

No. 10-930

IN THE
Supreme Court of the United States

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

Petitioner,

v.

ERNEST VALENCIA GONZALES,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether certiorari should be denied where the Petition for Writ of Certiorari overlooks this Court's precedent and the Common Law and only seeks error correction of an interlocutory decision, the foundation of which is Judge Kozinski's methodical *Rohan** decision, with which no circuit has disagreed.

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

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STATEMENT OF THE CASE

Introduction And Summary Of Procedural History

A. District Court Proceedings.

Respondent was convicted of first degree murder and sentenced to death in 1992. *State v. Gonzales*, 892 P.2d 838, 849 (Ariz. 1995). The Office of the Federal Public Defender has represented Respondent since November 30, 1999. Since that time, Respondent's ability to communicate rationally with counsel has incrementally declined to the point where it has become non-existent. While the case sat idle in the district court for a number of years, counsel regularly attempted communication with Respondent with little or no success.

During this time, state habeas was sought to exhaust claims for the habeas proceedings. Pet. App. B at 3. On April 19, 2001, the state post-conviction court ordered an evaluation to determine whether Respondent was competent to proceed in his state post-conviction proceedings. Pet. App. B at 3. Ultimately, the state court ruled that state law did not require a post-conviction petitioner to be competent to proceed. Pet. App. B at 3.

The district court then ordered merits briefing and evidentiary development on a number of issues the court found were properly exhausted. Pet. App. B at 4-5. At that point, based on their knowledge and understanding of Respondent's condition, habeas counsel for Respondent had no choice but to move for a determination of competency pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). Resp't. App. A.

Initially, the district court and Petitioner conceded that Respondent had in fact “identified *claims* where [Respondent] potentially will provide beneficial assistance during briefing of the remaining issues and cited,” a claim of judicial bias.¹ Resp’t. App. B at 12A, Resp’t. App. C at 15A.

Shortly before a *Rohan* hearing was to be held, Respondent was ordered moved by the district court, at the urging of Petitioner, to a state mental hospital for an extensive evaluation. Pet. App. A at 3. The state doctors agreed with Respondent’s counsel’s expert that Respondent suffered from psychosis and was “unable to *communicate rationally* for any extended period of time, such as would be required by a legal proceeding.” Pet. App. A at 3 (emphasis added). The district court then inexplicably ordered additional briefing and reversed its finding that Respondent’s claims could potentially benefit from his assistance. Pet. App. C at 27-8. The district court also ordered merits briefing of Respondent’s additional claims. Pet. App. C at 29.

Respondent moved the district court for a stay of the merits briefing and permission to appeal its decision, and the district court denied both. Resp’t. App. D.

B. Circuit Court Proceedings.

With a merits briefing date approaching, Respondent moved the Circuit Court for an emergency stay of the

1. Petitioner made that concession at an October 15, 2007, hearing (“... and obviously there are some [issues] that they need Mr. Gonzales to answer . . .”). Resp’t. App. C.

merits briefing and filed an Emergency Petition for Writ of Mandamus requesting review of the district court's order. Pet. App. at I-1. The request for a writ of mandamus arose from a series of inconsistent district court rulings that culminated in the denial of Respondent's request for a determination of competency, as set forth above. Rather than proceeding as a nominal party, the district court personally filed its own opposition to Respondent's emergency stay petition. Pet. App. H.

Citing the state hospital's assessment that Respondent is incompetent when unmedicated, the Circuit Court granted Respondent's request for a temporary stay of the merits briefing and ordered supplemental briefing. Pet. App. G. Respondent's proceedings were then stayed pending the outcome of two cases raising *Rohan* claims which were later consolidated. Pet. App. F. After the consolidated case was decided, the Circuit Court issued the decision in this matter. Pet. App. A.

SUMMARY OF THE ARGUMENT

[Note: Although the Circuit Court cited *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), in its limited decision to remand Respondent for a determination of competency, the basis for its decision is Judge Alex Kozinski's unanimous opinion in *Rohan ex. rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). Because Petitioner is using this case to attack the *Rohan* decision and refers to *Rohan* and the instant case interchangeably, Respondent will address the *Rohan* decision in this Brief in Opposition. The *Nash* Opinion is inapt and nonetheless

irrelevant, as it addresses only the limited issue of competency on appeal.]

Petitioner seeks to have the Court correct what it perceives to be a legal error in an interlocutory appeal. Yet, a final judgment could obviate the need for review, as Respondent's competency has yet to be determined. As is evidenced by Petitioner's Petition for Writ of Certiorari, the true object of his rancor is the *Rohan* decision itself, a case in which this Court has already denied review. *Woodford v. Rohan*, 540 U.S. 1069 (2003).

Petitioner accuses Judge Kozinski of basing *Rohan* on "flawed policy grounds, creating a right out of thin air" that aids delay tactics, and causing disparate treatment of the financially stable habeas petitioner. Pet. at 3, 7, 18. Nothing however could be further from the truth. This case involves a straight-forward application of the prior decisions of this Court, including *Rees v. Peyton*, 384 U.S. 312 (1966) (*Rees I*), *Rees v. Peyton*, 386 U.S. 989 (1967) (*Rees II*), and *Ford v. Wainwright*, 477 U.S. 399 (1986). Petitioner presents no compelling reasons warranting this Court's review. In finding a right to be competent at habeas corpus, Judge Kozinski faithfully applied well-settled principles of habeas corpus jurisprudence and the Common Law. The unanimous *Rohan* Opinion neither conflicts with the precedent of this Court nor with the decisions of other circuits. In addition, the impact of the *Rohan* decision on capital habeas proceedings has proven to be minimal. The Petition for Writ of Certiorari should therefore be denied.

