No. _____ 10-930 JAN 18 2011

IN THE
SUPREME COURT OF THE UNITED STATES

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

VS.

ERNEST VALENCIA GONZALES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

THOMAS C. HORNE
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

JOHN PRESSLEY TODD
Assistant Attorney General
(Counsel of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
john.todd@azag.gov

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CAPITAL CASE
QUESTION PRESENTED

Several years after Gonzales's counsel initiated federal habeas proceedings and filed an exhaustive petition seeking relief, counsel asserted that Gonzales was incompetent to communicate rationally and the proceedings should be indefinitely stayed pending possible restoration of competency. Based on 18 U.S.C. § 3599(a)(2), the Ninth Circuit agreed, even though Gonzales's claims were record-based or purely legal.

Did the Ninth Circuit err when it held that 18 U.S.C. § 3599(a)(2)—which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys"—impliedly entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

PETITION FOR WRIT OF CERTIORARI

Charles L. Ryan, Director of the Arizona Department of Corrections (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (the Ninth Circuit).

OPINION BELOW

The Ninth Circuit's opinion is reported as *In re Ernest Valencia Gonzales*, 623 F.3d 1242 (9th Cir. 2010). (Pet. App. A.) The district court's unpublished response to a Ninth Circuit Order is dated August 28, 2008. (Pet. App. B.) The district court's order denying a stay is published at *Gonzales v. Schriro*, 617 F.Supp.2d 849 (D. Ariz. 2008) (Pet. App. C.) Additional Ninth Circuit unpublished orders are dated May 23, 2008 (Pet. App. D), June 19, 2008 (Pet. App. E), July 7, 2008 (Pet. App. F), amended order July 7, 2008 (Pet. App. G), second amended order January 5, 2009 (Pet. App. H). The Ninth Circuit docket (Pet. App. I).

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on October 20, 2010. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The entire provisions of 18 U.S.C. § 3599 are set forth in the last appendix, Appendix J. The relevant part on which the Ninth Circuit relied, 18 U.S.C. § 3599(a)(2), provides:

> (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).

STATEMENT OF THE CASE

Through 18 U.S.C. § 3599(a)(2), Congress provided for the appointment of counsel for indigent defendants in capital habeas proceedings. The Ninth Circuit has essentially rewritten the statute to impliedly create two additional rights: to be competent to assist counsel during a capital federal habeas proceeding and to obtain a stay of the proceedings if the petitioner was incompetent. *Rohan ex rel. Gates*, 334 F.3d 803, 819 (9th Cir. 2002) (holding that where a state capital prisoner could "potentially benefit" from his ability to rationally communicate with counsel, he is entitled to a stay of his habeas proceedings). The Ninth Circuit extended these two newly-discovered statutory rights to apply in an appeal from a denial of the habeas petition and to have the case stayed pending a determination of

competency. *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009).[1]

In this case, the court similarly extended those rights still further by holding that they apply in district court even where the issues are record-based and legal in nature. Pet. App. A, at 2.

The Ninth Circuit's application of Section 3599(a)(2) is untethered to the language of the statute and is based on a flawed policy ground – that an indigent capital defendant's input can be essential even when the habeas claims are record-based or legal in nature. The consequence of this ruling is that capital defendants in the Ninth Circuit now have a new means of delaying their proceedings, contrary to Congress's stated intent in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to reduce delay in capital cases.

A. Relevant State Criminal Proceedings

Respondent Ernest Valencia Gonzales was convicted of the February 1990 murder of Darrel Wagner in Phoenix, Arizona, as well as related crimes, and sentenced to death for the murder. *State v. Gonzales*, 892 P.2d 838 (Ariz. 1995). His convictions and death sentence became final on January 8, 1996. *Gonzales v. Arizona*, 516 U.S. 1052 (1996). Gonzales then exhausted his state-court post-conviction relief opportunities.

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[1] In *Nash*, the State sought certiorari review in this court, but the inmate's death mooted the case.

