No. 11-218

IN THE

Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

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

BRIEF OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Does a court have discretion to stay habeas proceedings when the petitioner's mental incompetence renders him unable to provide assistance that is necessary to the litigation of his claims?

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INTRODUCTION

The Anglo-American legal tradition has long recognized that the mental competence of a criminal defendant is essential to the fairness of all stages of the proceedings against him. The reason, articulated by Blackstone and other leading expositors of the common law, is intuitive: a defendant who is not of sound mind is unable to come forward with critical facts that could provide a defense or a ground for overturning his conviction. More recent developments pertaining to the review of criminal convictions, such as the Antiterrorism and Effective Death Penalty Act (AEDPA), have not diminished the force of the basic moral principle that mental illness should not deprive an individual of the opportunity to defend himself or seek relief from a criminal conviction.

Following in this tradition, the court below stayed the habeas corpus proceedings of respondent Sean Carter, a schizophrenic who was physically and mentally absent from his own trial proceedings and today suffers from hallucinations, confuses his own lawyers with the State's witnesses, and cannot remember the penalty-phase verdict at his trial. Both the district court and the court of appeals concluded that a suspension of the proceedings was warranted because Carter alleged substantial claims of constitutional error that could not be litigated without his competent assistance.

In this unusual circumstance, where a defendant's mental state prevented him from actively participating in his own defense at trial and now precludes him from providing necessary assistance on habeas review, staying the proceedings is a

reasonable exercise of a habeas court's inherent discretion in light of our legal tradition's longstanding concern for competence. This Court should affirm the narrow and fact-bound decision of the court of appeals remanding for a determination of the scope of the stay.

STATEMENT OF THE CASE

A. Facts and state proceedings

Sean Carter's current mental illness was presaged both by his family history of schizophrenia and a childhood characterized by instability and abuse. He was born to a schizophrenic mother, and his half-uncle and half-aunt likewise suffered from schizophrenia. Pet. App. 30a; J.A. 29; Trial Transcript ("T.T.") 563.

When Carter was two years old, Children's Services removed him from his biological mother's care after he was discovered tied to a couch, malnourished with an enlarged stomach. Pet. App. 30a; T.T. 3284.

Under the care of a foster mother, Ida Magee, Carter initially flourished in his first years in school. T.T. 3340-41. Nonetheless, a report from this period describes Carter as "schizoid-prone and at high risk of becoming detached from reality." Pet. App. 30a. Ms. Magee wanted to adopt Carter, but state regulations prevented her from doing so. J.A. 62.

Although Carter's case worker warned that he would have "great difficulty leaving his foster home" and was still "schizoid-prone," T.T. 3261, Carter was placed with a prospective adoptive family, the Smiths, at age eight, *id.* at 3289. Within months, Children's Services removed Carter from their

custody because he was verbally and physically abused. Pet. App. 30a.

Carter was then adopted by the Carter family. *Id.* Carter reported that he was physically abused by his adoptive father, and his adoptive mother threatened to cut off his penis. J.A. 61. Carter also stated that at some point during his childhood he was sexually abused. T.T. 3314.

In September 1997, approximately six months after his eighteenth birthday, Carter killed Veader Prince, his adoptive grandmother. He was charged with aggravated murder, aggravated burglary, aggravated robbery, and rape. J.A. 32.

Prior to Carter's trial, the court held a competency hearing, at which a court-appointed psychologist, Dr. Stanley Palumbo, opined that Carter was competent to stand trial, even though Carter indicated he suffered from auditory hallucinations, including hearing the voice of the devil. T.T. 22, 32-33. A sheriff's deputy testified that Carter was suicidal and had attempted to take his own life with a shank. *Id.* at 97. The defense did not call or introduce the reports of social worker Albert Linder or psychologist Douglas Darnall, both of whom had previously evaluated Carter. J.A. 38-39. Linder had found that Carter suffered from paranoia and auditory and visual hallucinations, among other symptoms, and "may be suffering from a major psychiatric disorder." *Id.* at 39. Dr. Darnall had found that Carter was suffering from a mental disorder. *Id.* Without the benefit of these opinions, the court concluded Carter was competent to stand trial. T.T. 100.

On the day the trial was scheduled to begin, Dr. Stephen King, a defense expert, notified the court that he had concerns about Carter's competence to stand trial, so the court held a second competency hearing. *Id.* at 469-72. Dr. King testified that Carter reported continued hallucinations, *id.* at 607, laughed inappropriately throughout Dr. King's evaluation, and discussed thoughts of killing trial counsel, *id.* at 559. Dr. King diagnosed Carter with a psychotic disorder that rendered him incapable of assisting in his defense. *Id.* at 567-68. The prosecution's two witnesses confirmed that Carter felt hostility toward his attorneys, *id.* at 704-05, 794, and reported continued hallucinations, *id.* at 668-69, 791, but both prosecution experts opined that Carter was competent to stand trial, *id.* at 636-37, 798-99. The trial court again found Carter competent, and the case proceeded to trial. *Id.* at 860.

During opening statements, Carter spontaneously asked the court if he was required to remain at the trial. *Id.* at 2268. The court insisted that Carter attend the remainder of the day's proceedings while it considered the question. *Id.* at 2280. In reaction, Carter lunged at the judge and had to be restrained and removed by courtroom deputies. *Id.* at 2281-82.

For the remainder of the trial, Carter was placed in a separate room in which he could monitor the proceedings by closed circuit television. *Id.* at 2282. Courtroom deputies were instructed to notify the defense if Carter wanted to communicate with his attorneys. *Id.* at 2286. Defense counsel assured the court that they would confer with Carter "periodically." *Id.* Because of Carter's removal from the trial, neither the judge nor Carter's attorneys

were able to observe Carter continuously and take notice of his mental state.

On the last day of the guilt phase, the defense stated that Carter wanted to return, unshackled, to the courtroom. *Id.* at 3094. Courtroom deputies indicated that if Carter were unshackled they could not protect his attorneys, so the court conditioned Carter's unshackled return on his attorneys' waiver of their own protection. *Id.* at 3094-95. One attorney refused. *Id.* at 3095. The court did not hear directly from Carter regarding the possibility of his return to the trial, and Carter remained absent. J.A. 51.

Carter was convicted of criminal trespass, aggravated robbery, rape, and aggravated murder. T.T. 3243-45.

Based on defense counsel's own concerns about Carter's behavior, counsel purported to waive Carter's presence for the mitigation phase. Counsel stated: "I am still worried about him behaving during this phase, so the bottom line is he wants to stay where he's at." *Id.* at 3251. The court inquired no further.

The mitigation hearing was conducted in a single afternoon. The defense called two witnesses — a social worker and a mitigation specialist. The social worker, who had worked on Carter's case at Children's Services, recounted Carter's placement history and testified to her fear that he was "schizoid-prone." *Id.* at 3253-54, 3258, 3284-91. She acknowledged that her last contact with Carter was in 1986, when he was seven. *Id.* at 3301. Thus, she had no firsthand knowledge of his later childhood

development or his interactions with his adoptive family.

The mitigation specialist, psychologist Sandra McPherson, described Carter's family history of mental illness, family placement history, and childhood emotional problems. *Id.* at 3304-08. Dr. McPherson opined that Sean's "underlying rage . . . is expressed unfortunately in a mixture of both aggression and sexuality insofar as his fantasy life is concerned" and "[t]hat kind of fantasy life is known to produce the[] kinds of crimes" for which Carter was on trial. *Id.* at 3311. According to Dr. McPherson (still on direct examination), Carter "lacks an understanding of pain; he doesn't have the ability to know what other people are thinking, nor does he care; he's always alone." *Id.* at 3318. On cross examination, she agreed that Carter is the type of person who does not "really value life." *Id.* at 3334.