REASONS FOR DENYING THE PETITION

I. THE CASE DOES NOT MEET THIS COURT'S STANDARDS FOR REVIEW UNDER SUPREME COURT RULES 10, 11, AND 15.

A. This case is not ripe for review.

This Court should not accept jurisdiction because of the possibility that Respondent *may* be incompetent, without the district court first determining that question. The Court is being asked to decide a claim that is not yet ripe.

The Circuit Court granted Respondent's emergency petition for writ of mandamus and lifted the temporary stay it had ordered of the district court's proceedings. Pet. App. A. (*In re Gonzales*, 623 F3d. 1242 (9th Cir. 2010)). The district court must now hold a competency hearing to determine whether Respondent can meaningfully communicate with counsel. No final order has been issued in this case.

This Court very rarely grants review of a non-final order because doing so may induce inconvenience, litigation costs, and delay in determining ultimate justice. *Gillespie v. U.S. Steele Corp.*, 379 U.S. 148, 152-53 (1964). Petitioner failed to address why this Court should take the *exceptional* step of granting certiorari review of a non-final order. Certiorari is only appropriate if a case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11; *see also Bhd. of Locomotive Firemen and Enginemen v. Bangor &*

Aroostock R.R. Co., 389 U.S. 327, 328 (1967) (*per curiam*) (denying certiorari where petitioner sought review of an adverse court of appeals' ruling because the case had been remanded to the district court and therefore, was not ripe for review). Review is also unnecessary because this case is not far-reaching enough to be of "imperative public importance." Sup. Ct. R. 11.

Petitioner fears that if Respondent is incompetent that will result in an indefinite stay of proceedings. However, Respondent has yet to be determined incompetent. If Respondent were found competent in the district court, habeas proceedings would continue and this would negate the need for any action by this Court. Not only has Respondent *not* been determined incompetent, but the district court noted that the mental health reports offered in that court were conflicting with respect to competency. Pet. App. at C-3. Even if Respondent is found incompetent, review is further premature because he would not be entitled to a permanent, indefinite stay of proceedings. Respondent was already treated with psychotropic medication at the state hospital, with some success. This may indicate that even if found incompetent, Respondent may later regain competency, allowing the habeas proceedings to continue. Therefore, Petitioner's request for certiorari is based on speculation and hypotheticals.

In sum, the specter of an indefinite stay, argued by Petitioner, is simply too far removed from the present litigation to justify immediate intervention by this Court. Petitioner's fear of an indefinite stay will only come to fruition *if* Respondent is found incompetent; *if* the district court and the Circuit Court choose not to pursue the

appointment of a next friend; and, *if* Respondent does not regain competency. “Too many ‘ifs’” must come to pass before this Court’s review is appropriate. *California v. Rooney*, 483 U.S. 307, 313 (1987) (*per curiam*) (dismissing review as improvidently granted because the State argued too many “ifs” and “[e]ven if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it”).

The issues raised in Petitioner’s request for certiorari are not, and may never be, ripe. Because no final order has issued, and because the issues Petitioner now appeals may disappear entirely once a final order *is* issued, this Court’s review is premature.

B. Petitioner does not present compelling reasons for review.

Petitioner does not present any compelling reason for this Court to grant certiorari. Judge Kozinski’s *Rohan* Opinion, upon which this decision is based, applied well-settled principles of habeas corpus jurisprudence and the Common Law, and did not create a conflict with decisions from other circuits or contravene the precedent of this Court, or otherwise involve a question of exceptional importance. *See* Sup. Ct. R. 10.

Thus, the case has not so far departed from “the accepted and usual course of judicial proceedings” as to call for this Court’s exercise of its supervisory power. Sup. Ct. R. 10(a). In fact, the *Rohan* Opinion relied on jurisprudence extending back to the English Common Law for support on judicial practice in capital cases, and

found that the right to be competent was crucial to allow a defendant to defend himself where the punishment was the death penalty. 334 F.3d at 807-09.

Petitioner has presented no sound reason to distinguish this case from the many capital cases where state officials request error correction from this Court based solely on their disagreement with the conclusion of a lower court. This Court's burden and responsibilities are too great to review and correct every alleged misstep made by a lower court. *See* Sup. Ct. R. 10. (This Court will rarely grant review where the lower court has arguably misapplied "a properly stated rule of law"). Otherwise, the Court becomes just another court of appeals, contrary to its mission. "[This Court's] review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

Finally, the Court need not accept this appeal because it fails to concern an important matter of federal law that "has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). As set forth in Argument III *infra*, there are not enough decided cases in the lower federal courts for this claim to rise to the level of broad national significance.

C. Respondent's claims are not record-based; this is merely a factual dispute.

The Circuit Court ruled that although Respondent's claims were "record-based or legal in nature, he [was] entitled to a stay pending a competency determination" under *Rohan*. Pet. App. at A-2. The court specifically found, at a minimum, that Respondent's counsel could

benefit from Respondent's "first-hand insight into the earlier proceedings," which only a competent petitioner would be able to provide. Pet. App. at A-5. The Circuit Court identified Respondent's judicial bias claim as one requiring rational communication between attorney and client because Respondent, like Nash, had been represented by many attorneys over time, including 11 at trial and sentencing, he represented himself for a portion of that time, and he was needed to explain events so counsel would understand their "significance and context." Pet. App. at A-5

Regrettably, while the Circuit Court stated that federal habeas counsel could benefit from rational communication with Respondent with respect to his claims, all of which the court described as "record-based or legal in nature," not all of Respondent's claims fall into that category. As noted in the Statement of the Case, *supra*, Respondent demonstrated to the satisfaction of the district court that his judicial bias claim was *not* solely record-based, a point conceded by Petitioner in the district court but not addressed in the Petition for Writ of Certiorari. Resp't. App. B at 12A, Resp't. App. C at 15A. Accordingly, the district court initially ordered a *Rohan* hearing to determine Respondent's competency. The district court later explained its change of mind, stating that the state court trial record "contains no suggestion that additional [unreported] incidents occurred in which petitioner made personal observations of the judge's behavior." Pet. App. C - 14. Of course, it is not only the words reported by the court reporter at trial that might reflect judicial bias, it is also actions and words of a trial court not appearing on the face of the trial court record that tend to prove a judicial bias claim. *See Bracy v. Gramley*, 520 U.S. 899 (1997).

