No. 11-218

*IN THE SUPREME COURT OF THE UNITED STATES*

TERRY TIBBALS, WARDEN,

PETITIONER,

-vs-

SEAN CARTER,

RESPONDENT.

---

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

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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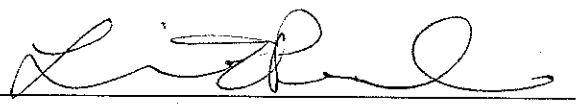
Respondent Sean Carter, through undersigned counsel, respectfully requests leave to file his Brief in Opposition without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

No affidavit is attached, inasmuch as the United States Court of Appeals for the Sixth Circuit appointed counsel for Respondent under 18 U.S.C. § 3006A (the Criminal Justice Act of 1964). *See* Rule 39.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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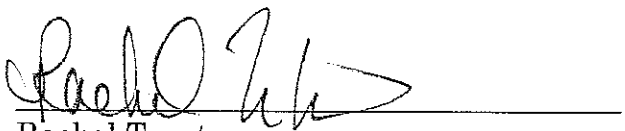

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No. 11-218

IN THE

# Supreme Court of the United States

TERRY TIBBALS, WARDEN,

*Petitioner,*

v.

SEAN CARTER,

*Respondent.*

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

## RESPONDENT'S BRIEF IN OPPOSITION


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## CAPITAL CASE

## QUESTION PRESENTED

Did the Sixth Circuit err in staying the adjudication of a capital habeas petitioner's ineffective assistance of counsel claims where experts agreed and the court found that (1) the petitioner is incompetent and (2) allowing those claims to proceed would be equivalent to allowing the petitioner to withdraw those claims?

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CASES

## INTRODUCTION

The courts below found and the experts for both parties agreed that the federal habeas petitioner, Sean Carter, suffers from mental illnesses, rendering him incompetent and unable to communicate information that is essential to his habeas counsel presenting his ineffective assistance of counsel claims. The court of appeals determined that Carter's incompetence so undermined his ability to pursue those claims that requiring him to adjudicate them now would be equivalent to him withdrawing those portions of his petition. It therefore stayed the habeas proceedings as to those claims and remanded the case so that the district court could adjudicate Carter's other claims. This fact-bound judgment is consistent with the holdings of the courts of appeals and this Court and with the petition's characterization of the law. It does not warrant review.

## STATEMENT

Sean Carter was convicted and sentenced to death under Ohio law. In his state habeas proceedings, he exhausted claims that his trial counsel was ineffective for failing to demonstrate his incompetence to stand trial and develop mitigation evidence. Pet. App. 43a. Carter's counsel raised those same claims in his federal habeas petition, which also alleged that Carter was incompetent and asked the court to stay the federal habeas proceedings. *Id.* at 28a, 42a-43a.

The district court held a competency hearing. The State's only witness, Dr. Phillip Resnick, testified that Carter suffered from schizophrenia and personality disorder. *Id.* at 34a. As a result, the State's expert testified, Carter could respond to

direct questions with "simple answer[s]" but could not elaborate on those answers. *Id.* at 46a. Accordingly, "Dr. Resnick concluded that Carter could be of little assistance in providing information to habeas counsel." *Id.* In particular, "Carter could not provide habeas counsel with specific information" necessary to present his ineffective assistance of counsel claims to the federal courts. *Id.*

Carter's experts testified similarly. Dr. Michael Gelbort stated that other than providing "straightforward, concrete information, Carter would have trouble responding" to questions. *Id.* at 33a. Dr. Robert Stinson testified that, as a result of his mental illnesses, Carter did not "engage in dialogue," "provide[d] a lot of empty responses," and "lack[ed]" the ability to "elaborat[e]." *Id.* at 31a. Dr. Stinson later provided an updated report on Carter's condition, explaining that since his initial evaluation of Carter, Carter's condition had "deteriorated." *Id.* at 35a. In fact, for part of the intervening period, prison officials had transferred Carter to a state psychiatric prison facility "because of his declining mental condition." *Id.* Notes provided by that facility indicated that Carter was "disoriented and unable to comprehend or respond to communications from others." *Id.*

In light of the consistent testimony of both parties' experts, the district court found Carter incompetent. *Id.* at 44a. It also found that "Carter clearly cannot assist habeas counsel in developing" his ineffective assistance of counsel claims. *Id.* at 47a. Therefore, it dismissed Carter's habeas petition and tolled the statute of limitations for re-filing. *Id.* at 53a.

