No. 10-930

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

BRIEF OF UTAH, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, NEVADA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, WASHINGTON, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The rule adopted by the Ninth Circuit permits an indefinite, perhaps permanent, stay of execution of a death sentence even though no court has found the sentence to be unconstitutional. That rule undermines the *amici* States' compelling sovereign interests in the finality of their criminal judgments, their power to punish offenders, and their good faith efforts to enforce constitutional rights. *See, e.g., Harrington v. Richter*, No. 09-587, slip op. at *12 (Jan. 19, 2011).

While federal habeas review provides a legitimate "'guard against extreme malfunctions in the state criminal justice systems,'" it also "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id*. (citations omitted). The States have a legitimate interest in ensuring that federal habeas review of a state death sentence intrudes on those significant interests only to the extent absolutely necessary to fulfill a federal court's limited role in reviewing a state judgment.[1]

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief.

ARGUMENT

Through 18 U.S.C. § 3599(a)(2), Congress granted state inmates sentenced to death the right to federally funded counsel in their federal habeas proceedings. The Ninth Circuit has read into that provision another, additional right: the right to be competent to assist that federally funded habeas counsel. The Ninth Circuit did not purport to find that additional right in the text of § 3599(a)(2). Rather, it based the right on a purported "common law tradition" that "inform[s] [its] interpretation of the statutes Congress has enacted." *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 812-13 (9th Cir.), *cert. denied*, *Woodford v. Rohan*, 540 U.S. 1069 (2003). As the Warden explains in his petition, certiorari is warranted because the Ninth Circuit improperly rewrote the federal statute to create a new right that imposes severe burdens on the States' efforts to attain finality and execute their judgments. Those burdens are not limited to Arizona or the Ninth Circuit; the series of decisions culminating in the decision below have led to the needless delay of habeas proceedings nationwide. This Court's intervention is needed.

THE COURT SHOULD GRANT REVIEW BECAUSE UNCERTAINTY OVER WHETHER THERE IS A RIGHT TO BE COMPETENT TO PROCEED IN FEDERAL HABEAS REVIEW HAS GENERATED UNJUSTIFIED DELAY IN FEDERAL HABEAS LITIGATION ACROSS THE COUNTRY

The Ninth Circuit requires a federal district court to impose an indefinite stay of a federal habeas action if a petitioner is found to be incompetent to assist his attorneys. The Ninth Circuit initially limited its rule to situations where the petitioner's assistance in developing extra-record information is essential; that is, where his incompetence prevents him from "communicating [to his habeas counsel] information that he alone possesses." *Rohan*, 334 F.3d at 816. The court of appeals then expanded the rule to habeas appeals even though the appeal is "record-based." *Nash v. Ryan*, 581 F.3d 1048, 1050 (9th Cir. 2009). And in this case, the Ninth Circuit expanded the rule to federal district court proceedings even when the "claims are record-based or legal in nature." Pet. App. A.

The atextual, court-created *Rohan/Gonzales* rule prohibits a state from executing its judgment without requiring the petitioner to prove that it resulted from an "'extreme malfunction[ ] in the state criminal justice systems.'" *Richter*, slip op. at *12 (citations omitted). An indefinite or, potentially, permanent stay that enjoins a state from executing a death sentence that a petitioner never proves to be unconstitutional

unreasonably interferes with the States' interests in punishing their worst offenders.

In the Ninth Circuit, only the petitioner in *Rohan* has been deemed incompetent to continue litigating his federal habeas case. But the *Rohan* rule has prompted death-sentenced petitioners in the circuit to bring such claims, thereby substantially delaying the habeas proceedings while competency was determined.[2]

And while only the Ninth Circuit has recognized a right to be competent to assist counsel on federal habeas review, its rule affects more than the States in its jurisdiction. It has spawned competency litigation in other circuits. Those circuits have declined to resolve whether there is a right to be competent in federal habeas proceedings, instead dodging the predicate legal issue and focusing on whether a petitioner actually is competent. *Ferguson v. Sec.*