Respondent's trial judge may have failed to comply with an ethical duty of disclosure that would have added to the proof of judicial bias or assisted Respondent in demonstrating cause for his failure to develop all facts in support of the judicial bias claim in an earlier state court proceeding. The state court may have concealed disqualifying facts and, as such, violated the provisions of the Arizona Code of Judicial Conduct, which require that a judge disqualify himself from a proceeding where his impartiality might reasonably be questioned or disclose on the record the basis of his potential disqualification. *See* Canons 3(E) and (F), Arizona Supreme Court Rule 81. *See Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995) (judge's ethical breach of the duty to recuse himself or disclose potentially disqualifying facts serves as "cause" to overcome a procedural default and requires a remand to the district court for an evidentiary hearing).

Petitioner failed to raise in the Petition for Writ of Certiorari the question whether a stay based on incompetency is appropriate where the habeas petitioner's claims include *non-record-based claims*. That question, should Petitioner attempt to broaden his Petition to include it, is therefore waived. Sup. Ct. R. 15.

II. THE OPINION BELOW IS NOT IN CONFLICT WITH ANY FEDERAL STATUTES, DECISIONS OF THIS COURT, DECISIONS OF THE COURTS OF APPEALS OR OTHER LONG-STANDING PRECEDENT, INCLUDING THE COMMON LAW.

A. The Circuit's Opinion is consistent with this Court's precedent.

1. *Rees v. Peyton*, 384 U.S. 312 (1966) (*Rees I*) and *Rees v. Peyton*, 386 U.S. 989 (1967) (*Rees II*).

Although the *Rees* line of cases is one of the cornerstones of Judge Kozinski's *Rohan* Opinion, Petitioner and *Amici Curiae* fail to distinguish *Rohan* and all concurring circuit decisions from *Rees*. Curiously, they do not make a *single* mention of the case.

Over 45 years ago, this Court twice addressed similar questions to the one posited here. In *Rees I*, 384 U.S. 312, and *Anderson v. Kentucky*, 371 U.S. 886 (1962) (*Anderson I*), this Court confronted the issue of determining whether to allow death-row prisoners to withdraw their pending petitions for writ of certiorari (from a federal habeas corpus proceeding in *Rees*; from a direct capital appeal in *Anderson* (*Anderson v. Commonwealth*, 353 S.W.2d 381, 383 (Ky. 1961) (describing the defendant's desire to forego his direct capital appeal)). In both instances the Court concluded that death-sentenced petitioners needed to be competent to make such important decisions. *Rees I*, 384 U.S. at 312-14; *Anderson I*, 371 U.S. at 886 (granting certiorari to Court of Appeals of Kentucky to determine competency).

In *Rees I*, this Court ordered the district court to determine whether the petitioner in a habeas corpus case was competent to make the decision to withdraw his pending certiorari petition and forego any further legal proceedings. 384 U.S. at 313-14. This Court recognized that the petitioner’s “mental competence [was] of prime importance” to the resolution of this question and concluded that it was not “in a position to determine what disposition should be made of Rees’s petition for certiorari” until after the district court had determined whether Rees was competent. *Id.*

As a result of the mental status of each petitioner and the related concerns about competency, this Court stayed each proceeding indefinitely. On April 10, 1967, this Court ordered, “This case is held without action on the petition until further order of the Court.” *Rees II*, 386 U.S. 989. Before that, this Court “continued [Mr. Anderson’s matter] indefinitely.” *Anderson*, 376 U.S. at 940. Finally, on October 2, 1995, this Court dismissed Rees’s Petition for Writ of Certiorari.² *Rees v. Superintendent of Virginia State Penitentiary*, 516 U.S. 802 (1995) (*Rees III*). Further, Mr. Anderson’s case remained on this Court’s docket until over a year after his death. *See Anderson v. Kentucky*, 515 U.S. 1155 (1995) (*Anderson II*) (“It appearing that petitioner died April 6, 1994, the writ of certiorari is dismissed as moot.”).

The course of action taken in the *Rees* cases was not arbitrary; this Court clearly considered its options before remanding the petitioner for a competency determination. Information contained in *Rees*’s unpublished record, and

2. It appears the matter was dismissed because the Petitioner died. *Rohan*, 334 F.3d at 815 n.8.

reviewed by the Circuit Court in *Rohan*, shed light on this Court's actions and the rationale behind them.³

On the one hand, the state in *Rees I* urged this Court to decide the certiorari petition before it and ignore the competency issue until the proceedings concluded at execution. *Rohan*, 334 F.3d at 815. Petitioner has embraced this argument, asserting the only competency determination left for Respondent is governed by *Ford*. 477 U.S. 399 (1986) (setting standard for competency to be executed). However, this Court in *Rees I* rejected the argument that “under no circumstances should this matter be further stayed.” *Id.* (citing to State’s Memorandum at 3, *Rees v. Peyton*, Misc. No. 9 (U.S. Mar. 14, 1967)). This Court also considered simply staying Rees’s proceedings without a remand but decided against it. *Rees I*, 384 U.S. at 314. Instead, this Court chose to remand the matter to the district court to determine “whether [Rees] 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.” *Id.* at 313.

The Circuit Court adopted this Court’s prudent course of action in *Rees II*, concluding: “We obviously presume that the Supreme Court follows the law even when acting through summary orders rather than reasoned opinions. The record in *Rees* . . . shows that incompetence is grounds for staying habeas proceedings.” *Rohan*, 334 F.3d at 815.