The Sixth Circuit, in a 2-to-1 panel decision, amended the judgment and remanded. The court of appeals explained that "[f]ederal habeas petitioners facing the death penalty for state criminal convictions do not enjoy a constitutional right to competence." Pet. App. 4a. Indeed, it cited binding circuit precedent establishing that a "next friend" may be appointed to represent the interests of an incompetent habeas petitioner in federal habeas proceedings. *Id.* at 11a. (citing *Martiniano ex rel. Reid v. Bell*, 454 F.3d 616, 617 (6th Cir. 2006)). Nonetheless, relying on *Rees v. Peyton*, 384 U.S. 312 (1966), the court stated that capital habeas petitioners have a "right to competence" when they seek "'to withdraw the petition and forgo any further legal proceedings.'" Pet. App. 4a (quoting *Rees*, 384 U.S. at 313-14).

Accordingly, the court of appeals concluded that the district court did not abuse its discretion in conducting a competency hearing or determining that Carter "was incompetent to assist his counsel." *Id.* at 8-9a. The court of appeals further concluded, however, that the district court erred in dismissing Carter's petition. *Id.* at 9a. The evidence and findings below demonstrated that Carter's incompetence effectively "terminated [his] right to pursue a habeas writ" based on his claims of ineffective assistance of counsel. *Id.* at 8a-11a. Regarding these claims, "Carter alone has evidence" that is "essential" to "assist[ing] [his] attorneys" in understanding the nature of the allegations and developing a "strategy," "and that evidence is inaccessible as long as [Carter] remain[s]" in his present condition. *Id.* at 12a-13a. Because Carter's incompetence would effectively result in him withdrawing those claims, the court held that adjudicating *those* claims would be

improper. *Id.* At the same time, the court reiterated, Carter does not possess a general right to be competent during his habeas proceedings. *Id.* at 13a. Therefore, the district court was required to appoint a "next friend" and adjudicate all claims for which Carter's assistance is not "essential." *Id.*

The court of appeals reinstated the petition, stayed the adjudication of Carter's ineffective assistance of counsel claims, and remanded so that the district court could adjudicate the claims for which Carter's assistance is not "essential." *Id.* at 15a. It further indicated that the district court should "monitor Carter's on-going condition" so that it could litigate the ineffective assistance of counsel claims as expeditiously as possible. *Id.* at 14a.

## REASONS FOR DENYING THE WRIT

### I. The Decision Below is Narrow and Fact-bound.

The court of appeals rendered a narrow fact-bound decision. It stayed only those claims for which the evidence demonstrated that Carter's assistance is so essential that forcing him to present those claims while he is incompetent would be equivalent to him withdrawing those claims. Further, it indicated that the partial stay would remain in effect only until Carter can meaningfully communicate with his counsel. The court based its decision on the undisputed testimony of both the State and Carter's experts, who agreed that Carter suffers from schizophrenia and personality disorder, and, as a result, is unable to communicate with counsel.

The narrowness of the court of appeals' holding is reinforced by the fact that it reversed the district court's dismissal of the petition and remanded so that the

district court could appoint a "next friend" and adjudicate all of Carter's claims for which his assistance is not essential. Moreover, the court of appeals instructed the district court to monitor Carter's condition to ensure that the parties litigate Carter's stayed claims as soon as feasible.

This fact-specific decision has no broad implications for the "capital-litigation process." Pet. 20.

## II. No Conflict Exists Among the Lower Courts.

In *Rees v. Peyton*, this Court stated:

> Whether or not [the capital habeas petitioner] Rees shall be allowed . . . to withdraw his certiorari petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance. We have therefore determined that, in aid of the proper exercise of this Court's certiorari jurisdiction, the Federal District Court in which this proceeding commenced should upon due notice to the State and all other interested parties make a judicial determination as to Rees' mental competence and render a report on the matter to us.

384 U.S. 312, 313-14 (1966). The district court judged Rees incompetent and this Court then held the case "without action," *Rees v. Peyton*, 386 U.S. 989 (1967), until Rees died, at which point the Court dismissed the case without opinion, *Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802 (1995).