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[2] *See, e.g., In re Gonzales*, 2010 WL 4104722; *Nash*, 581 F.3d 1048; *Blair v. Cullen,* No. CV 99-6859, 2010 WL 5563896 (C.D. Cal. March 21, 2010), *report and recommendation adopted by Blair v. Cullen*, 2011 WL 91949 (C.D. Cal. Jan. 04, 2011); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504 (E.D. Cal. Jan. 26, 2010), *report and recommendation adopted by Lewis v. Ayers*, 2010 WL 3502667 (C.D. Cal. Sept. 2, 2010); *Rogers v. McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 at *3 (D. Nev. March 24, 2008); *Hill v. Ayers*, No. 4-94-cv-641, 2008 WL 683422 (N.D. Cal. March 10, 2008). In one case, a death-sentenced petitioner relied on the *Rohan* right to be competent to ask to reopen his federal habeas action under Fed. R. Civ. P. 60(b). *Van Adams v. Schriro*, No. CV-04-1359, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

Dep't of Corrections, 580 F.3d 1183, 1222 (11th Cir. 2009), *cert. denied, Ferguson v. McNeil,* 130 S. Ct. 330 (2010); *Clayton v. Roper*, 515 F.3d 784, 790 n.2 (8th Cir.), *cert. denied,* 129 S. Ct. 507 (2008); *Holmes v. Buss*, 506 F.3d 576, 578-79 (7th Cir. 2007); *Mines v. Dretke*, No. 03-11137, 2004 WL 2913069 (5th Cir. Dec. 16, 2004).

But avoiding the predicate legal issue has resulted in significant delay across the country to litigate whether federal habeas petitioners are competent to assist their attorneys. That delay is, itself, an unjustified interference with the States' interests. Delay caused by litigating whether a federal habeas petitioner is competent to assist his habeas attorney is, of course, unwarranted if he has no right to be competent in the first place.

And experience teaches that the delay will be substantial. In Florida, for example, Ferguson relied on *Rohan* to challenge his competence to proceed. *Ferguson v. Dep't of Corrections*, No. 1:95-cv-00573 at doc. no. 58. The district court adopted the reasoning in *Rohan* and scheduled an evidentiary hearing on Ferguson's competence. *Id*. It took twenty months to resolve whether Ferguson was competent, which, in turn, postponed disposing of the second amended petition for approximately the same period. *Id*. at doc. nos. 57, 58, 107, 108. On appeal, the Eleventh Circuit declined to resolve whether the right to be competent existed on the strength of the district court's conclusion that Ferguson was in fact competent. *Ferguson*, 580 F.3d at 1222.

In *Clayton*, the Eighth Circuit likewise "assume[d], without deciding, that competency is required to proceed in a habeas proceeding. . . ." *Clayton*, 515 F.3d at 790 n.2. It affirmed the district court's conclusion that Clayton was competent to proceed. But the litigation about whether Clayton was in fact competent spanned over two years from the date the district court ordered a competency evaluation. *Clayton v. Luebbers*, No. 4:02-cv-08001, doc. nos. 79 and 104. It included a seven-month sojourn at the United States Medical Center for Federal Prisoners. *Clayton*, 515 F.3d at 789. The evaluator took ten months from the order for an evaluation to issue her report. *Clayton*, No. 4:02-cv-08001, doc. nos. 79 and 104. Clayton took another five months to renew his motion for a stay based on his alleged incompetence to proceed with his habeas petition. *Id*. at doc. nos. 93 and 104.

In *Dansby v. Norris*, No. 02-04141, 2009 WL 485418 (W.D. Ark. Feb. 26, 2009), a district court in the Eighth Circuit, citing *Clayton*, "assume[d] that competency is required, without answering whether an inmate must be competent to proceed in a habeas action." *Id*. at *2. That was nearly two years ago. Although the district court scheduled an evidentiary hearing on the competency issue for April 2011, Dansby has moved to continue that date. *Dansby v. Norris*, No. 4:02-cv-04141, doc. nos. 140 and 167. Because the issue of whether a petitioner has a right to be competent remains unresolved, the merits of Dansby's habeas claims remain in limbo while the

parties continue to litigate whether he is in fact competent.