3. The Circuit Court took judicial notice of the unpublished record in *Rees* and considered it in its decision. *Rohan*, 334 F.3d at 815 n. 7-8.

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

When incompetency arises at a much later stage, i.e., *after* the habeas litigation has been completed and relief has been denied, a petitioner’s competency for execution is governed by *Ford v. Wainwright*. See *Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997), *aff’d*, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). *Ford* concerned whether Florida could execute a prisoner who had already exhausted all direct and collateral remedies, but whose counsel raised the issue of whether the petitioner was *then* competent, or “sane,” to be executed. *Ford*, 477 U.S. at 401-05. Justice Powell found it significant that “[o]nly *after all of these challenges* [a direct appeal and collateral federal habeas proceeding] *had been resolved against him* *did* [Mr. Ford] challenge his impending execution on the ground of insanity.” *Id.* at 420 n.1 (Powell, J., concurring) (emphasis added).

Justice Powell addressed competency’s meaning in the specific context of the condemned prisoner whose direct and collateral attacks had been completed, i.e., where the only remaining issue was whether the Eighth Amendment forbids execution of the insane. Justice Powell’s concurrence thus addressed only the specter of execution of the insane, not the specter of the incompetent capital petitioner’s inability to assist counsel during the entire course of post-conviction habeas proceedings. In that limited context, Justice Powell found the Blackstone rationale that insane inmates could not be executed to have “slight merit today.” *Ford*, 477 U.S. at 420. As Justice Powell explained:

Modern practice provides far more extensive review of convictions and sentences than did the

common law, including not only direct appeal but ordinarily both state and federal collateral review. Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process

Id. at 420-21 (emphasis added). Were the Court to overrule *Rohan*, it would remove the doctrinal underpinnings of *Ford*.

The *Ford* Court concluded: “It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.” *Id.* at 417. Both the majority and concurring opinions recognized by implication that Blackstone’s rationale is still valid under circumstances where the inmate’s ability to assist counsel remains essential, i.e., *during* the course of direct and collateral review, as opposed to the situation in *Ford*, where all possible attacks on the judgment and sentence had already been exhausted. *Id.* at 399, 420. Such collateral habeas corpus actions “[a]re a central part of the review process for prisoners sentenced to death. As Justice Stevens observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings.” *Murray v. Giarrratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring). (emphasis added).

Therefore, a condemned inmate’s mental competency to *proceed* with federal habeas corpus must be measured under a higher standard than that defined in *Ford* for execution. Applying this Court’s precedent, the Circuit Court in *Rohan* observed that *Ford* implicitly “reinforces

the importance of competence to pursue collateral review” in capital cases. 334 F.3d at 811. The applicable standard was defined over thirty years ago, in *Rees I*. As stated above, this Court in *Rees I* rejected the idea that the only competency right remaining for a capital petitioner in certiorari proceedings was whether a capital petitioner was competent to be executed. 384 U.S. at 313-14.

The Circuit Court in *Rohan* recognized that the right to be competent to pursue federal habeas relief falls somewhere between the right to be competent to stand trial and the right to be competent to be executed. 334 F.3d at 810. The “constitutional requirement of competence to stand trial . . . does not imply a coordinate requirement on collateral review,” which is more limited and during which there is no constitutional right to counsel. *Id.* (citations omitted). However, the Circuit Court also recognized that “Justice Powell’s *Ford* opinion does not *preclude* such a requirement” during federal habeas proceedings, because *Ford* involved the competency of a petitioner who had already exhausted all avenues of review of his sentence. *Id.*; see *Ford*, 477 U.S. at 420 n.1.

B. There is no conflict in the circuits.

No circuit court of appeals has rejected *Rohan*. In *Holmes v. Buss* (*Holmes I*), 506 F.3d 576 (7th Cir. 2007), Judge Richard Posner writing for the three-judge panel, remanded the case to the district court for further competency determinations. *Id.* at 584. In prior proceedings, the district court had found the capital petitioner competent without consulting a mental health expert and had subsequently rejected all of the petitioner’s habeas claims on the merits. *Id.* at 577. After the Seventh

Circuit remanded for a more thorough competency determination, the district court personally questioned the capital habeas petitioner and accepted reports from defense and prosecution mental health experts before deciding, again, that the petitioner was competent to proceed. *Id.* at 577-78. On appeal, the Seventh Circuit once again remanded for an evidentiary hearing, finding the district court had erroneously denied defense counsel's request to cross-examine the state's mental health expert. *Id.* at 581, 583-84.

Judge Posner did not make an affirmative holding regarding the existence of the right to *Rohan* competency in *Holmes I*. Because the parties had assumed the validity of *Rohan*, Judge Posner determined that the better course was to continue this assumption and order a determination of competency without first deciding whether the right to competency existed. *Id.* at 578. Assuming the validity of *Rohan* allowed Judge Posner to avoid formally adjudicating the matter, thus foreclosing the potential creation of an inter-circuit conflict. *Id.*

After the district court heard additional competency evidence and, for a third time, denied the petitioner's request for a stay due to incompetence, Judge Posner again reversed, adopting *Rohan* and finding that the evidence supported the petitioner's claim of incompetence. *Holmes v. Levenhagen (Holmes II)*, 600 F.3d 756, 763 (7th Cir. 2010). The court then stayed Holmes's habeas corpus proceedings indefinitely. *Id.* at 762-63. Despite the Seventh Circuit's earlier concern regarding a potential circuit split, the law of the Seventh Circuit is now consistent with that of the Ninth Circuit—there is a right to competence to proceed in federal habeas corpus.

Petitioner also argues that the benefit *Rohan* confers is minimal because Section 2254 is intended to gain review of claims that were exhausted in the state courts and therefore the *Rohan* right is extremely limited. Pet. at 13. Petitioner adds that the information Respondent could contribute to his case is limited. Pet. at 13. However, in addition to the judicial bias claim, which Petitioner, the district court and the Circuit Court have all previously conceded could potentially benefit from Respondent's assistance,⁴ Respondent has highlighted six claims which also require his input. Pet. App. at C-27. See also Argument I. C, *supra*.

