has adopted a clear position that comity and finality notwithstanding, incompetence is a superseding consideration. Further in application, this Court has always allowed the habeas petition to proceed in light of conceivable intrusions upon these two goals.

In *Rees*, this Court permitted a valid state court conviction to be stayed for twenty-nine years pending a determination of incompetency. Crocker, *supra*, at 921–35. This unquestionably had an impact on the finality of the state conviction. Rees was convicted of murder in a state court in Virginia and that judgment was confirmed on appeal. 384 U.S. at 313. Despite acknowledging the role of comity in formulating habeas procedure just three years earlier, *Fay v. Noia*, 372 U.S. 391 (1963), this Court agreed to stay irrespective of any potential impact on the relationship between state courts or an interest in the finality of the conviction.

Paradoxically for Petitioner's argument, had Rees dropped his petition, the goals of comity, finality and federalism would have all been very well-served. A state conviction, vetted fully on appeal would have been carried through to execution. Instead, this Court allowed a 29 year delay (an infinite stay for practical purposes, as it amounted to the rest of Rees's life). Indeed, *Rees* embodies a clear statement by this Court: even in the face of policy encouraging quick and tidy resolution of habeas claims, competence issues can, and must, be given priority.

Twenty years later, this notion endured. In *Ford*, the petitioner was convicted of murder in a state

court and sentenced to death. *Ford*, 477 U.S. at 399. Despite a strong dissent from Justice Rehnquist emphasizing the importance of ensuring finality for state court convictions, *id.* at 435 (Rehnquist, J., dissenting), this Court held that incompetence of a prisoner prevented his execution. *Id.* at 417–18. Further, this was despite procedures at the state level for determining competence and a full state review of the conviction. *Id.*

Petitioner's argument in favor of the delicate balance forged between the states and the federal government is well-headed. *See* Pet'r's Br. at 29–34. Certainly, compliance with the explicit strictures of AEDPA is mandatory: these time bars and procedural nuances allow for efficient resolution of habeas claims and allow states to meaningfully enforce their criminal law. What AEDPA, nor any other statute or ruling of this Court, does not allow is the dismissal of recognized rights by the mere suggestion that tangential finality or comity interests are implicated. Petitioner acknowledges this: "While certainly influential, considerations of finality and comity are not dispositive. Federal 'post conviction proceedings must be more than a formality.'" Pet'r's Br. 29 (citing *Johnson v. Avery*, 393 U.S. 483, 486 (1969)).

To ensure Mr. Carter's habeas proceedings are not mere formality and to preserve the integrity of *Rees*, his right to competence should be vindicated with a stay.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted.

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NOVEMBER 2, 2012

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APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3599

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

> **(A)** before judgment; or
>
> **(B)** after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

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).

> **(2)** In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, 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).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services

were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

18 U.S.C. § 4241

(a) Motion to determine competency of defendant.--At 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, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological

examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition

has not so improved as to permit proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) Discharge.--When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) Admissibility of finding of competency.--A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing

evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), as modified by the Keedy Cup Rules, we certify that this document contains 10,332 words and does not exceed 40 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

We declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2012.

_____
David J. Robbins

_____
Samuel D. Harrison