Echoing Dr. McPherson's themes, the defense in closing highlighted Carter's "lack of empathy," *id.* at 3367, and characterized him as a "piece of machinery . . . that doesn't feel for other people," *id.* at 3369. Defense counsel likened Carter to "a big bomb." *Id.* at 3375. Defense counsel concluded by inviting the jury to review the mitigating evidence and "go through it and time line it, whatever, and figure [it] out." *Id.* at 3379.

The jury returned a recommendation of death, which the court imposed. *Id.* at 3408, 3422.

On direct appeal to the Ohio Supreme Court, Carter's claims included incompetence to stand trial and ineffective assistance of counsel; the court

rejected all claims and affirmed the conviction. *State v. Carter*, 734 N.E.2d 345, 355-57, 360 (Ohio 2000).

Carter's state post-conviction petition included his claims of incompetence at trial and ineffective assistance of counsel regarding incompetence and mitigation. 6th Cir. App. 5460-61, 5464-65. Carter sought an evidentiary hearing to establish the facts relevant to his claims. *Id.* at 5465. Without providing Carter a hearing, the state trial court held that the claims were barred by res judicata because they were raised on direct appeal; in the alternative, the trial court concluded that the record was complete and rejected Carter's claims as unsupported by the record. *Id.* at 5532-34, 5537-38. Carter appealed, and the appellate court affirmed. *State v. Carter*, No. 99-T-0133, 2000 Ohio App. LEXIS 5935, at *8-*14 (Ohio Ct. App. Dec. 15, 2000). The Ohio Supreme Court denied review. *State v. Carter*, 746 N.E.2d 612 (Ohio 2001).

Beginning in 2002, Carter was represented by attorneys from the Office of the Ohio Public Defender (OPD). In 2003, OPD attorneys moved to reopen the direct appeal in order to claim ineffective assistance of appellate counsel for insufficient pursuit of the claims regarding ineffective assistance of trial counsel. 6th Cir. App. 5397-5401.[1] The Ohio Supreme Court summarily denied the motion. *Id.* at 5443.

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[1] *See State v. Murnahan*, 584 N.E.2d 1204, 1208-09 (Ohio 1992) ("[C]laims of ineffective assistance of appellate counsel are not cognizable in [Ohio] post-conviction proceedings. . . . [The defendant] may pursue delayed reconsideration [of his appeal]."), *codified into rule as modified*, Ohio R. App. Pro. 26(B).

B. Proceedings below

When OPD attorneys sought to pursue federal habeas relief on Carter's behalf, Carter refused to meet with them. J.A. 18. Based on this refusal, his placement in Ohio's psychiatric incarceration facility, and his state case worker's statement that Carter was mentally ill, the OPD filed a suggestion of incompetence with the District Court for the Northern District of Ohio. *Id.* at 18-19. Counsel also filed a habeas petition on Carter's behalf, asserting, among other claims, incompetence to stand trial, ineffective assistance of trial and appellate counsel regarding the competence issue, and ineffective assistance of trial counsel in mitigation. *Id.* at 37-54, 54-70, 75-76, 77-79 (amended petition).

In response to the state's contention that counsel did not represent Carter's interests, counsel obtained an affidavit from Carter stating that he wanted them to pursue habeas relief on his behalf. *Id.* at 24. But Carter subsequently refused to meet with his counsel, instead lying on the floor outside the visiting room during counsel's attempted visit. *Id.* at 103. On other occasions, Carter was willing to meet with counsel but did not seem to remember who counsel was and said he did not care what happened in his case. *Id.* at 103-04.

The court granted a competency hearing, at which both sides presented the opinions of mental health experts. Pet. App. 28a-36a. Through a report and testimony, one of Carter's experts, psychologist Bob Stinson, diagnosed Carter as suffering from schizophrenia, as well as other psychological disorders. *Id.* at 30a. He testified that Carter experienced hallucinations, distorted thinking,

unpredictable agitation, and spontaneous laughter. *Id.* Carter could not effectively communicate; he provided only vague answers to questions because he lacked the ability to elaborate. *Id.* at 31a. Carter did not understand the nature of the habeas proceedings, held the false belief that he could not be executed unless he volunteered, and misidentified the State's expert witness against him as one of his own attorneys. *Id.* A neuropsychologist, Dr. Michael Gelbort, testified to Carter's fragmented and distracted thinking and explained that Carter would have trouble responding to questions and recalling events. *Id.* at 33a.

The State's expert, Dr. Phillip Resnick, concurred in Dr. Stinson's diagnosis of schizophrenia. *Id.* at 34a. But, relying on second-hand reports of Carter's conversations with a social worker, Dr. Resnick disputed that Carter held false beliefs regarding his risk of execution. *Id.* Dr. Resnick acknowledged that Carter lacked the ability to describe details of events, but Dr. Resnick nonetheless opined Carter could sufficiently communicate with his counsel. *Id.* at 35a.

After the hearing, Dr. Stinson submitted a supplemental report on Carter's condition, which had deteriorated further. He noted that the State itself temporarily transferred Carter back to its psychiatric incarceration facility. *Id.* He observed that Carter continued to experience hallucinations and now was "unable to comprehend or respond to communications from others." *Id.* Carter engaged in nightly screaming and laughing. *Id.* at 36a. Habeas counsel added that Carter could not remember his trial, the penalty-phase verdict, his trial attorneys, or even the experts who had recently examined him. J.A. 106-07.

The district court found Carter incompetent. Pet. App. 44a. The court credited Dr. Stinson's conclusion that Carter could not comprehend the nature of the habeas proceedings, and the court found that testimony from both sides showed that Carter could not assist his counsel because his mental illness prevented him from accurately recounting events or identifying significant or even relevant information he should convey. *Id.* at 45a-47a.

Relying on *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), the district court concluded that adjudicating Carter's habeas petition was inappropriate in light of his incompetence. Pet. App. 36a-42a, 47a. The court found that Carter's competent assistance — in the form of his recollections — was needed for his claims of incompetence to stand trial, ineffective assistance of trial and appellate counsel regarding competence, and ineffective assistance of trial counsel during the mitigation phase. *Id.* at 42a-43a, 47a.

The district court decided that the appropriate remedy was to dismiss Carter's habeas petition without prejudice and prospectively toll the statute of limitations, allowing Carter to re-file his petition after he was restored to competence. *Id.* at 52a-53a.

The Court of Appeals for the Sixth Circuit amended the district court's order and remanded the case for reconsideration. Citing *Rees v. Peyton*, 384 U.S. 312 (1966), in which this Court required an inquiry into the competence of a habeas petitioner who wished to abandon his petition, the court of appeals held that the district court had not abused its discretion in holding a competency hearing because Carter's refusals to meet with his attorneys

would have effectively terminated his opportunity for habeas review. Pet. App. 7a-8a. The court further concluded that the district court, based on the evidence before it, had not abused its discretion in finding Carter incompetent to assist counsel. *Id.* at 8a-9a.

However, the court of appeals rejected the district court's remedy as overly broad. The court noted that the terms of the district court's dismissal unfairly shifted to the warden the onus of attempting to proceed by repeatedly filing petitions seeking to enforce Carter's sentence. *Id.* at 10a. The proper course, the appellate court held, was for the district court to employ its inherent discretionary authority to stay the proceedings so that the court could "monitor Carter's on-going condition." *Id.* at 14a. The court of appeals explained that the district court should stay only those claims that require Carter's assistance, such as claims whose "factual basis . . . is locked away exclusively in his memory." *Id.* at 12a. Claims for which Carter's assistance was "not essential" — for instance, because "evidence could be replicated by, or substituted with, other sources" — could be litigated by a next friend. *Id.* at 13a. The court of appeals therefore held that Carter's petition should be stayed "with respect to his ineffective assistance claims and any other claims that the district court determines essentially require his assistance," and the court remanded for imposition of a stay and determination of which of the remaining claims "essentially require [Carter's] assistance." *Id.* at 15a.