As Judge Posner noted in *Holmes I* and *II* the degree to which a petitioner needs to be competent “depends on the nature of the decisions” to be made. 600 F.3d at 759. Judge Posner recognized that where the petitioner’s “recollections could help his lawyers formulate a persuasive argument,” then he must be competent to do so. *Id.*

Critical to Respondent’s judicial bias claim in this matter is the fact that “[Respondent] was at his trial; his current lawyers were not.” See *Holmes I*, 506 F.3d at 580. This discounts Petitioner’s argument that others, including prosecutors, could fill in the gaps in Respondent’s memory. Pet. at 17. Petitioner also chastises the Circuit Court for not specifying what Respondent could contribute to his judicial bias claim. Pet. at 11. Petitioner ignores Judge Kozinski’s response to this argument “Well, if I knew that, I wouldn’t have to ask!” *Rohan*, 334 F.3d at 818 (emphasis original). Sometimes common sense should prevail.

4. See Statement of the Case, *supra*.

Petitioner attempts to discount the Seventh Circuit's decisions in *Holmes I* and *II* as irrelevancies because Indiana failed to challenge the right recognized by the Ninth Circuit in *Rohan*, only contesting whether Holmes was incompetent. Pet. at 12 n.5. Whatever Indiana's reason for not challenging the application of *Rohan*, the Seventh Circuit could think of no better solution than to indefinitely stay the habeas proceedings of the incompetent Holmes. 600 F.3d at 762-63. Despite assuming the validity of *Rohan* in *Holmes I*, the Seventh Circuit nevertheless thoroughly analyzed the rationale for, and the implications of, recognizing a right to *Rohan* competency in both *Holmes I* and *II*, ultimately determining that *Rohan* provided both the appropriate competency standard and the most appropriate relief for Holmes. *Holmes I*, 506 F.3d at 578-80; *Holmes II*, 600 F.3d at 758-59, 762-63.

Furthermore, the other circuits to discuss the issue have not rejected *Rohan*, but rather have either assumed that the right exists or have resolved the competency issue on other grounds. See *Ferguson v. Sec'y for Dep't of Correct.*, 580 F.3d 1183, 1222 (11th Cir. 2009) (assuming there is a right to be competent in the district court in habeas, the district court did not abuse its discretion in denying the stay); *Ward v. Norris*, 577 F.3d 925, 936-37 (8th Cir. 2009) (holding that the district court correctly construed Rule 60(b) motion as successive petition because it was based upon previous habeas counsel's ineffectiveness for failing to raise petitioner's competency in the district court); *Clayton v. Roper*, 515 F.3d 784, 790 (8th Cir. 2008) (assuming there is a right to be competent in federal habeas proceedings, the district court's finding that the petitioner was competent was not clearly erroneous); *Paul v. United States*, 534 F.3d 832, 845-48 (8th Cir. 2008)

(same); *Pierce v. Blaine*, 467 F.3d 362, 373 (3d Cir. 2006) (refusing to accept review of a district court’s decision to evaluate the petitioner’s competency but noting that the order was “not clearly beyond the discretion of the district court in aid of its jurisdiction”); *Mines v. Dretke*, 118 Fed. Appx. 806, 813-14 (5th Cir. 2004) (holding it was not abuse of discretion to deny a stay, assuming there was a right to be competent, because petitioner presented no evidence of incompetency).

Also instructive is *Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000), a case that predates *Rohan*. In *Mata*, the Fifth Circuit also relied on *Rees I* and gleaned from this Court’s reasoning that district courts were directed to conduct hearings suitable to address the issue of competency, which was presumed to include input from psychiatric and other medical experts. 210 F.3d at 327-28. The Fifth Circuit further noted that following *Rees I*, it would address the issue of competency to waive collateral review of a state conviction and sentence. *See Rumbaugh v. Procunier*, 753 F.2d 395, 403 (5th Cir. 1985). Applying *Rees I*, the Fifth Circuit established a three-part test for district courts to apply when considering competency issues: “(1) whether that person suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that person from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options.” 210 F.3d at 328 (citing *Rumbaugh*, 753 F.2d at 398). Following this Court’s precedent, the Fifth Circuit in *Mata* was clear about the federal constitutional implications involved with competency determinations in federal habeas corpus proceedings.

Similarly, federal courts within the Sixth Circuit have not only assumed there is a right to be competent during federal habeas proceedings, but have also held that a capital habeas petitioner must be competent to withdraw his federal habeas corpus petition. *See Carter v. Bradshaw*, 583 F. Supp. 2d 872, 984-85 (N.D. Ohio 2008). In *Carter*, the district court concluded that while *Rohan* was not binding precedent, in the Sixth Circuit, “it remains the standard by which the Court should review Carter’s competence.” *Id.* at 877. The district court relied on the fact that “it appears that no court has rejected the *Rohan* holding outrightly,” as well as the fact that the Sixth Circuit in *Awkal*⁵ applied this Court’s reasoning in *Rees* to require that a federal habeas petitioner be competent to withdraw his federal habeas petition. *Id.* at 879. “Because the *Rohan* holding remains intact and, if *Awkal* is any indication, may actually be adopted by the Sixth Circuit, the Court sees no reason to depart from its earlier conclusion that the *Rohan* holding is the standard of review here.” *Id.*

Because the circuits that have addressed the question presented are in agreement, the petition should be denied.

C. The Opinion is consistent with the Common Law.

Petitioner’s argument that the Circuit Court created the *Rohan* right “out of thin air” (Pet. at 7) ignores this

5. *Awkal v. Mitchell*, 174 Fed. Appx. 248, 249-50 (6th Cir. 2006) (remanding to the district court for a determination of whether petitioner was competent to withdraw his appeal under the *Rees* standard).