B. Federal District Court Habeas Proceedings

In November 1999, the federal court stayed Gonzales's execution when he initiated a post-AEDPA federal habeas proceeding seeking relief from the state-court judgment. *Gonzales v. Schriro*, CV99-02016-PHX-SMM, at Docs. 1, 3. His counsel filed a 237-page amended petition raising 60 claims for federal habeas relief. Pet. App. B, at 3. Gonzales returned to state court in 2001 to pursue a successive state-court post-conviction relief petition. *Id.* In the state proceedings, his post-conviction relief counsel raised the issue of Gonzales's competence to assist counsel, a claim that the state court found not cognizable. *Id.* Then, 3 years after the appointment of habeas counsel, Gonzales started to refuse visits from his attorneys. *Id.*

Following the case's return to federal district court, the court, in January 2006, found 31 of Gonzales's habeas claims were appropriate for merits review. *Id.* at 4. Because of the 6 years that had elapsed since habeas counsel had filed Gonzales's amended petition, the district court provided an opportunity for habeas counsel to file up-to-date legal citations and argument in support of the properly exhausted claims. *Id.* "On the eve of the Court's deadline for [Gonzales's] opening merits brief, counsel filed a *Rohan* motion for a competency determination and a stay." *Id.* at 5. Initially, the district court set the matter for an evidentiary hearing, but vacated it so Gonzales could be sent to the state hospital for further

evaluation. *Id.* There Gonzales withdrew from a regimen of anti-psychotic medication despite its apparently positive effects. *Id.*

After additional briefing, review of the mental health information, the entire state court record and the remaining habeas claims in light of the *Rohan* decision, the district court concluded that Gonzales's claims were record-based and involved purely legal issues and "therefore [Gonzales] would not potentially benefit from his ability to communicate rationally with counsel." *Id.* at 6. The district court declared that, "[i]n sum, the Court has endeavored to follow *Rohan*. In doing so, the Court accepted [Gonzales's] contention that he is not presently competent to communicate rationally with counsel but found this fact irrelevant because none of the claims remaining to be decided by this Court are ones that 'could benefit from his ability to communicate rationally.'" *Id.* at 11 (quoting *Rohan*). The district court therefore denied Gonzales's Motion for a Competency Determination and to Stay Proceedings. Pet. App. C, at 27. It further denied Gonzales's request for an interlocutory appeal under 28 U.S.C. § 1292(b).

C. Proceedings in the Ninth Circuit

On May 23, 2008, Gonzales filed an emergency petition for a writ of mandamus and an emergency motion for a stay of the district court proceedings. In an order filed June 19, 2008, a Ninth Circuit panel (Judges Stephen Reinhardt, Marsha S. Berzon, and Milan D. Smith) stayed the lower court proceedings. Pet. App. D. The following month, the panel denied Arizona's motion for reconsideration. Pet. App. E, F.

Months later, in an order filed January 5, 2009, the panel further stayed the case pending decisions in *Nash v. Schriro*, No. 06-99007 and *Adams v. Schriro*, No. 07-99018, because those cases involved "related issues." Pet. App. G.

Nearly 2 years after the grant of the temporary stay, over 1 year after the decision in *Nash*, and nearly 6 months after Arizona filed a request for a ruling, Judge Reinhardt issued the opinion in this case granting the petition for a writ of mandamus.[2] Pet. App. A, at 8. The court held 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 5 (citing *Nash.*)

The panel reasoned that because Gonzales had been represented by several attorneys over the course of his state-court proceedings, Gonzales's judicial bias claim could potentially benefit from the 'first-hand insight into the earlier proceedings' that a competent petitioner would be able to provide." *Id.* at 5-6 (citing *Nash*). In reaching that conclusion, the court disregarded the district court's prior finding that "it is clear from a review of the state court record that the factual underpinnings of [the judicial bias] claim were fully developed in state court and the record on the issue is complete." Pet. App. B, at 8.

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[2] Adams died waiting a decision in his case.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit created a competency right out of thin air. The Constitution does not provide a right to counsel on federal habeas corpus review. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). This Court has likewise never found a federal right to be competent to assist habeas counsel. The Ninth Circuit nonetheless found that *Congress* created such a right, even when the claims presented are entirely record-based or legal in nature.

The statute upon which the court relied, however, 18 U.S.C. § 3599, does nothing of the sort. Section 3599(a)(2) does not address the defendant's competence, and there is no reasoned basis for concluding that Congress intended that death penalty habeas proceedings should be stayed, suspending indefinitely enforcement of a presumptively valid state court judgment based on a death-sentenced inmate's alleged inability to assist counsel.