Without challenging the conclusion that Carter was incompetent and unable to assist his counsel,

the dissent contended that all of Carter's claims should be pursued by a next friend. *Id.* at 16a. The dissent acknowledged that at least two of Carter's claims could benefit from his assistance, *id.* at 24a, but argued that "[t]he incompetency of witnesses does not stop civil proceedings," *id.* at 25a.

SUMMARY OF ARGUMENT

Habeas courts have inherent discretionary power to enter stays. And our common-law tradition has long recognized the importance of a criminal defendant's competence to the fair adjudication of his case, from arraignment to execution. In *Rees v. Peyton*, 384 U.S. 312 (1966), this Court synthesized these principles and stayed a capital habeas case because of the petitioner's incompetence. This case asks the Court to confirm a court's equitable power to issue a stay where it finds that a habeas petitioner is incompetent and has potentially meritorious, fact-based claims for which his assistance is necessary.

The warden argues vigorously against a statutory right to a competency stay. This Court need not consider that argument, because a simpler, narrower ground of decision is available: the equitable discretion of habeas courts.

At common law, the competence of a criminal defendant was a *sine qua non* of adjudication at all stages of the case. The bar on proceeding against a charged or convicted incompetent individual — a bar set down by Blackstone and other leading common-law theorists, and recognized in early American practice and by this Court — proceeds from a basic moral proposition: no individual should lose his chance to allege a viable defense to his charge or

sentence simply because he has had the misfortune to be stricken with a debilitating mental illness.

The warden asks this Court to abjure this time-honored principle in service of interests of much more recent vintage — the finality and efficiency goals underlying AEDPA. But AEDPA's purposes do not require the categorical elimination of district courts' equitable discretion to apply traditional precepts carried down from the common law. As this Court has repeatedly admonished, AEDPA's purposes are not to be pursued at all costs, and in some cases a petitioner's interest in obtaining review of potentially meritorious claims must take priority. For this reason, this Court should not adopt the warden's proposed blanket ban on incompetency stays. A case-by-case approach of guided discretion is more appropriate.

The facts of this case highlight factors that can channel district courts' discretion in the competency context. First, to warrant a stay, a petitioner should be shown based on expert opinion to be genuinely incompetent. Trial courts are fully qualified to determine competence and have done so for centuries. Second, the petitioner should be raising claims for which his competent assistance is necessary, such as claims for which the petitioner's recollection is needed to establish key facts not available in the record. Assessing this second factor inevitably involves a degree of uncertainty — if the court knew precisely what the petitioner could contribute if he were competent, the petitioner's assistance would be unnecessary — but the common law tolerated this uncertainty and erred on the side of the prisoner, in service of what Blackstone called

"the humanity of the English law." 4 William Blackstone, *Commentaries on the Laws of England* 24 (1769). Third, the petitioner's claims should be viable under federal habeas law. In this regard, this Court's recent decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), is relevant but not dispositive. *Pinholster* does not preclude the consideration of new facts in all federal habeas cases; in certain circumstances, the federal court may consider them, while in others the court may grant the petitioner the opportunity to return to state court to exhaust claims involving newly developed facts. Because it constricts the universe of cases in which new facts can be considered, *Pinholster* may cabin the exercise of district courts' discretion to issue incompetency stays, but it does not snuff out such discretion entirely.

The warden argues that an indefinite stay is categorically impermissible. This argument misreads *Rhines v. Weber*, 544 U.S. 269 (2005), which held only that an indefinite stay is impermissible when a petitioner requests a stay-and-abeyance so that he can return to state court and exhaust all his claims. In fact, *Rhines* supports the type of guided equitable discretion that the lower courts have exercised — and, under the Sixth Circuit's narrow remand order, will continue to exercise — in this case. Moreover, the warden's broadside against indefinite stays ignores *Rees*, in which this Court stayed a habeas case indefinitely because of the petitioner's incompetence.

The warden's fears that incompetency stays will become widespread are unjustified. In the forty-five

years since *Rees*, the number of stays granted has been negligible.

Incompetency stays are appropriately reserved for unusual circumstances. But in such circumstances — including this case, in which the petitioner has suffered from mental illness since before his trial and raises fact-based claims for which his competent assistance is necessary — such stays must be available, so that district courts can exercise their discretion, consistent with our common-law tradition, to protect against the forfeiture of claims because of mental illness.

ARGUMENT

I. Courts Have Discretion To Stay Habeas Proceedings Because Of The Petitioner's Mental Incompetence.

This Court need not consider the statutory argument with which the warden's brief begins — i.e., that there is no "statutory right" under 18 U.S.C. § 4241 to be competent in habeas proceedings. Although the court of appeals used that phrase (perhaps inaptly) to describe *Rees v. Peyton*, 384 U.S. 312 (1966), in which this Court cited the predecessor provision of § 4241 in ordering a competency hearing for a habeas petitioner who tried to abandon his petition, the holding below is narrower that the warden suggests. Following this Court's example in *Rees*, 384 U.S. at 314, the Sixth Circuit used § 4241 as a guide to the competency inquiry that might, but need not always, occur: district courts, the Sixth Circuit explained, "*may* employ section 4241." Pet. App. 7a (emphasis added). The basis on which the court of appeals endorsed the district court's decision

to suspend Carter's case was the district court's inherent authority "to stay proceedings and manage its docket as it sees fit." Pet. App. 14a.

The dispositive question in this case is the second question the warden addresses: whether a district court has discretion to stay habeas proceedings based on the habeas petitioner's incompetence. In accordance with this Court's habeas jurisprudence, our common-law tradition, and the inherent powers of the federal courts, the answer is yes.

A. District courts possess inherent authority to stay cases, including habeas cases.

The power of a district court to manage the cases before it includes the power to stay proceedings. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379, 381-82 (1935), *overruled on other grounds*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287 (1988). This power applies no less in habeas cases than in other types of cases. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005).

Although AEDPA "circumscribe[s]" courts' discretion to stay habeas cases, insofar as stays must be compatible with AEDPA's purposes of reducing delays in habeas review and promoting finality, "AEDPA does not deprive district courts of [their traditional stay] authority[.]" *Id.* In passing AEDPA, Congress "did not seek to end every possible delay at all costs." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). On the contrary, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental

fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

Accordingly, the Court has recognized that, in some circumstances, "the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions." *Rhines*, 544 U.S. at 278. Interpreting AEDPA requires consideration not only of the statute's purposes, but also of the practical effects of any proposed interpretation, particularly where petitioners are at risk of forever losing their opportunity for federal review of particular claims. *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007); *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (holding that if state collateral review provides the only opportunity to raise a particular claim, an attorney's erroneous failure to raise that claim in that setting excuses procedural default, because otherwise "no court will review the prisoner's claims").

Applying these principles, the Court has held that, notwithstanding AEDPA, courts may apply the equitable principles that have traditionally governed habeas corpus, such as equitable tolling. *Holland*, 130 S. Ct. at 2562. The Court has carefully and pragmatically interpreted AEDPA's bar on "second or successive" petitions so as not to foreclose mentally incompetent individuals' efforts to invoke the Eighth Amendment's ban on executing the insane — a claim that usually becomes ripe only after the first habeas petition has been filed. *Panetti*, 551 U.S. at 947. And this Court has unanimously held that courts may stay mixed petitions (i.e., habeas petitions that include both exhausted and unexhausted claims) and

hold them in abeyance pending resolution of unexhausted claims in state court. *Rhines*, 544 U.S. at 278.

Like petitioners with potentially meritorious claims unexhausted through no fault of their own, and petitioners entitled to equitable tolling, a mentally incompetent petitioner has a substantial and legitimate interest in retaining the ability to pursue his claims. As explained below, a petitioner's interest in not losing the opportunity for a full hearing of his claims on account of mental illness has long been recognized in the common law and the jurisprudence of this Court.