Court's precedent and the Common Law's role in this matter. It is the Common Law that informs this Court's interpretation of the Bill of Rights. *See Cunningham v. California*, 549 U.S. 270, 281 (2007) (Common Law was viewed in *Apprendi* and *Ring* as informing Sixth Amendment, which requires juries to find facts, and to find them beyond a reasonable doubt, in order to elevate sentences); *Deck v. Missouri*, 544 U.S. 622, 626 (2005) (Common Law prohibited shackling of defendant in criminal trial; due process violated in state capital trial where defendant was shackled); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (Common Law informs the scope of the Confrontation Clause). While this Court has long found these trial rights derived from the Common Law, the Circuit Court in *Rohan* thoroughly traced the Common Law history of the right to competence in criminal proceedings in which the death penalty is or may be imposed, and concluded that the right extends until a condemned prisoner's execution.

An incompetent condemned prisoner's inability to assist counsel was recognized under English Common Law as a ground for staying proceedings because the condemned prisoner was unable to assist with the legal process which might preclude execution. *See* 4 Sir William Blackstone, *Commentaries on the Laws of England*, *24-25, *389, *395-96 (1769); 1 Sir Matthew Hale, *The History Of The Pleas Of The Crown*, 34-35 (Prof'l Books Ltd. 1971) (1736); Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1719), reprinted in 11 *State Trials* 473, 476 (T.B. Howell ed., 1811). The Circuit Court's careful review of the Common Law jurisprudence regarding competency in *Rohan* demonstrates that the right has a long and well-established pedigree that attaches not only

to trial, but continues through to execution of sentence. 334 F.3d at 807. The Common Law commentators all tied “competence to capacity for rational communication.” *Id.* at 807-08. If the condemned prisoner became of unsound mind at any point before execution, the proceedings were to be stayed. *Id.* The rationale behind this rule was that the condemned prisoner’s mental disorder might prevent him from sharing with his lawyer a fact, known only to him, that could result in his life being spared. *Id.* This rationale is just as relevant today.

D. The Opinion does not undermine the AEDPA or 18 U.S.C. § 3599(a)(2).

Petitioner argues that petitioners who file a habeas petition and then bring a motion for a *Rohan* stay, undermine one purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2241 *et seq.*, which is to speed capital habeas cases to a conclusion. Pet. at 12. By that same logic, this Court incorrectly decided *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010), which recognized for the first time the principle of equitable tolling. Equitable tolling is not prescribed in the AEDPA, but this Court, like virtually all of the circuits, concluded that there are rare times where the courthouse doors should not be closed where the petitioner is not at fault in failing to timely bring his claims. Likewise, the Circuit Court has long recognized mental incapacity as an extraordinary circumstance justifying equitable tolling. *See Rohan*, 334 F.3d at 814-15 (citations omitted).

Petitioner’s accusation that *Rohan* motions are being filed for purpose of delay is not supported by citation to any authority, nor is it supported by the legal landscape

in the circuits and district courts, as set forth in Section III, *infra*. In fact, *Rohan* incompetency findings are rare and stays even more so.

Congress's statutory enactments in the field of habeas corpus, including the AEDPA, do not operate in a vacuum. They are directed at "eliminat[ing] delays in the federal habeas review process . . . without undermining basic habeas corpus principles and while seeking to harmonize the new statute[s] with prior law" *Holland*, 130 S. Ct. at 2562 (citing *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). In its effort to position itself behind what it sees as Congress's rejection of a right to be competent in federal habeas proceedings, Petitioner overlooks two important aspects of any inquiry into Congress's intent in enacting 18 U.S.C. § 3599(a)(2) and its predecessor statute. First, nothing in the text of that statute specifically disavows this Court's precedent that a death row prisoner has the right to competency in federal habeas proceedings. *See Rees I and II, supra*. Second, Congress presumably enacted § 3599 and its predecessor statute against the backdrop of the Common Law. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Salimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

The interplay between the AEDPA's statute of limitations and this Court's decisions since the enactment of the statute are instructive in this matter. The AEDPA's statute of limitations is subject to equitable tolling if extraordinary circumstances prevent the petitioner from timely filing a petition. *See Holland*, 130 S. Ct. at 2562 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). These extraordinary circumstances can include a

prisoner's mental illness or incompetence. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010) (citing decisions of the Third, Fifth, Sixth, and Ninth Circuits). Like the right to competency, the equitable-tolling doctrine was never expressly ratified or rejected by Congress when it enacted the AEDPA. Yet, "Congress enacted AEDPA" after this Court had expressly reaffirmed the equitable-tolling doctrine in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and Congress therefore "was likely aware that courts, when interpreting AEDPA's timing provisions, would apply" the doctrine unless Congress expressly disavowed it. *Holland*, 130 S. Ct. at 2561. Because Congress did not expressly disavow the doctrine when it enacted § 2244(d), equitable tolling applies to the AEDPA's statute of limitations.

Similarly, Congress enacted § 3599's predecessor statute after *Anderson* and *Rees*, and thus presumably was aware that even with appointed counsel, indefinite stays of federal habeas actions were available in the event of a petitioner's incompetence. *See Rees*, 386 U.S. 989, *cert. dismissed*, 516 U.S. 802 (1995). The right of competency in federal habeas that existed at Common Law, *see Rohan*, 334 F.3d at 807-10, that this Court vindicated in *Anderson* and *Rees*, therefore remains part of federal habeas jurisprudence after the AEDPA.

Further, Petitioner asserts that the Circuit Court has engaged in policy analysis as part of its statutory construction of § 3599(a)(2) where no such statutory construction is permitted because one can view the wording of the statute to understand that Congress did not include reference to a stay based on incompetence. Rather than speaking to competency, the statute fails

to address it altogether. *See* 18 U.S.C. § 3599. As Judge Kozinski made clear, however, the Framers did not include a right to trial competency in the Sixth Amendment, but this Court found such a right vital to protect the right to counsel. *Rohan*, 334 F.3d at 813.