Moreover, the Ninth Circuit's line of cases (*Rohan*, *Nash*, *Gonzales*), based on its interpretation of Section 3599(a)(2), directly undercuts Congress's purpose in enacting AEDPA to "reduce delays in the execution of state and federal criminal sentences, particularly capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Reading a competency requirement into the statute, when the AEDPA statutory scheme provides for no such requirement fosters unnecessary delays in the resolution of capital cases. Furthermore, such a requirement is inconsistent with this Court's "next friend" jurisprudence, which expressly recognizes that

habeas cases can proceed notwithstanding the mental incapacity of petitioners. And, it creates a two-tiered system under which indigent capital petitioners have a statutory right to be competent to assist habeas counsel while non-indigent capital petitioners do not. There is no basis to believe Congress intended to create such a regime.

Additionally, freezing the habeas proceeding perhaps indefinitely defeats the purpose of federal habeas review. If constitutional error occurred in the state court proceedings, it should be identified and relief granted; if not, the state's judgment should not be stymied. Long before enactment of AEDPA, this Court admonished the lower courts that federal habeas is not "a means by which a defendant is entitled to delay an execution indefinitely." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). If not overruled, the Ninth Circuit's ruling will significantly delay capital proceedings, and thereby frustrate the State's interest in proceeding with its judgments. This Court's review is necessary to halt further expanding this court-created impediment to moving capital cases forward.

I. THE NINTH CIRCUIT'S DECISION ERRONEOUSLY REWRITES A FEDERAL STATUTE TO GRANT HABEAS PETITIONERS IN CAPITAL CASES A RIGHT TO STAY PROCEEDINGS IF THEY ASSERT THEY ARE NOT COMPETENT TO ASSIST COUNSEL.

The Ninth Circuit, alone among the circuits, has discovered a right to competence to assist habeas

counsel in 18 U.S.C. § 3599(a)(2).[3] This subsection declares:

> 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 . . . .

The provision does not mention competence to assist counsel. Rather, it merely grants indigent habeas petitioners under a sentence of death a right to be represented by appointed counsel in a proceeding under 28 U.S.C. §§ 2254 or 2255 and certain additional post-conviction proceedings.[4] Nothing in the "plain language" of the statute, *see Harbison*, 129 S. Ct. at

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[3] The source of the statutory right discovered in *Rohan* was 21 U.S.C. § 848(q)(4)(b), enacted 22 years earlier. *Rohan*, 334 F.3d at 814. That provision has been replaced, effective October 13, 2008, by § 3599(a)(2), a "materially identical statute." *Nash*, 581 F.3d at 1051 n.5; *see also Harbison*, 556 U.S.___, 129 S. Ct. 1481, 1486 (2009) ("recodified without change").

[4] "Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties." *Harbison*, 129 S. Ct. at 1486. Among other duties, subsection (e) allows federally appointed counsel to seek stays, to represent habeas petitioner in a *Ford v. Wainwright*, 477 U.S. 399 (1986), competency to be executed hearing, or represent a habeas petitioner in a state clemency proceeding. Like subsection (a)(2) the scope of subsection (e) grants no rights beyond representation, nor did the Ninth Circuit suggest that it did.

1486, requires that an indigent state prisoner under a sentence of death be competent to assist counsel before his federal habeas may proceed. And nothing in its plain language provides any right to have the habeas proceeding stayed when the petitioner might not be able to communicate rationally with his counsel.

Lacking textual support, the Ninth Circuit instead relied upon policy for reading a competency requirement into the provision. *See Rohan*, 334 F.3d at 812-13 ("Congress has not explicitly required competence in federal habeas proceedings, but the common law tradition underlying the right to competence and its great practical significance in this context inform our interpretation of the statutes Congress has enacted."). Yet this Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotation marks omitted). A court's "task is to apply the text, not improve upon it." *Harbison*, 129 S. Ct. at 1494 (quoting *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989)).