B. Our tradition recognizes the importance of mental competence at all stages of criminal proceedings.

Because habeas corpus is a remedy with "its root deep [in] the genius of our common law," *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (citations and internal quotation marks omitted), "this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country" to inform its application of the Great Writ. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).[2]

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[2] The warden does not deny this point; rather, he argues that the common law should not inform the interpretation of the right-to-counsel statute, 18 U.S.C. § 3599. But the Court need not construe that statute to determine the scope of a habeas court's inherent authority to manage the cases before it. *See, e.g.*, *Holland*, 130 S. Ct. at 2560 ("[E]quitable principles have traditionally governed the substantive law of habeas corpus[.]" (citation and internal quotation marks omitted)).

At common law, the mental competence of an accused or convicted individual was a *sine qua non* not only at trial but also at subsequent stages of the proceedings through and including execution. Although habeas review of criminal convictions did not then exist in its present form, *see Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-03 (1830), one of the chief reasons for the common law's concern for competence was to enable the accused to retain the opportunity to assert defenses, even after conviction. As Blackstone explained:

> [T]hough a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for . . . *the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings*.

4 William Blackstone, *Commentaries on the Laws of England* 388-89 (1769) (emphasis added); *see also id.* at 24-25 ("[I]f after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.").

Other leading common-law authorities agreed that criminal proceedings, *at whatever stage*, from arraignment to execution, ought to be stayed if the accused is incompetent, and they agreed with Blackstone that a primary rationale was the

possibility that the accused or convicted individual might, if sane, be able to assert a defense. *See* John Hawles, *Remarks on Mr. Bateman's Tryal*, *in Remarks upon the Tryals* (1689), *reprinted in* 11 How. St. Tr. 473, 476 (1811) ("[N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed . . . . [T]he true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is by an act of God . . . disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence[.]"); 1 Matthew Hale, *The History of the Pleas of the Crown* 35 (Lawbook Exchange 2003) (1736) ("[I]f [a] person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."); *see also Frith's Case*, 22 How. St. Tr. 307, 311 (1790) ("[S]uch is the humanity of the law of England, that in all stages both when the act is committed, at the time when the prisoner makes his defence, and even at the day of execution, it is important to settle what his state of mind is[.]").

Nineteenth-century British commentators (some published in the United States as well as Britain) agreed, all restating, sometimes verbatim, the Blackstone rule. *See* 1 William Oldnall Russell, *A*

Treatise on Crimes and Indictable Misdemeanors 12 (1831); Leonard Shelford, *A Practical Treatise of the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind* 595 (2d ed. 1847); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 760-61 (5th Am. ed. 1847). Nineteenth-century American practice adhered to the Blackstone position. *See, e.g.*, *Youtsey v. United States*, 97 F. 937, 940-41 (6th Cir. 1899); *State v. Vann*, 84 N.C. 722 (1881); *see also In re Buchanan*, 61 P. 1120, 1121 (Cal. 1900) (discussing a state statute implementing the common law); *Freeman v. People*, 4 Denio 9, 19-20 (Sup. Ct. N.Y. County 1847) (same); *see generally* 2 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 664 (2d ed. 1872) ("[A] prisoner cannot be tried, sentenced, or punished, while he is known to be insane."). The Supreme Court of Michigan explained specifically that "insanity, when discovered, was held at common law to bar any further steps against a prisoner, *at whatever stage of the proceedings*." *Underwood v. People*, 32 Mich. 1, 1 (1875) (emphasis added).

Concern for the loss of the mentally incompetent individual's opportunity to defend himself from a charge or a judgment extended to any available grounds: both eighteenth- and nineteenth- century authorities referred to the possibility that the incompetent person could provide "some reason" to stay the proceedings, 4 Blackstone, *Commentaries* 389; "allege somewhat in stay of judgment or execution," 1 Hale, *Pleas of the Crown* 35; or "assign[] any error in the judgment," 1 Chitty, *Practical Treatise* 761.

Over a century ago, this Court cited Blackstone's position along with Hale's as indicative of the common-law rule on incompetence. *See Nobles v. Georgia*, 168 U.S. 398, 406-07 (1897). And Justice Frankfurter, in a prescient dissent from the Court's rejection of a due process claim by an allegedly insane individual set to be executed, *see Solesbee v. Balkcom*, 339 U.S. 9 (1950), *abrogated by Ford v. Wainwright*, 477 U.S. 399 (1986), referred to the principle that "one under sentence of death ought not, by becoming non compos, be denied the means to 'allege somewhat' that might free him" as "the unbroken command of English law for centuries preceding the separation of the Colonies." 339 U.S. at 19-20 (Frankfurter, J., dissenting) (quoting 1 Hale, *Pleas of the Crown* 35).

In the contexts of competence to stand trial and competence to be executed, this Court's jurisprudence has incorporated and perpetuated the common-law view on competence. In explaining why an incompetent person cannot be subjected to a criminal trial, this Court has repeatedly voiced Blackstone's principal concern: "[I]f he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (quoting 4 Blackstone, *Commentaries* 24); *accord*, *Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996); *Medina v. California*, 505 U.S. 437, 446 (1992). The Court likewise cited Blackstone, along with Hale, Hawles, and others, in support of its holding in *Ford v. Wainwright*, 477 U.S. 399 (1986), that the Eighth Amendment bars the execution of the mentally incompetent. *See id. at* 406-09.

Although Justice Powell joined the portion of the Court's opinion in *Ford* setting forth its Eighth Amendment holding and its common-law underpinnings, his concurrence questioned the contemporary relevance of Blackstone's and Hale's concern that a defendant retain the ability to make arguments on his own behalf. *See id.* at 420-21 (Powell, J., concurring in part and concurring in the judgment). Justice Powell expressed faith that, in light of more comprehensive modern review procedures, including federal habeas corpus, it is "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Id.* at 420.

But the common-law concern that an incompetent individual "might have offered some reason, if in his senses, to have stayed these respective proceedings," 4 Blackstone, *Commentaries* 389, retains its vitality where a petitioner's incompetence disables him from communicating grounds for relief and thereby jeopardizes the effectiveness of federal habeas corpus itself, one of the review procedures upon which Justice Powell relied. *See Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 811 (9th Cir. 2003) (Kozinski, J.). "It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment); *see also Holland*, 130 S. Ct. at 2562 ("[T]he 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000))). Therefore, the common law's traditional reasons for insisting on competence at every stage of the proceedings are acutely relevant to the exercise

of a court's discretion in the case of an incompetent habeas petitioner.

C. The incompetence of a habeas petitioner is a valid reason to stay habeas proceedings.

Over a century ago, this Court in dicta synthesized the common-law concern for competence with courts' longstanding discretion to manage post-conviction proceedings: "[B]y the common law, if, after conviction and sentence, a suggestion of insanity was made . . . [the judge] should take such action as, in his discretion, he deemed best." *Nobles v. Georgia*, 168 U.S. 398, 407 (1897) (rejecting right to jury trial to determine insanity post-conviction).

This Court's disposition of *Rees v. Peyton*, 384 U.S. 312 (1966), *held without action*, 386 U.S. 989 (1967) ("*Rees II*"), *writ dismissed sub nom. Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802 (1995) ("*Rees III*"), put the *Nobles* dictum into practice and confirmed that federal courts' normal equitable discretion to stay habeas cases applies to circumstances in which a habeas petitioner has become mentally incompetent. In *Rees*, a habeas petitioner sought to abandon his habeas rights by withdrawing a petition for certiorari seeking review of the denial of habeas relief by lower courts. 384 U.S. at 313. The petitioner's attorney alerted the Court to his doubts about the petitioner's competence, and the Court directed the district court to hold an evidentiary hearing on that question. *Id.* at 313-14. When the district court found the petitioner incompetent, this Court ordered that the petition be stayed, over the strong objection of the Commonwealth of Virginia. *Rees II*, 386 U.S. 989

(holding case in abeyance); *see* Resp. Br. 2-3, *Rees v. Peyton*, Misc. No. 9 (U.S. Mar. 14, 1967) [hereinafter "*Rees II* Resp. Br."] (available in the Library of the Court) (noting district court's finding of incompetence and Virginia's opposition to further stay); *accord*, Phyllis L. Crocker, *Not To Decide Is To Decide: The U.S. Supreme Court's Thirty-Year Struggle With One Case About Competency To Waive Death Penalty Appeals*, 49 Wayne L. Rev. 885, 915 (2004). The stay remained in effect, undisturbed, for nearly thirty years, and the Court dismissed the case after the petitioner died. *Rees III*, 516 U.S. 802; *see* Crocker, *Not To Decide*, 49 Wayne L. Rev. at 935.