The *Rohan* issue also has arisen in the District of Utah. Death row inmate Ronald Lafferty asked the federal district court to stay his habeas action because, according to him, he is incompetent to proceed. He filed the motion two and one-half years after the federal court appointed counsel to represent him and nineteen months after he had filed and twice amended his habeas petition. *Lafferty v. Turley*, No. 2:07-cv-00322, doc. nos. 3, 24, 39, 42, 89. In its opposition, the State argued that Lafferty had no right to be competent. *Id*. at doc. no. 93. The district court granted a stay pending the resolution of Lafferty's motion for a competency determination. *Id*. at doc. no. 104. As a result of the competency litigation in *Lafferty*, nothing has been filed on the merits of his challenges to his conviction and sentence since the State responded to his petition nearly two years ago. *Id*. at doc. no. 69.

In *Holmes v. Buss*, the Seventh Circuit likewise assumed, without deciding, that Holmes had a right to be competent in federal habeas proceedings. *Holmes v. Buss*, 506 F.3d at 578.[3] But further evidentiary development convinced the Seventh Circuit that Holmes was incompetent. *Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010). It then ordered the district court "to suspend the habeas corpus proceeding

[3] The Seventh Circuit declined to decide whether *Rohan* was correct because the state did not challenge it.

unless and until the state provides substantial new evidence that Holmes's psychiatric illness has abated, or its symptoms are sufficiently controlled, to justify the resumption of the proceeding." *Id.* at 763. Thus, the Seventh Circuit has stayed Holmes' habeas case indefinitely and, with it, the execution of the death sentence he has never proven is unconstitutional. It did so to secure a right that it assumed, but never decided, that Holmes had.

The Seventh Circuit even went so far as to condone raising a competency challenge as a tactic to delay execution by way of a stay in federal habeas review: "the tactical question whether to plead incompetence and if one prevails perhaps remain on death row for the rest of one's life, or to press for a new trial even at the risk of another conviction and another death sentence, becomes all-important." *Id*. at 759. The court therefore concluded that, if a petitioner has a right to be competent to assist counsel on federal habeas review, he must be competent to make that determination. *Id*. at 762-63 (noting it would be unsatisfactory to allow a next friend to make that determination for the petitioner).

Until this Court resolves whether there is a right to be competent to assist federally funded counsel on federal habeas review, capital petitioners across the nation will continue to raise the issue. Unlike any other habeas petitioner, a death-sentenced petitioner has every reason to find ways to postpone a federal court's decision on whether his sentence resulted from an "extreme malfunction" in state processes. If he

loses, his sentence will be carried out sooner. Even if he wins, he may be retried and resentenced to death. But an indefinite stay will postpone the merits inquiry, possibly forever.

This Court recognized this problem when it limited the availability of stays in federal habeas actions while a petitioner returns to state court to exhaust his federal claims. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (recognizing that capital defendants may deliberately engage in dilatory tactics to "prolong their incarceration and avoid execution of the sentence of death"). Competency litigation provides another avenue for delay. The petitioner has nothing to lose by raising the issue regardless of how frivolous it may be. If he succeeds, he may avoid execution until his competence to assist habeas counsel is restored. If his competence is never determined to be restored, he may avoid execution forever without ever proving that his sentence was unconstitutional (or that he is incompetent to be executed under the standard of *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986)). Even if he does not succeed in procuring a stay, the additional delay generated by litigating his competence will "prolong [his] incarceration and avoid execution of [his death] sentence" at least for the period of that litigation. *See Rhines,* 544 U.S. at 277-78. This is precisely the kind of interference in state criminal justice processes that federal stays should avoid.

In sum, any time a federal court delays its review of a state judgment it necessarily infringes on a state's interest in carrying out that judgment. Where the delay does not further the legitimate federal interest in correcting extreme malfunctions in state judicial systems that result in constitutional violations, it is an unreasonable incursion in the states' compelling interests. These delays are particularly unacceptable because the basis for them is a series of Ninth Circuit decisions that improperly read a right to competency in habeas proceedings into a federal statute that provides nothing of the sort. This Court's intervention is needed to ensure that 18 U.S.C. § 3599(a)(2) is confined to its terms – the provision of counsel to death-sentenced inmates – and is no longer improperly used by courts as the basis for a right to competency that unduly delays habeas proceedings in capital cases.

CONCLUSION

For the reasons argued, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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