The cases subsequent to *Rohan* have compounded and extended the error. In *Nash*, the Ninth Circuit extended the holding of *Rohan* to the right to be competent in a habeas *appeal* and to have the appeal stayed if the appellant/petitioner claims to be no longer able to communicate with appellate counsel. According

to the Ninth Circuit, "[w]hile an appeal is record-based, that does not mean that a habeas petitioner in a capital case is relegated to a nonexistent role. Meaningful assistance of appellate counsel may require rational communication between counsel and a habeas petitioner." *Id.* at 1050. In contrast, this Court has emphasized that in appellate proceedings it is "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling arguments on [the appellant's] behalf' that benefits the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). This Court has never held that an appellant's assistance is necessary to winnow out weaker arguments on appeal and to focus on the ones more likely to prevail. Rather, this has been understood to be the role of counsel. *Jones*, 463 U.S. at 751-52.

In the instant case, the Ninth Circuit similarly extended this non-existent statutory right to apply "even though Gonzales's exhausted claims are record-based or legal in nature." Pet. App. A, at 2. The court surmised that "Gonzales's judicial bias claim could potentially benefit from the 'first-hand insight into the earlier proceedings' that a competent petitioner would be able to provide." Pet. App. A, at 5-6 (citing *Nash*, 581 F.3d at 1056). However, the court made no attempt to explain, in light of the existing record, how Gonzales's "first-hand insight" might have any legal significance. Under AEDPA, this is a record-based claim based on a state-court change of judge for-cause hearing, a claim that had been exhausted in Gonzales's direct appeal. *Gonzales*, 892 P.2d at 847-48.

Since *Rohan* was decided in 2002, no other federal circuit has found that Section 3599(a)(2) provides a death row petitioner with the general right to rationally communicate with counsel while seeking relief in a federal habeas proceeding and the right to a stay of the proceedings if competency is questioned.[5] That is hardly surprising, given that Congress did not speak to competence in the provision. Nonetheless, the 7 states in the Ninth Circuit that impose the death penalty are now subjected to a punishment-delaying rule, purportedly decreed by Congress, but which appears nowhere in the U.S. Code.

II. THE NINTH CIRCUIT'S INTERPRETATION OF § 3599(A)(2) CONFLICTS WITH EXISTING LAW AND TREATS SIMILARLY SITUATED HABEAS PETITIONERS DIFFERENTLY.

The Ninth Circuit's decisions in *Rohan*, *Nash*, and this case not only rewrite a federal statute; they conflict with existing law and mandate a regime that Congress could not possibly have intended.

A. The Ninth Circuit's reading of § 3599(a)(2) undermines Congress's purpose in enacting AEDPA.

This Court has recognized the practical considerations facing a habeas petitioner under a state's death sentence. Such petitioners "might deliberately engage in dilatory tactics to prolong their

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[5] The Seventh Circuit in the case of Eric D. Holmes proceeded as if such a right existed because the State of Indiana did not challenge it. *Holmes v. Buss*, 506 F.3d 576, 578 (7th Cir. 2007); *see also Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010).

incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Thus, one of AEDPA's purposes is to reduce the delays in capital cases on habeas review. *Id.* at 276; *Garceau*, 538 U.S. at 206. Congress designed it to "streamline and simplify" federal habeas review. *Pace v. DiGuglielmo*, 544 U.S. 408, 427 (2005). The *Rohan* line of cases undercuts this Congressional purpose by building into the Ninth Circuit's habeas review an unnecessary opportunity for death row prisoners to stymie progress on the very habeas proceedings they initiated.

Before a state prisoner may present a claim for relief on federal habeas, he must have first fairly presented his federal claim to the state courts. 28 U.S.C. § 2254(b)(1); *see, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Under AEDPA, the merits rulings of the state courts are reviewed only to see if the state courts reasonably applied this Court's precedent and if the state court's decision was reasonable given the "evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). The ability to expand the state-court record in the federal proceedings is very limited. 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 424 (2000). Thus, Congress has created a scheme of federal review under which there is rarely a need to seek information from the state prisoner. A court-created right, that before a habeas case can proceed, the death row inmate must be able to rationally communicate with counsel markedly undermines Congress's attempt to streamline federal review in capital cases.

B. The Ninth Circuit's reading of § 3599(a)(2) conflicts with this Court's "next friend" jurisprudence.

In *Whitmore v. Arkansas*, 495 U.S 149, 165 (1990), this Court acknowledged the availability of "next friend" standing in limited circumstances if "the real party in interest is unable to litigate his own cause due to *mental incapacity*, lack of access to court, or other similar disability." (Emphasis added.) Implicit in that decision, which addressed a request for "next friend" standing to pursue a direct appeal in a capital case, is the recognition that mental incapacity does not require that an appeal be delayed indefinitely because of a convicted defendant's mental incapacity.