Although *Rees* was an unusual case, it demonstrates that the federal courts have the inherent power to stay a habeas petition because of the petitioner's incompetence. *See Rohan*, 334 F.3d at 815 ("We obviously presume that the Supreme Court follows the law even when acting through summary orders rather than reasoned opinions. The record in *Rees II* shows that incompetence is grounds for staying habeas proceedings."). Following *Rees*, all three courts of appeals to consider the question (the Sixth, Seventh, and Ninth Circuits) have held that habeas proceedings may be stayed where the petitioner is incompetent to assist counsel. *See* Pet. App. 15a; *Holmes v. Levenhagen*, 600 F.3d 756, 763 (7th Cir. 2010) (Posner, J.); *Rohan*, 334 F.3d at 815. No court of appeals has held otherwise.

Indeed, the United States agrees (and even the warden finds it conceivable) that "district courts have inherent authority to grant[] limited competency-related stays in appropriate circumstances." U.S. Br.

14.; *see also* Pet. Br. 31 (conceding that AEDPA would not necessarily foreclose a stay).

The warden seeks to minimize the significance of *Rees* by characterizing it as the product of a "judicially negotiated settlement"; the warden claims that "[o]nce the district court found the prisoner incompetent, counsel for Virginia acceded to the indefinite stay." Pet. Br. 21. This assertion is incorrect: Virginia's brief to this Court following the determination of incompetency stated that the Commonwealth "strenuously opposes any stay." *Rees II* Resp. Br. 3; *see also id.* ("[U]nder no circumstances should this matter be further stayed.").

The warden interprets equivocal statements in a memorandum from the Clerk of the Court as evidence that Virginia actually agreed to a stay in the course of a post-briefing conversation with the Clerk. *See* Pet. Br. 21. But the memorandum noted that, during the conversation, Virginia's attorney raised several objections to a stay. *See* Pet. Br. App. 1. Therefore, the Clerk's qualified conclusions that "he really has no *substantial* objection" and that counsel "do not *really* present any objection," *id.* at 1, 2 (emphasis added), appear to reflect an evaluation of the objections that Virginia's attorney did offer, rather than a sudden change in position by the Commonwealth. Even if the memorandum were read as the warden proposes, a party's grudging acceptance of a result presented as this Court's "proposed disposition of [a] case," *id.* at 1, is hardly the same as freely agreeing to "settle" the case on those terms — particularly where the party had, less than three weeks earlier, "strenuously oppose[d]" that very result. *Rees II* Resp. Br. 3.

The warden also suggests that *Rees* is irrelevant here because the reason for the stay in this case is Carter's incompetence *to assist* in his proceedings rather than his competence *to terminate* his proceedings. Pet. Br. 20. But the warden and the United States both acknowledge that district courts have authority to issue stays in certain cases because of a petitioner's incompetence *to proceed* (not merely because of a petitioner's incompetence *to decide* whether to proceed). *See id.* at 31; U.S. Br. 29-31. Given the case-specific nature of courts' discretion to stay habeas cases, the fact that *Rees* did not address the precise circumstances presented here is irrelevant. Indeed, if the Court's only concern in *Rees* had been the petitioner's competence to withdraw his petition, it would have proceeded to adjudicate the petition once it found him incompetent to withdraw it; instead, the Court granted a stay that halted the entire proceeding. What *Rees* demonstrates is that, based on the traditional equitable stay authority of habeas courts and our legal tradition's longstanding concern for competence in criminal and related proceedings, a petitioner's incompetence during his habeas proceedings can be a valid reason for a stay.

D. This case provides a model for the careful exercise of stay authority within the limits of AEDPA and *Pinholster*.

That courts have the power to stay habeas proceedings because of the petitioner's incompetence does not mean (as the warden implies) that such power is limitless or immune from review. The federal courts' equitable powers and inherent authority to control proceedings before them are not unconstrained: "[C]ourts of equity must be governed

by rules and precedents no less than the courts of law." *Holland*, 130 S. Ct. at 2563 (citation and internal quotation marks omitted).

The narrow decision below, in which the Sixth Circuit indicated that a stay would be appropriate but remanded to the district court to determine the contours of such a stay based on the specific claims presented, reflects due consideration of three factors that should guide courts' discretion in striking a proper balance between AEDPA's goals and fairness to an incompetent habeas petitioner.

1. District courts should rely on expert opinion to determine whether the petitioner is genuinely incompetent, as Carter is.

To ensure that a habeas petitioner seeking a stay because of incompetence is not engaging in "dilatory litigation tactics," *Rhines*, 544 U.S. at 278, a court concerned about a petitioner's competence should carefully evaluate his mental state with the help of expert witnesses or reports, as this Court ordered in *Rees* and as the district court did here. Adjudicating competence is a task common-law courts have performed for centuries. *See Cooper v. Oklahoma*, 517 U.S. 348, 356-57 (1996) (discussing the historical practice of trials to determine competence).

The warden seems to distrust district courts' ability to make sound findings regarding mental health. *See, e.g.*, Pet. Br. 29. The warden implies that mental health problems are easy to fake, and that unless the decision below is reversed, conniving habeas petitioners will run roughshod over gullible district courts. Such concern is unfounded. District

courts regularly rule on complex issues involving expert testimony, including (in federal criminal proceedings) the issue of a defendant's competence to stand trial. The warden has offered no reason to believe that a district court lacks the ability to assess a petitioner's current mental state and draw conclusions grounded in both fact and science. On the contrary, this Court has "presume[d] . . . that it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care." *Cooper*, 517 U.S. at 365. Common-law authorities, likewise, were unmoved by the possibility of deception. In the words of Sir John Hawles, later Solicitor General to King William III:

> I know it will be objected, that if this matter of *non sana memoria* should be permitted to put off a trial or stay execution, all malefactors will pretend to be so: But I say there is a great difference between pretences and realities, and *sana* and *non sana memoria* hath been often tryed in capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it.

John Hawles, *Remarks on Mr. Bateman's Tryal*, *reprinted in* 11 How. St. Tr. at 477-78 (citation omitted).

Here, the district court's finding of genuine incompetence was well-justified by the record. The State itself has repeatedly assigned Carter to its psychiatric prison facility. *See* J.A. 32; Pet. App. 35a. Having examined Carter, experts for both sides agreed that he is schizophrenic. Pet. App. 30a, 34a. One of Carter's experts, Dr. Stinson, elaborated that

Carter's condition entails hallucinations and problems in perception, including the persistent false belief that he cannot be executed unless he volunteers, and his misidentification of the State's expert as Carter's own attorney. *Id.* at 30a-31a.

Carter's mental illness has a profound effect on both his understanding of the proceedings and his ability to identify, recall, and communicate relevant facts. Both sides' experts agreed that Carter could not provide specific information regarding his trial or mitigating circumstances that his trial counsel could have presented but did not. *Id.* at 45a-47a. Moreover, after the competency hearing, Carter's condition declined to the point where he could not remember the penalty verdict at his trial, J.A. 107, and could no longer "comprehend or respond to communications from others," Pet. App. 35a. The district court's finding of incompetence was thus strongly supported in the record.