III. PETITIONER’S CLAIM THAT THE CIRCUIT COURT’S OPINION HAS CAUSED SIGNIFICANT DELAYS ACROSS THE CIRCUITS IS LEGALLY AND FACTUALLY ERRONEOUS.

Petitioner’s hysterical claim that Judge Kozinski’s opinion will subvert habeas corpus is unfounded. Petitioner argues that *Rohan* allows capital habeas petitioners to abuse the writ by engaging in “delaying tactics” to “avoid execution.” Pet. at 18. *Amici Curiae*⁶ also focus on the concern that *Rohan* claims will allow capital habeas petitioners to indefinitely delay their executions thus frustrating the state’s interest in executing its criminal judgments. *See* Brief for State of Utah *et al.* as *Amici Curiae*, *passim*.

6. The grouping of the represented states in this *Amici Curiae* is peculiar. First, the State of California is clearly not supporting the *Amici Curiae*’s position and favors the *Rohan* rule since that attorney general has previously stipulated to incompetency stays in *Rohan* cases. *See* n.9, *ante*. California’s agreement with the *Rohan/Rees* line of cases is significant since that state seems to be the most affected by this issue, albeit still in few numbers. *Amici Curiae* at p. 4 n.2.

In addition, although Delaware, Pennsylvania, South Carolina, and Virginia are listed as interested states in the *Amici Curiae*, none was cited as having *Rohan* litigation, and the Fourth Circuit has not weighed in on this issue. As such, these states seem to lack standing and their participation appears to be an attempt by Petitioner to overstate the opposition to *Rohan*’s application.

Petitioner's portrayal of competency proceedings in habeas would lead a novice to believe that *Rohan* stays are freely dispensed. The *Rohan* competency right is narrow in scope and the *Rohan* standard is demanding. A federal habeas petitioner has a right to *Rohan* competence only if he raises claims which could benefit from his ability to rationally communicate information lying uniquely within his own private knowledge, *Rohan*, 334 F.3d at 818-19, or if his incompetence prevents him from rationally making an important decision which he alone can make. *Rees I*, 384 U.S. at 314; *see also Holmes II*, 600 F.3d at 762. Furthermore, *Rohan* competency is not required in cases where appointment of a next friend or guardian ad litem would adequately protect the petitioner's rights and interests. *See Rohan*, 334 F.3d at 816.

The evidence supports the assertion that this is a high burden for incompetents to meet. *Amici Curiae* list several cases in support of their substantial delay argument. *Amici Curiae* at p. 4 n.2. And while only *one* case involved a petitioner who was found incompetent, *none* of the cases listed was stayed indefinitely. *See Blair (James Nelson) v. Cullen*, No. CV 99-6859, 2010 WL 5563896, at *25 (C.D. Cal. March 21, 2010) (finding that the presumption of Petitioner's competency has not been overcome by a preponderance of the evidence); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504, at *10 (E.D. Cal. Jan. 26, 2010) (denying petitioner's motion to have himself declared incompetent and to have his proceedings stayed); *Rogers v. McDaniel*, No. 3:02-CV-0342, 2008 WL 820088, at *3 (D. Nev. March 24, 2008) (district court found petitioner competent to proceed and amended habeas petition was filed December 14, 2006); *Hill v. Ayers*, No. 4-94-CV-641, 2008 WL 683422, at *2 (N.D. Cal. March 10,

2008) (“Respondent is correct that it would be premature for the Court to stay the proceedings at this time. Rather, the parties shall meet and confer to attempt to stipulate to a case management schedule that will allow for Petitioner to be examined by mental-health experts to determine his competence.”). Three Arizona cases were also cited in support of *Amici Curiae*’s substantial/indefinite delay argument. Of those, two petitioners have died.⁷ The third, Respondent, has not yet been determined incompetent and, therefore, his case has not been indefinitely stayed.⁸

In the almost *eight* years since the *Rohan* decision, Petitioner and Respondent have only been able to cite to a few cases where incompetency has been found by the courts. Moreover, Petitioner’s fear of an indefinite stay is overstated as noted by Judge Posner in *Holmes I*: “[I]t is odd to think that someone who initiates a proceeding can then freeze it by claiming to be mentally incompetent.” 506 F.3d at 578.

Not all states with *Rohan* litigation oppose the process. In several California cases, the attorney general

7. Undersigned counsel’s office represented both Mr. Nash and Mr. Adams. Mr. Nash died of natural causes at age 94. Petitioner asserted “Adams died waiting (sic) a decision in his case.” Pet. at 6 n. 2. In fact, Mr. Adams committed suicide as a result of his mental illness.

8. In terms of delay, Petitioner asserts that Respondent’s “case has now been under federal review for over a decade. . . .” Pet. at 19. However, for three and a half years the proceedings were either stayed by the district court pending a resolution of the *Ring v. Arizona* litigation, (see 536 U.S. 584 (2002) or awaiting rulings from the district court. *Gonzales v. Schriro*, No. CV-99-02016 (D. Ariz.).

stipulated to a petitioner's incompetency, and the courts made clear that the resultant stays could be lifted if the petitioner was restored to competency.⁹ California's position on this issue is important, since its interest in this litigation appears to be substantial. *See Amici Curiae* at 4, n.2. It is of note that California did not join in the *Amici Curiae*.

Petitioner fails to provide any support for the proposition that the *Rohan/Rees* line of cases has had any widespread affect in the last eight years. In fact, as demonstrated above, the narrow scope of the decision, coupled with the high burden of proof, has proven beneficial to the states in some cases where those attorneys general have stipulated to incompetency.