The court below performed a straightforward application of *Rees*. It recognized that it was its responsibility to ensure that Carter was competent before allowing him effectively to withdraw his ineffective assistance of counsel claims. As in *Rees*, it stayed those claims until Carter can provide the necessary assistance.

The Petition characterizes the other circuits' applications of *Rees* in precisely the same way: *Rees* requires federal courts to assure the competence of capital habeas petitioners before allowing them to "abandon further legal proceedings." Pet 13 (quoting *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987)) (internal quotation marks omitted). For example, as the petition highlights, the Third Circuit has explained that "*Rees* demands" a capital habeas petitioner "may not" be allowed to withdraw his petition "if [he] is incompetent." Pet. 14 (quoting *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006)) (internal quotation marks omitted).

The other cases cited in the petition articulate *Rees*'s holding similarly. *Henderson v. Campbell*, 353 F.3d 880, 893, 894 (11th Cir. 2003) ("Language from the Supreme Court's decision in *Rees v. Peyton* has consistently been cited as setting forth the controlling legal standard for assessing the validity of a death row inmate's choice to forego post-conviction review": For the decision to be valid the court must find that the petitioner understands "'he must continue to engage in the review process or be executed.'" (citation omitted) (quoting *Hauser ex. rel. Crawford v. Moore*, 223 F.3d 1316, 1323 (11th Cir. 2000)); *Brewer v. Lewis*, 989 F.2d 1021, 1026 n.4 (9th Cir. 1993) ("The Supreme Court stated the test for determining whether a habeas petitioner is competent to waive his right to federal review of his conviction and sentence in *Rees v. Peyton*: 'whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation . . . .'" (citation omitted) (quoting *Rees*, 384 U.S. 314)); *Rumbaugh v. Procunier*, 753 F.2d 395, 396, 398 (5th Cir. 1985) (explaining that under *Rees*, a

capital habeas petitioner who "resist[ed] the efforts" of others to secure habeas relief on his behalf should be allowed to "forgo further appeals and collateral attack[s] upon his conviction and sentence" only if he is not suffering from a mental disease that "prevent[s] him from making a rational choice" about whether and how to pursue his claims).

At bottom, the petition seeks to fashion a conflict not based on the courts' of appeals articulations of *Rees*, but because this case involves an effective withdrawal rather than an affirmative withdrawal of habeas claims. Pet. 13-17. At the same time, the petition concedes that the Sixth Circuit's binding precedent is "like [that of] its sister circuits." Pet. 15 (citing *Harper v. Parker*, 177 F.3d 567, 571 (6th Cir. 1999)). And it cites no case contrary to the decision below. This fact-specific application of *Rees* does not satisfy any of the Court's criteria for review.

**III. The Decision Below is Consistent With this Court's Jurisprudence.**

The petition (at 18-20) briefly argues that the decision below is inconsistent with several of this Court's cases. None address the issue presented here.

First, the petition cites *Rhines v. Weber*, 544 U.S. 269 (2005), in which this Court considered whether federal courts may stay consideration of a habeas petition so that the petitioner can exhaust claims in the state courts. *Rhines* did not address whether or when a court should stay proceedings on an incompetent individual's habeas petition, and it held that, under the Antiterrorism and Effective Death Penalty Act, federal courts retain their "ordinar[y]" power to issue stays. *Id.* at 276. *Rhines* is not pertinent here.

Second, the petition suggests an inconsistency with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), which held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. The issue here, however, is not whether the essential information Carter's incompetence prevents him from providing could be used to supplement the record. Instead, the question is whether Carter's undisputed mental illness required the lower court to stay Carter's ineffective assistance of counsel claims, in light of the court of appeals' determination—based in part on the State's own expert—that Carter is incapable of providing the communication essential to the pursuit of those claims.

Finally, the petition relies on *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), which address when the state may execute an individual who claims to be incompetent. That issue is not presented here.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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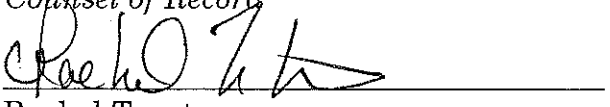

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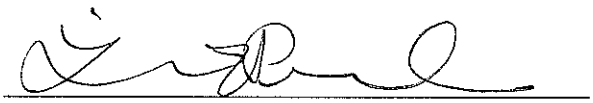
October 2011

## WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,021 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on October 28th, 2011.



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