No. 11-218

In the Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
Terry Tibbals, Warden

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REPLY OF THE PETITIONER

The unique facts of this case and Respondent Carter's mental condition are not at issue. The Warden's petition for certiorari raises only discrete questions of law—whether a capital prisoner possesses a "right to competence" under *Rees v. Peyton*, 384 U.S. 312 (1966), and whether that decision permits an indefinite stay of the prisoner's habeas proceeding.

Carter's Opposition does nothing to undermine the Warden's request: The Court has never recognized a "right to competence" in federal habeas proceedings—a point that Carter has repeatedly stressed in this case; the federal appellate courts diverge sharply in their applications of *Rees*; and the Sixth Circuit's decision—permitting an indefinite stay of an incompetent prisoner's habeas case—runs headlong into AEDPA.

Finally, the Sixth Circuit's decision will bring capital habeas litigation to a halt. Now, any Ohio prisoner may invoke *Rees* by "refus[ing] to meet with his attorneys," "relay facts," or "communicate in detail." App. 8a. A district court must then stay all proceedings, authorize multiple psychological exams, conduct a hearing, render a decision on competency, and permit several rounds of appeal. After nine years of such litigation in this case, the district court is still no closer to reviewing the merits of Carter's habeas claims.

The Court issued its cryptic opinion in *Rees* forty-five years ago. Because the Sixth Circuit's novel and sweeping interpretation of that decision threatens Ohio's capital punishment scheme, the Court should grant review and clarify its precedent.

A. This Court has never addressed whether capital prisoners have a "right to competence" in habeas proceedings.

The Sixth Circuit identified "a statutory right for the [habeas] petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." App. 6a. The court and Carter both portray this holding as "a straightforward application of *Rees*." Opp. to Cert. at 5.

They are wrong. *Rees* says nothing of the sort. And in the years after *Rees*, several prisoners have asked this Court to realize the same "right to competence." Each time, the Court refused to consider the question.

For instance, in *Rector v. Bryant*, 501 U.S. 1239 (1991), mental examiners concluded that a capital habeas petitioner "would have considerable difficulty . . . work[ing] in a collaborative, cooperative effort with an attorney" and "he would not be able to recognize or understand facts which might be related to his case." *Id*. at 1240 (Marshall, J., dissenting from denial of certiorari). Despite those limitations, the Court denied his petition for certiorari. *Id*. at 1239.

Twenty years later, another capital petitioner alleged that he suffered "substantial impairments in [his] mental capacity," that he "c[ould] not assist counsel," and that he "c[ould] not communicate accurate information to counsel." Pet'n for Cert., *Bedford v. Collins*, No. 09-8671, at 12-14 (U.S. Jan. 15, 2010). The prisoner invoked his "rights to meaningful representation" under *Rees* and

requested a remand to the district court. *Id.* at 12. Again, the Court denied certiorari without comment. See *Bedford v. Collins*, 130 S. Ct. 2344 (2010).

If *Rees* recognized a "right to competence," then these prisoners were entitled to an indefinite stay of proceedings pending their restoration to competency. The Court's summary denial of their claims supports the opposite proposition: That *Rees* did not address this issue.

In fact, Carter has repeatedly acknowledged the dearth of Supreme Court authority in support of his position. In his initial request for a competency hearing, Carter claimed a "right to competence for all proceedings, including proceedings seeking collateral relief." Mot. for Comp. Det. and to Stay Proceedings, *Carter v. Bradshaw*, No. 3:02-cv-524, at 2 (N.D. Ohio Oct. 3, 2005) (Doc. 132). But he conceded that "[t]he United States Supreme Court has not determined whether such a right exists." *Id.* at 2 n.1. In a later pleading, Carter again admitted that "Supreme Court precedents do not conclusively resolve th[e] issue" of whether "a requirement of rational communication [exists] between Petitioner and his attorney during federal habeas proceedings." Reply to Warden's Mem., *Carter v. Bradshaw*, No. 3:02-cv-524, at 2 (N.D. Ohio Oct. 31, 2005) (Doc. 136).

The federal appellate courts have also noted this lack of guidance. In *Mines v. Dretke*, No. 03-11137, 2004 U.S. App. Lexis 26259 (5th Cir. Dec. 16, 2004), a capital prisoner asserted a "right to communicate with and assist his counsel effectively in a habeas proceeding." *Id.* at *15. The Fifth Circuit observed that "[n]either the Supreme Court nor this court ha[s] determined whether such a right exists." *Id.*

The Ninth Circuit made a similar comment in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 810 (9th Cir. 2003): Whether "a district court [must] stay habeas proceedings when a petitioner cannot assist counsel because he is incapable of rational communication . . . is an issue the Supreme Court precedents do not conclusively resolve."[1]

No evidence supports the Sixth Circuit's contrary conclusion—that *Rees* "long ago" established a right to competence in federal habeas proceedings. App. 4a.