IV. CERTIORARI SHOULD NOT BE GRANTED BECAUSE PETITIONER FAILED TO RAISE SEVERAL POLICY ARGUMENTS IN THE LOWER COURT; NONETHELESS THOSE ARGUMENTS ARE MERITLESS.

A. Petitioner's failure to raise arguments resulted in waiver.

Petitioner raises two arguments it did not present below: (1) that implying a right to competency in habeas will result in disparate treatment of non-indigent habeas appellants because the habeas counsel appointment statute does not apply to them (Pet. at 15); and (2) that

9. See *Jones v. Wong*, 2:97-CV-02167 (E.D. Cal. Aug. 28, 2009); *Holt v. Woodford*, 1:97-CV-06210 (E.D. Cal. Nov. 21, 2008); *Millwee v. Ayers*, 2:99-CV-07220 (C.D. Cal. Nov. 21, 2008); *McPeters v. Ayers*, 1:95-CV-05108 (E.D. Cal. Sept. 18, 2007).

finding a right to competency is “inconsistent” with this Court’s “next friend” jurisprudence. Pet. at 14.

This Court ordinarily “does not decide questions not raised or resolved in the lower court”; “[i]t is only in exceptional cases coming [to the Court] from the federal courts that questions not pressed or passed upon below are reviewed.” *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*) (citation omitted). Respondent was ably represented in the proceedings below and had ample opportunity to give the Circuit Court an opportunity to examine these issues. *Cf. Pollard v. United States*, 352 U.S. 354, 359 (1957) (finding an exceptional circumstance and reviewing additional legal questions not presented in the lower courts because prior pleadings had been filed without the assistance of counsel); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 399-400 (1947) (finding that although employers did not raise issue in lower courts, the unions did, and because both would be entitled to use the issue as a defense to the indictment, fairness compelled its consideration). There is no exceptional reason which allows for consideration of these newly raised issues.

Regardless of any waiver, these arguments have no merit. However, in an abundance of caution, Respondent will address the merits of the waived claims as follows:

B. The Opinion does not create an equal protection dilemma.

Petitioner argues that the Circuit Court’s interpretation of § 3599(a)(2) would lead to the disparate treatment of indigent capital petitioners (who would have a right to

be competent to assist counsel) and non-indigent capital petitioners (who, according to the State, indisputably do not have such a right). Pet. at 15. Petitioner argues that *Rohan* requires that indigent capital habeas petitioners entitled to counsel benefit from *Rohan* where paying petitioners are not afforded *Rohan's* benefit. However, the Circuit Court, when deciding *Rohan*, only had before it the claim that an indigent capital petitioner was incompetent and could not assist counsel. The Circuit Court went to great pains to explain that it was deciding the case on the most narrow constitutional grounds in keeping with “the principle that statutes should be interpreted to avoid substantial constitutional questions.” *Rohan*, 334 F.3d at 813. The Circuit Court further stated that “Rohan’s due process claim is debatable, but it raises constitutional questions substantial enough that we should avoid them if possible. By reasonably construing 21 U.S.C. § 848(q) (4)(B) to incorporate a statutory right to competence, we leave them for another day.” *Id.* at 814. As a result, whether a paying petitioner can assert the right is left for another case and is not appropriate in this case on the record before the Court.

C. The Opinion does not undermine the “Next Friend” practice.

Petitioner argues that the Circuit Court’s interpretation of 18 U.S.C. § 3599(a)(2) conflicts with this Court’s “next friend” jurisprudence. Pet. at 14. Petitioner makes the argument rejected in *Rohan* that a next friend can ably bring the incompetent’s claims despite his incompetency. Pet. at 14 (citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990)). The problem with that argument, as noted in *Rohan*, is that *Rohan* concerns competency to assist

counsel, not to merely make decisions affecting litigation, such as the decision to waive claims as in *Whitmore*. 334 F.3d at 816. As Judge Kosinski noted:

The prisoner's incompetence is relevant, not because it impairs his decisionmaking, but because it prevents him from communicating information that he alone possesses. Appointing a next friend does not respond to this dimension of incompetence-particularly where, as here, the next friend is an attorney with no greater knowledge of [the petitioner's] circumstances than his counsel.

Id. In fact, the Circuit Court specifically approved of the “next friend” option in some cases of incompetency: “When grounds for relief are apparent even without the prisoner's assistance, a next friend could conclude that the prisoner's best interests would be served by pursuing relief notwithstanding his incompetence.” *Id.* at 816.

The “next friend” practice is not ignored by the *Rees/Rohan* line of cases. In fact, *Holmes II* also clearly and thoroughly explains when appointment of a next friend (*guardian ad litem*) may and may not be of use in the case of an incompetent habeas petitioner. 600 F.3d at 763. In *Holmes II*, Judge Posner was concerned with the petitioner's ability to rationally decide whether to pursue an incompetency claim or waive the claim and have his habeas case decided on the merits. *Id.* at 758-59, 763. The Seventh Circuit noted that a guardian ad litem would easily be able to make this decision for a petitioner who has a sure-winner habeas claim but that, in closer cases,

the guardian ad litem's decision "would be exceedingly difficult" in the absence of the petitioner's rational input. *Id.* at 764.

In this matter, Petitioner's argument that this Court's recognition of next friend standing proscribes *Rohan* claims fails in light of the rationale expressed in *Rohan* and *Holmes II*. Recognition of a right to competence in habeas proceedings is not at odds with the next friend practice. In some habeas cases, appointment of a next friend will adequately safeguard the incompetent petitioner's interests; in others, it will not.

Furthermore, while the Circuit Court in *Rohan* did discuss the "next friend" practice as set forth above, in Respondent's case, the next friend process was not discussed by the Circuit Court, nor was this issue raised by Petitioner. Perhaps because that argument would have been premature since the appointment of a "next friend" is not even relevant until *after* a determination of incompetency is made, and as such is not relevant in this matter.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted this 25th day of April 2011.

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