"Next friend" standing is a well-established practice. *See, e.g.*, 28 U.S.C. § 2242 (allowing a habeas petition to be filed "by someone acting" on behalf of the person seeking relief); *Munaf v. Geren*, 553 U.S. 674 (1008) (family members filed next-friend habeas petitions); *Demosthenes v. Baal*, 495 U.S. 731 (1990) (parents failed to establish inmate was not competent); *Gusik v. Schilder*, 340 U.S. 128 (1950) (father brought habeas petition on behalf of his minor son); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010) (Guantanamo Bay prisoner challenged his custody though his next friend). This accepted practice is inconsistent with the Ninth Circuit's decision to read a competency mandate into Section 3599(a). The practice next-friend recognizes that a habeas claim *can* proceed even if the petitioner himself is unable to participate.

C. The Ninth Circuit's reading of § 3599(a)(2) leads to disparate treatment of indigent and non-indigent capital petitioners.

There is no constitutional right to the effective assistance of counsel beyond the direct appeal stage of a state criminal proceeding. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 752 (1991). And 28 U.S.C. § 2254(i) expressly excludes "ineffectiveness or incompetence" of federal habeas counsel as a grounds for relief. Accordingly, there is no dispute that a non-indigent capital petitioner has no right to effective counsel and no right to be competent to assist counsel. Under the Ninth Circuit's reading of Section 3599(a)(2), however, indigent defendants have been given that latter right. The Ninth Circuit's decisions thus lead to the odd result that indigent and non-indigent capital petitioners have different rights to competence and different abilities to obtain stays while pursing relief in federal habeas.

There is no basis in AEDPA or Section 3599 to believe that Congress intended such a two-tiered approach to capital habeas cases. *Cf. Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) ("We see no justification for treating defendants' speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned."). The provisions of 28 U.S.C. § 2254 apply to all "persons in custody pursuant to the judgment of a State court," not just indigent petitioners. Congress intended Section 3599(a)(2) to place indigent capital petitioners on comparable footing with non-indigent petitioners — not to grant them new and superior rights.

III. THE NINTH CIRCUIT'S RULING DEFEATS THE HABEAS GOAL OF CORRECTING UNCONSTITUTIONAL STATE COURT DECISIONS AND UNDERMINES THE STATES' INTEREST IN EXECUTING THEIR JUDGMENTS.

The Ninth Circuit's rule undercuts the very purpose of federal habeas review of state court judgments as well as the States' interest in finality by granting capital petitioners another means — authorized neither by the Constitution nor by statute — through which they can freeze review of their claims. The purpose of federal habeas review is to ensure that state courts comply with the United States Constitution in conducting criminal proceedings. *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Sawyer v. Smith*, 497 U.S 227, 234 (1990). In pursuing federal habeas review, the very purpose of the state prisoner is to overturn the state-court judgment and thereby obtain relief. *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993). If a claim of incompetency is able to halt the federal review and consign the habeas petitioner to "habeas corpus limbo indefinitely" the purposes of federal habeas review have been defeated. *See Holmes v. Levenhagen*, 600 F.3d at 762-63. "[I]magine a capital defendant who has a slam-dunk habeas corpus claim that would not merely get him a new trial, but an acquittal; but because he is incompetent, he cannot communicate effectively with his lawyers or they with him." *Id.* at 763. "The implication is profoundly unsatisfactory." *Id.* at 672. Moreover, as Judge Posner observed, it is simply "odd to think that someone who initiates a [federal habeas] proceeding can then freeze it by claiming to be mentally incompetent." *Holmes v. Buss*, 506 F.3d at 578.

The benefits of the competency and stay right the Ninth Circuit read into Section 3599 are small. Under AEDPA, federal review is very limited—generally confined to federal exhausted record-based or legal claims. And even when the record is supplemented during federal habeas, it would be exceedingly unusual for the state prisoner to be the sole source of information, given the number of other actors involved in the criminal justice process. Generally, the prisoner's trial attorneys, investigators, and mitigation specialist are available, as are the prosecutors. Given the complexity of habeas litigation, it is highly improbable that the prisoner's habeas counsel would require the prisoner's assistance in district court, much less on appeal.