B. The circuits have diverged on this issue.

Lacking clarification, four circuits apply *Rees* to a narrow category of cases where the prisoner "elects to abandon further legal proceedings." *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987). For these courts, the rationale of *Rees* is applied only to the "determination [whether] a petitioner was competent to abandon collateral review of his . . . capital murder conviction and death sentence." *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000); accord *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006); *Henderson v. Haley*, 353 F.3d 880, 893 (11th Cir. 2003).

As Carter recognizes, these cases all involved "an *affirmative withdrawal* of habeas claims." Opp.

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[1] The Ninth Circuit in *Rohan* instead located a "right to competence" in 18 U.S.C. § 3599, which supplies appointed counsel to indigent capital prisoners. (The State of Arizona is seeking review of that decision. See Pet'n for Cert., *Ryan v. Gonzales*, No. 10-930.) The Sixth Circuit did not ground its decision in § 3599, and Carter's Opposition does not rely on *Rohan* as an alternative basis to defend the judgment below.

to Cert. at 7 (emphasis added). After the prisoner expressed a desire to terminate his proceeding, the courts consulted *Rees* to assess his competency to make that choice.

But Carter has not sought to terminate his habeas proceeding. To the contrary, Carter has indicated that he "does not wish to die and wants to avoid being executed." Merit Br. of Appellee, *Carter v. Bradshaw*, No. 08-4377, at 35-36 (6th Cir. June 2, 2009).

The Sixth Circuit is the first court to apply *Rees* to this situation, finding that the decision was "not cabin[ed] . . . to only scenarios where a petitioner chooses to terminate an appeal." App. 7a. Rather, the Sixth Circuit indicated, *Rees* is triggered whenever a prisoner's "psychological disorders affect[] his abilities to relay facts to his counsel and communicate in detail." App. 8a.

What is more, the Sixth Circuit's decision sets up a direct conflict with the Eighth Circuit. After unsuccessfully attempting suicide, the capital prisoner in *Rector v. Clark*, 923 F.2d 570, 571 (8th Cir. 1991), underwent a lobotomy. Due to "organic deficits," doctors concluded that the prisoner "would have considerable difficulty . . . in being able to work in a collaborative, cooperative effort with an attorney," and that "he would not be able to recognize or understand facts which might be related to his case." *Id.* at 572.

The Eighth Circuit rejected this "ability-to-assist-counsel" deficiency as a reason to delay the federal habeas proceeding. *Id.* at 572-73. The court

then evaluated and dismissed the prisoner's habeas claims on their merits. *Id.* at 573.

Simply put, the disagreement among the lower courts is stark. The Eighth Circuit has said that a prisoner's incompetence will not justify suspension of the habeas proceeding. And at least four circuits limit *Rees* to cases where the prisoner "direct[s] his counsel to withdraw his petition . . . and to forgo any further federal habeas proceedings," *Michael*, 459 F.3d at 420. But the Sixth Circuit takes a different view: An expansive "right to competence" exists in post-conviction proceedings under *Rees*, even where the prisoner has not attempted to withdraw his petition. And a district court must stay indefinitely the habeas proceeding if it finds the prisoner to be incompetent.

The Court should grant review and resolve this confusion.

C. The Sixth Circuit's decision to stay indefinitely Carter's habeas proceeding violates AEDPA.

The judgment below warrants review for an additional reason: The Sixth Circuit's stay order violates AEDPA.

Carter asserts, and the Warden agrees, that "federal courts retain their 'ordinary' power to issue stays" in habeas proceedings. Opp. to Cert. at 7 (alteration omitted). But while "AEDPA does not deprive district courts of that authority . . . it does circumscribe their discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). A federal court's decision to stay a habeas proceeding "must . . . be compatible with AEDPA's purposes." *Id.*

In defending the need for an indefinite stay, the Sixth Circuit stressed Carter's present inability to communicate with his attorneys about his habeas petition: "Only Carter knows critical parts of the factual basis for these claims . . . and Carter 'is better positioned than anyone' to provide that evidence." App. 12a (citation omitted). Because "the factual basis for Carter's claims is locked away exclusively in his memory," the Sixth Circuit concluded that "[i]t would be inappropriate . . . to proceed through this action without th[ose] foundational facts." App. 12a-13a.

Carter's Opposition repeats this justification: His habeas proceedings must come to a halt because he is currently "incapable of providing the communication essential to the pursuit of [his] claims." Opp. to Cert. at 8.