2. District courts should consider whether the petitioner's assistance is necessary, as it is in Carter's case.

For a habeas petitioner whose assistance is necessary for his claims — for example, a petitioner who raises claims that depend on factual matters within his own knowledge but not contained within the record — a stay may be required to protect the petitioner from losing his claims through no fault of his own. By contrast, a petitioner with a purely record-based claim — such as a claim of improper prosecutorial argument — is less likely to require a stay so that he may regain his competence.

Obviously, the determination of whether a habeas petitioner's assistance is necessary cannot depend on proving the *particular* facts the petitioner would be expected to provide if he were competent. As Judge Kozinski has pointed out, "[r]equiring an incompetent petitioner's counsel to identify precisely what the petitioner would tell him were he able seems more likely to elicit the response, 'Well, if I knew that, I wouldn't have to ask!'" *Rohan*, 334 F.3d at 818. The common law likewise reflected the practical reality that, when a court is dealing with an individual who is not mentally competent, some degree of uncertainty is inevitable. *See, e.g.,* 4 Blackstone, *Commentaries* 24-25 ("[H]ad the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."); 1 Hale, *Pleas of the Crown* 35 ("[W]ere he of sound memory, he might allege somewhat in stay of judgment or execution."). The analysis should therefore focus on the type of claims at issue and whether the proffer of petitioner's counsel regarding additional facts is plausible. *Cf. Rhines*, 544 U.S. at 278 (stay appropriate where claims are "potentially meritorious").

It is also appropriate to consider, as the Sixth Circuit ordered the district court to do here, whether the purpose of an incompetency stay could be served by the appointment of a next friend. *See* Pet. App. 13a; *Whitmore v. Arkansas*, 495 U.S. 149, 162-64 (1990). But there are limits to what a next friend can do. If what is required from the petitioner is a crucial set of facts only the petitioner himself could know, a next friend cannot substitute. *See* Pet. App. 12a-13a ("Where the factual basis for Carter's claims is locked away exclusively in his memory, he faces the lonely

certainty that no friends in this world could *meaningfully* be dedicated to his interests because they lack the benefit of his knowledge." (emphasis in original)); *Rohan*, 334 F.3d at 816 ("No matter how faithfully [the next friend] may act in [the petitioner's] best interests, she cannot get inside his head any more than his counsel can.").

Here, the district court correctly recognized that certain of Carter's fact-based claims are plausible and require his competent assistance: specifically, claims arising from his incompetence to stand trial (and ineffective assistance claims premised thereon) and the claim that trial counsel was ineffective during mitigation. Pet. App. 42a-43a.

The most relevant facts regarding whether Carter was incompetent to stand trial are Carter's own experiences, thoughts, and capacities of perception and expression at the time of his trial in 1998 — especially during the trial itself, when Carter's petition claims that his lawyers should have renewed the competence issue in response to Carter's bizarre behavior and unwillingness to remain in the courtroom. *See Drope v. Missouri*, 420 U.S. 162, 182 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); J.A. 45-50. Facts about Carter's mental state at that time cannot be gleaned from other sources because of Carter's absence from his own trial. Normally an attorney can observe his client and be alert to his deteriorating capacity. Normally the judge can also observe the defendant's condition to determine whether further

inquiry into competence is necessary. *See Godinez v. Moran*, 509 U.S. 389, 408 (1993) (Kennedy, J., concurring in part and concurring in the judgment). But here, apart from trial counsel's once-a-day visits to Carter's remote location, neither Carter's attorneys nor the judge could observe signs of his mental condition continuously throughout the trial. J.A. 46-48.

Only Carter could know what he observed during that time and his reactions to the trial — or even whether he was capable of reacting or communicating his reactions. Pet. App. 47a (explaining that Carter cannot assist his attorneys in his habeas proceeding because in his current condition, he "could not reasonably be expected to recall and describe how well he was able to view the trial once he was removed from it"). Only Carter could know what he tried to communicate to counsel and whether he was successful. Only Carter could describe his perceptions at the time of trial to shed light on whether he was then impaired by the schizophrenic symptoms — including hallucinations and loss of touch with reality — that plague him today. *See Drope*, 420 U.S. at 181 ("[A]s a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him."); *see also Rohan*, 334 F.3d at 818 ("If [petitioner] were competent today, he could provide information to bolster [his claim of incompetence to stand trial]. His own testimony about his former state of incompetence, for example,

would (to the extent credited by the court) support his position.").

In arguing that the stay of Carter's case was inappropriate, the United States relies on the critical assumption that "[c]ounsel will *usually* have means other than the prisoner's knowledge to establish facts outside the record that bear on a potentially meritorious claim." U.S. Br. 30 (emphasis added). But this case is not "usual." Here, given Carter's precarious mental state and his isolation during his trial, the assumption that facts can be obtained from other sources does not hold.

As to the claim of ineffective assistance of counsel at mitigation, Carter's case exemplifies this Court's observation that "a claim of ineffective assistance . . . often turns on evidence outside the trial record." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). Here, the case in mitigation consisted of just two witnesses, one of whom had no personal knowledge of Carter's life past age seven, and the other of whom was a mitigation specialist who had met Carter only for the purposes of his trial. *See* J.A. 56. Only Carter could know who else might have been called to fill in the details of his pre-adolescent and adolescent years, including the difficulties he experienced living with his adoptive family. *See id.* at 60-61.

Notably absent from the short roster of mitigation witnesses was Carter's foster mother Ida Magee, who alone of all of his guardians during a childhood marred by abuse, neglect, and a revolving door of placements, provided a supportive environment for him and thought highly of him. *Id.* at 62-63. Carter's assistance is needed to identify other witnesses who might have helped humanize him for the jury, and to

explain what other leads he gave or could have given trial counsel about mitigation if asked. *See* Pet. App. 47a (finding that Carter "does not have the present capability to judge and express to habeas counsel what mitigating evidence from his social and family background defense counsel should have introduced during the sentencing phase of trial").

The American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*Guidelines*"), to which this Court has approvingly referred in considering counsel's responsibilities in capital cases, *see Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005), require counsel to "conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense" including "in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history," and a survey of the client's

> medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and

> community influences; [and] socio-economic, historical, and political factors.

Guidelines 10.11(B)-(C) (Supp. 2008), *reprinted in* 36 Hofstra L. Rev. 677, 689 (2008). Counsel's duties in this regard have been clear for decades. *See Guidelines* 10.7 & 10.11 (2003), *reprinted in* 31 Hofstra L. Rev. 913, 1015-27, 1055-70 (2003); *Guidelines* 11.4.1(D)(2)-(3), 11.8.3(F), 11.8.6(B) (1989).[3] It is difficult to imagine how a court could gauge whether Carter's counsel met these standards without an understanding of what evidence was missing at trial — an understanding for which Carter's assistance is needed. In some cases, a petitioner's competent assistance may not be essential for ineffective assistance claims, because the missing information can be gleaned from the other witnesses who did testify at mitigation. But in this case, neither of the two witnesses presented had personal knowledge of Carter's life after age seven.

Relatedly, Carter's attorneys purported to waive his presence for the entire penalty phase, a separate ground for Carter's ineffective assistance claim. J.A. 50-52. The degree to which Carter's attorneys seem to have projected their own preferences onto Carter himself is refleted in counsel's statement to the trial court regarding Carter's presence at the penalty phase: "*I* am still worried about him behaving during this phase, so the bottom line is *he wants* to stay where he's at." T.T. 3251 (emphasis added). Other

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[3] The 1989 Guidelines are available at: http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf.

than his lawyers, only Carter could know whether his lawyers' representations were accurate and whether he wanted to waive his presence for the penalty phase — a decision that can be highly damaging. *See Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring in the judgment) ("It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial . . . . At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.").