Moreover, Gonzales is protected from being executed if he is found incompetent under the *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), standard. Under *Ford*, inmates sentenced to death may not be executed if "they are unaware of the punishment they are about to suffer and why they are to suffer it. . . ." *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989) (internal quotes and cite omitted). That standard applies to all death row inmates and is universally applied throughout the federal circuits as well as the state courts. Because "[a]ll prisoners are at risk of deteriorations in their mental state," a *Ford* claim is, as a general matter, not ripe until an actual execution is set. *See Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). The AEDPA statutory bar against successive habeas petitions does not apply to a *Ford* claim brought when the claim is first ripe. *Id.* at 947. Thus, if Gonzales is incompetent under *Ford*, he will not be

executed. Requiring a higher level of competency during his federal habeas proceedings adds an unsupportable additional gloss to the *Ford* right, and may deprive Gonzales of the opportunity to obtain timely relief on a meritorious claim.

By contrast, the costs of the Ninth Circuit's rule are great. This Court has repeatedly acknowledged the States' strong interest in the timely review of their death penalty cases in federal habeas. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Mayle v. Felix*, 545 U.S. 644, 657, 662 (2005).*Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Calderon v. Thompson*, 523 U.S. 538, 655-56 (1998); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). But as this Court has also recognized, capital petitioners have an incentive to adopt delaying tactics to avoid execution. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *see also Evans v. Chavis*, 546 U.S. 189, 203 n.1 (Justice Stevens, concurring in judgment). The practical effect of the Ninth Circuit's rule is to aid those tactics.

The concrete examples of *Rohan* and this case illustrate the costs of the rule. Oscar Gates, the petitioner in *Rohan*, filed his federal habeas petition in July 1988. *Gates v. Woodford*, No. CV 88-02779-WHA (N.D. Cal.), at Doc. 1. Following the 2002 *Rohan* decision, additional litigation ensued until the case was stayed indefinitely in September 2004. *Id.* at Docs. 531-65. The last entry in the district court's docket is in January 2008. *Id.* at Doc. 579. Although the record does not reflect that Gates is incompetent under *Ford v. Wainwright*, it does reflect he is incompetent to assist counsel under *Rohan* (Doc. 565). Thus, although there is no clear authority from this

Court precluding his execution for his 1979 California murder, the State of California is effectively barred from proceeding with its judgment that has never been shown to be constitutionally infirmed.

In this case, more than 2 years elapsed while the parties awaited a Ninth Circuit decision on mandamus review of Gonzales's incompetent-to-assist-habeas-counsel claim. Should this Court deny certiorari, and should Gonzales be found incompetent, another round of litigation and appeals would likely follow regarding whether he can be forced to take medication that would restore him to competency. All this litigation, delay and expense are, of course, collateral to the purpose of federal habeas review as envisioned by Congress. Yet the case has now been under federal review for over a decade with untold years of future litigation. And if Gonzales is permitted to refuse medication, and if he never regains his competency to assist habeas counsel without such medication, the state will never be permitted to impose its judgment upon Gonzales—even if he would be permitted to be executed under the *Ford* standard.

Whether or not that result would be tolerable if Congress expressly mandated it, the result is manifestly intolerable at present. Congress has authorized counsel for indigent capital inmates seeking federal habeas review. It has not imposed an additional competency requirement backed by a stay of proceedings. This Court should not tolerate the Ninth Circuit's creation of that right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

THOMAS C. HORNE
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

JOHN PRESSLEY TODD
Assistant Attorney General
(Counsel of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Ernest Valencia Gonzales,	)	
	)	
Ernest Valencia Gonzales,	)	No. 08-72188
Petitioner,	)	
v.	)	D.C. No.
United States District Court for	)	CV-99-02016-SMM
The District of Arizona,	)	
Phoenix,	)	
Respondent,	)	OPINION
	)	
Dora B. Schriro,	)	
Real-party-in-interest-Respondent.	)	
	)	

Petition for Writ of Mandamus

Filed October 20, 2010

Before: Stephen Reinhardt, Marsha S. Berzon and Milan D. Smith, Jr., Circuit Judges

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

Ernest Valencia Gonzales seeks a writ of mandamus