This rationale rests on a mistaken premise: It assumes that, but for his mental illness, Carter might be able to identify some yet-to-be-unearthed evidence, information, or fact for this habeas proceeding. That is wrong. Because Carter's habeas claims "w[ere] adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), "the record under review is limited to . . . *the record before the state court*." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (emphasis added). "[E]vidence later introduced in federal court is irrelevant to § 2254(d)(1) review"; the courts "are barred from considering [it]." *Id*. at 1400, 1411 n.20.

Carter's habeas proceeding therefore turns "on the record that was before the state court." *Id*. at 1400. Any new information that Carter might communicate in the future to his attorneys, were his

condition to improve, would not alter the proceeding's outcome. For that reason, the Sixth Circuit's indefinite stay order—premised on the need to preserve Carter's ability "to provide . . . evidence in support of his habeas claims," App. 12a—violates AEDPA.

D. The Sixth Circuit's decision disrupts Ohio's capital punishment scheme.

Carter dismisses, without discussion, the Warden's remaining arguments for certiorari. The Sixth Circuit's decision radically alters capital habeas litigation in Ohio and elsewhere.

First, the Sixth Circuit's decision effectively displaces *Ford v. Wainwright*, 477 U.S. 399 (1986), as the seminal case on prisoner incompetency.

Justice Powell's controlling opinion in *Ford* condemned "the practice of executing the insane": A State may not proceed with an execution if the prisoner cannot rationally understand "the punishment [he is] about to suffer and why [he is] to suffer it." *Id*. at 418, 422 (Powell, J., concurring). Before adopting this narrow standard, Justice Powell made clear that a prisoner's "[in]ability to make arguments on his own behalf" *was not a basis for halting a capital sentence*. *Id*. at 419.

The Sixth Circuit held differently in this case: It indicated that a capital habeas petitioner must "be competent enough to . . . assist properly in his defense." App. 6a. And if he falls below that standard, the Sixth Circuit instructed the district court to stay indefinitely the habeas proceeding—and the State's ability to enforce the capital sentence—

"until the petitioner is found to be competent." App. 14a.

This framework is irreconcilable with *Ford*. A prisoner in the Sixth Circuit can now obtain an indefinite stay of his execution based on his "[in]abilities to relay facts to his counsel and communicate in detail," App. 8a—the very deficiencies that Justice Powell *rejected* as justifications to forestall a capital sentence.

For that reason, *Ford* is toppled in the Sixth Circuit. Going forward, capital prisoners in Ohio, Kentucky, and Tennessee will litigate incompetency claims in this new, more permissive forum.[2]

Second, the decision below will give rise to interminable delays in federal habeas proceedings. A prisoner can activate the Sixth Circuit's "right to competence" with ease: In this case, Carter "refused to meet with his attorneys" and his attorneys expressed concern that Carter "could not understand the proceedings or assist counsel." App. 8a. The competency evaluation process is quite protracted: The parties have spent nine years examining Carter's mental capacity, haggling over expert findings, submitting updated reports, and taking two interlocutory appeals to the Sixth Circuit. And that process continues to this day: Consistent with the Sixth Circuit's directive, the district court must determine whether some of Carter's claims can be litigated piecemeal. App. 15a. Disputes over forced

[2] Capital prisoners will benefit not just from an expansive definition of "incompetence." As the Warden previously documented, the Sixth Circuit's framework circumvents a number of exhaustion and standing requirements that attach to *Ford* claims. See Pet'n for Cert. at 20.

medication and the procedures by which the district court is "to monitor Carter's on-going condition" are on the horizon. App. 14a.

"All prisoners are at risk of deteriorations in their mental state." *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). And each capital prisoner in the Sixth Circuit will now press a claim of incompetency under *Rees*. At best, he will obtain an indefinite stay of his habeas proceeding. At worst, the collateral litigation will delay his federal habeas proceeding by a decade. Either way, the Sixth Circuit has afforded all capital prisoners a tool by which to "prolong their incarceration and avoid execution of the sentence of death." *Rhines*, 544 U.S. 277-78.

If the Sixth Circuit's reading of *Rees* is correct, then the State of Ohio and its citizens must endure this protracted process before implementing any capital sentence. But all the evidence points to the contrary: The Court has rejected similar incompetency claims, the other circuits have adopted far more restrictive interpretations of *Rees*, and AEDPA undermines the central rationale of the Sixth Circuit's decision. At a minimum, the novelty of the court's holding and its disruption to the capital habeas process warrant this Court's attention.

CONCLUSION

The Court should grant the Warden's petition.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
Terry Tibbals, Warden

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