The United States' suggestion that information about Carter's communications with his trial counsel could be gleaned from the lawyers themselves, U.S. Br. 32, rings hollow, because the lawyers would have an interest, adverse to Carter's, in defending their own competence. *See Massaro v. United States*, 538 U.S. 500, 506 (2003) ("[T]rial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence."). Even indulging the notion that Carter's trial attorneys would confess an inadequate investigation, Carter's recollections would be necessary to establish that he was prejudiced because a more effective investigation would have uncovered potentially useful facts in mitigation. And of course the attorneys' testimony cannot reach into the biggest black box in this case — Carter's mental state during the trial, when he was utterly alone.

3. District courts should consider relevant procedural doctrines, including *Pinholster*, which does not bar Carter's claims.

The warden does not dispute that Carter, if competent, could contribute meaningfully to his claims. Instead, the warden (echoed by the United States) argues that any such contributions from Carter would *necessarily* be irrelevant because *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), confines federal review to the evidence presented to the state court. *See* Pet. Br. 24-27; U.S. Br. 28-29.

It is reasonable to assume that if there were *no* possibility that the district court could consider any information that the petitioner might contribute if competent, a stay based on incompetence would be at cross-purposes with AEDPA's goal of finality without any corresponding enhancement to the fairness of the proceeding. But the warden overreads *Pinholster*.

Pinholster held only that a federal court could not rely on new evidence in concluding that a state court decision was unreasonable. 131 S. Ct. at 1398. It did not hold that evidence presented in federal court could never be relevant to the adjudication of a habeas case. *See id.* at 1401 ("[S]tate prisoners may sometimes submit new evidence in federal court[.]"). For instance, as the warden and the United States acknowledge, *Pinholster* does not foreclose the consideration of new facts in cases in which a claim was not adjudicated on the merits in state court. Pet. Br. 30; U.S. Br. 29; *see Pinholster*, 131 S. Ct. at 1401 ("[N]ot all federal habeas claims by state prisoners fall within the scope of § 2254(d)[.]"). To prevent meritorious claims based on material unavailable at

the time of the state proceeding from being shut out of court, *cf. id.* at 1417-19 (Sotomayor, J., dissenting) (positing such a hypothetical), the Court recognized that a petitioner could present new evidence that transforms an existing claim into a new claim, never "adjudicated on the merits in State court proceedings" under 28 U.S.C. § 2254(d) and therefore subject to federal review. *Pinholster*, 131 S. Ct. at 1401 & n. 10 (responding to the dissent). And Justice Breyer, agreeing with the majority regarding the limitations on new evidence in federal court, observed that, even without a new claim, a petitioner "can always return to state court presenting new evidence not previously presented. If the state court again denies relief, he might be able to return to federal court to make claims related to the latest rejection." *See id.* at 1412 (Breyer, J., concurring in part and dissenting in part). As these examples show, *Pinholster* is not a categorical bar to the presentation of new evidence in federal court. Therefore, *Pinholster* does not categorically preclude an incompetency stay. Rather, like other procedural habeas doctrines, *Pinholster* merely narrows the universe of claims that would be "potentially meritorious" on federal habeas review, *Rhines*, 544 U.S. at 278, so as to justify a stay.

In this case, if Carter were competent and presented additional facts about his mental state at trial and the deficiencies of his counsel, the district court could stay the case pending exhaustion of new facts or claims in state court. *See Rhines*, 544 U.S. at 277-78; *see, e.g.*, *Cook v. Anderson*, No. 1:96-cv-424, 2011 WL 6780869, at *3-*4 (S.D. Ohio Dec. 22, 2011) (granting a *Rhines* stay in light of *Pinholster*); *Craddock v. Cain*, No. 11-655, 2012 WL 1580771, at

*4-*5 (E.D. La. Apr. 3, 2012) (same), *report and recommendation adopted*, 2012 WL 1580422 (E.D. La. May 4, 2012); *see also Conway v. Houk*, No. 2:07-cv-947, 2011 WL 2119373, at *3 (S.D. Ohio May 26, 2011) ("Without expressing an opinion on the propriety of such a procedure, the Court notes that, should Petitioner exhaust additional claims based on new facts in the state courts, then *Pinholster* would not preclude this Court's consideration of those facts."). Carter's lack of mental competence during the state post-conviction proceedings — his federal habeas petition explains that he was incompetent as far back as his original trial, J.A. 37-45 — would constitute "good cause," *Rhines*, 544 U.S. at 278, for his failure to exhaust previously.

If the state court subsequently applied a state procedural bar to claims based on additional facts Carter could provide if he were competent, Carter's mental incompetence during his original state proceedings could provide cause and prejudice to overcome the default on return to federal court. *See Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999); *Sena v. N.M. State Prison*, 109 F.3d 652, 654 (10th Cir. 1997). At that point, *Pinholster* would not bar the consideration of new facts, because the state court would not have decided the claim "on the merits." *Pinholster*, 131 S. Ct. at 1401 (quoting 28 U.S.C. § 2254(d)).

* * *

Taken together, the factors discussed — expert evidence supporting a finding of incompetence, the assertion of claims for which the petitioner's competent assistance is necessary, and the impact of relevant and timely-invoked procedural bars — will

ensure that, far from being "a powerful new mechanism for capital prisoners" that "give[s] every prisoner" a chance to derail the proceedings, Pet. Br. 29, the incompetency stay will remain a rarity in federal habeas litigation. According to a July 2012 Westlaw search, in the forty-five years since *Rees*, there are only five cases with reported decisions in which a federal court issued an indefinite stay in a habeas proceeding because the court found the petitioner incompetent (excluding stays overturned on appeal). *See* Pet. App. 15a; *Holmes*, 600 F.3d at 762-63; *Rohan*, 334 F.3d at 806, 819; *White v. Ryan*, No. 08-8139, 2012 WL 273707, at *1, *5 (D. Ariz. Jan. 31, 2012) (both sides stipulated to petitioner's incompetence); *Mulder v. Baker*, No. 3:09-CV-610, 2011 WL 4479771, at *22 (D. Nev. Sept. 26, 2011); *see generally* Br. for United States as Amicus Curiae on Pet. For Cert. 19, *Ryan v. Gonzales*, No. 10-930 (Feb. 2012) (noting, in urging the Court to deny certiorari, that "federal courts have stayed very few habeas cases on competency grounds"); Resp. Br. at Part II.C, *Gonzales*, No. 10-930 (U.S. July 20, 2012) (discussing infrequency of competency stays).[4] The

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[4] In *Gonzales*, the court of appeals ordered a temporary stay so that the district court could hold a competency hearing. *See In re Gonzales*, 623 F.3d 1242, 1244 (9th Cir. 2010). There has been no federal-court competency determination or indefinite stay.

Other habeas cases in which courts have found petitioners incompetent have resulted either in a temporary stay, *see United States ex rel. Fernandez v. Pfister*, No. 07 C 2843, 2011 WL 2746328, at *7 (N.D. Ill. July 14, 2011); or no stay at all where courts were able to adjudicate a petition after finding the petitioner incompetent to abandon it, *see, e.g.*, *Awkal v. Mitchell*, 559 F.3d 456, 462, 470 (6th Cir. 2009) (reciting

(*Footnote continued*)

paucity of such stays shows that permitting an incompetency stay in an appropriate case, such as this one, will not unleash a flood. *Rees* demonstrably did not.

In the very rare instances when an incompetency stay is warranted, it serves the vital function of ensuring that a habeas petitioner has a full and fair chance at federal review, and that the unfortunate and arbitrary circumstance of mental illness does not cost him that chance. *See Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (cautioning against interpreting procedural bars so as to "close our doors to a class of habeas petitioners" (quoting *Castro v. United States*, 540 U.S. 375, 380 (2003)) (internal quotation marks omitted)).

E. Staying a habeas proceeding because of incompetence does not contravene *Ford*.

The United States argues briefly that permitting a stay of habeas proceedings based on a petitioner's incompetence would supplant the test of *Ford v. Wainwright* for incompetence to be executed under the Eighth Amendment. U.S. Br. 12. This argument ignores the differences between the purposes and procedural settings of the two tests. Unlike the standard the Sixth Circuit applied here for competence in habeas proceedings — a standard focusing on the individual's understanding of the

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procedural history, including district court's finding of incompetence, and granting relief on the merits), *superseded en banc*, 613 F.3d 629, 634 (2010) (affirming district court's denial of petition on the merits); *In re Cockrum*, 867 F. Supp. 484, 494 (E.D. Tex. 1994) (noting that the court would proceed to adjudicate the merits).

proceedings and ability to assist counsel — competence to be executed requires a rational understanding of the punishment to be inflicted and the reason for it. *See Panetti*, 551 U.S. at 957-60; *Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment). An individual competent under one standard may be incompetent under the other, and vice versa. For instance, an individual might be impaired from communicating facts about his trial but nonetheless comprehend why he has been sentenced to death. Or an individual who can explain the facts necessary to his habeas claims might not perceive reality well enough to understand why he is being punished. Therefore, one standard cannot supplant the other: they are different tests for different purposes, and not all petitioners who qualify for a stay in one context would do so in the other.

Moreover, as demonstrated by the dearth of cases in which courts have stayed proceedings because of a petitioner's incompetence, showing incompetence to proceed with a habeas petition is not a simple matter. The assumption that the availability of incompetency stays will substantially swell the ranks of those who cannot be executed is unfounded.

F. In the competency context, an indefinite stay can be warranted, and *Rhines* is not to the contrary.

The warden and the United States recognize that an incompetency stay of *limited* duration would be permissible in certain circumstances, *see* Pet. Br. 31; U.S. Br. 29-31, but both insist that an *indefinite* stay is categorically impermissible, *see* Pet. Br. 32; U.S. Br. 30. This contention rests on a misreading of this

Court's decision in *Rhines* and disregards this Court's decision in *Rees*.

The warden cites *Rhines* for what he characterizes as an "emphatic command: Habeas 'petition[s] should not be stayed indefinitely.'" Pet. Br. 29 (quoting *Rhines*, 544 U.S. at 277) (alteration retained from the warden's brief); *see also id.* at 15, 30 (same characterization of *Rhines*). However, the warden's quotation from *Rhines* omits a crucial word that limits and places in context what the warden incorrectly presents as a categorical rule. The entire sentence from *Rhines* reads, "A *mixed* petition should not be stayed indefinitely." *Rhines*, 544 U.S. at 277 (emphasis added). *Rhines* does not stand for the proposition that an indefinite stay may never issue in any habeas case. Rather, it says only that an indefinite stay would be inappropriate *for the purpose of allowing exhaustion of claims in a mixed petition*, presumably because the purpose of that type of stay is to maintain the status quo pending a specific event (resolution of claims in state court) whose conclusion is easy to discern.

An incompetency stay is different. Despite a court's best efforts and testimony from the best experts, no one can know when, or whether, a petitioner will be restored to competence. Therefore, an indefinite stay can be warranted to ensure that mental illness does not deprive a person of his chance for a full and fair federal habeas hearing on claims that require his assistance. That the nature and purpose of an incompetency stay can justify a stay without a definitive end date is demonstrated, of course, by this Court's orders in *Rees v. Peyton*. *See supra* Part I.C; *cf. Medina v. California*, 505 U.S.

437, 448 (1992) (in the trial competency context, due process requires "suspension of the criminal trial until such time, *if any*, that the defendant regains the capacity to participate in his defense" (emphasis added)); *Riggins v. Nevada*, 504 U.S. 127, 145 (1992) (Kennedy, J., concurring in the judgment) ("If the defendant cannot be tried without his behavior and demeanor being affected in [a] substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process.").

Moreover, the distinction that the warden and the United States draw between a limited and an indefinite stay is difficult to maintain. If a habeas petitioner's mental competence is important enough to the litigation of his claims that a stay is warranted based on his incompetence, *see* U.S. Br. 29 (acknowledging the propriety of a limited stay where, for instance, "a capital prisoner's testimony or assistance might be crucial to a potentially meritorious habeas claim"); *cf.* Pet. Br. 31 (conceding such a stay is not necessarily foreclosed), the passage of a limited but arbitrary period of time should not itself change anything where the petitioner's condition has not improved. Thus, a stay for a stated period, renewable if the defendant remains incompetent at the end of that time, is little different as a practical matter from a stay with no fixed endpoint other than the restoration of the petitioner's competence. *Compare United States ex rel. Fernandez v. Pfister*, No. 07 C 2843, 2011 WL 2746328, at *1 (N.D. Ill. July 14, 2011) (granting one-year stay because of petitioner's incompetence); *with* Joint Status Report at 2, *Fernandez*, No. 07 C 2843 (N.D. Ill. June 4, 2012) (Dkt. Entry 139) (noting expert's

conclusion that petitioner remains incompetent, and position of petitioner's counsel that "[i]f, after a guardian is appointed, appointed counsel still cannot proceed with the habeas case, then a continued stay would be appropriate"). The distinction between what the Sixth Circuit envisioned in this case — a stay that will allow "all parties to remain actively involved and the court to monitor Carter's on-going condition," Pet. App. 14a — and a series of limited stays that are renewed as long as the petitioner remains incompetent, is a matter of form and not substance. Either circumstance would involve a stay because of incompetence, to be continued if the petitioner remains incompetent, or lifted if the petitioner has recovered.

The warden and the United States try to justify the limited/indefinite distinction by likening the mind of an incompetent habeas petitioner to a piece of lost evidence. *See* Pet. Br. 31; U.S. Br. 30. But to treat the habeas petitioner himself, whose life is at stake in his proceedings, like a malfunctioning computer drive, *see* Pet. Br. 31, ignores the fundamental role of an individual in his own case. A criminal defendant's participation in his own case is sufficiently important that this Court has recognized a constitutional right, with deep roots in the common law, not to be tried while incompetent. *See supra* Part I.B. This Court need not find constitutional implications here to see that the distinction between lost evidence and the defendant's own mind remains valid in post-conviction review. Although the likelihood that the defendant/petitioner has evidence of legal significance to contribute to the proceeding may diminish between trial and subsequent review stages, his fundamental interest in participating if

he has such evidence remains compelling: "[F]or peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 Blackstone, *Commentaries* 24-25. And if that interest is compelling today, it will be equally so after a pre-established time period. Thus, the line between a limited and an indefinite stay is not a meaningful one when the issue is competence in habeas proceedings. The same reasons that would justify a limited stay because of incompetence would also justify an appropriately monitored, indefinite stay, tailored to the facts of the case and the claims asserted — precisely what the Sixth Circuit ordered the district court to devise on remand in this case. *See* Pet. App. 14a-15a. That remedy is consistent with *Rees*, the traditional discretion of habeas courts, and the common law.[5]

II. Carter Has Preserved His Alternative Ground For Affirmance, 18 U.S.C. § 3599.

Because courts have the inherent equitable power to impose stays as a matter of discretion, and staying this case is a proper exercise of discretion, this Court need not consider as an alternative ground for affirmance whether 18 U.S.C. § 3599 independently supports a stay — a question on which this Court did not grant certiorari in this case.

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[5] If the Court categorically rules out indefinite stays for incompetence, it should nonetheless allow the district court on remand to craft a narrower stay based on Carter's up-to-date prognosis and his potential role in the proceedings going forward.

However, Carter has raised this alternative ground for relief throughout his case by urging courts to apply *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). *See* Pet. App. 91-94, 100; Br. of Appellee 15-19, *Carter v. Bradshaw*, No. 08-4377 (6th Cir. June 9, 2009). Under the rationale of *Rohan*, and for the reasons advanced by the respondent in *Ryan v. Gonzales*, No. 10-930, this Court should hold in *Gonzales* that 18 U.S.C. § 3599 justifies an incompetency stay for capital habeas petitioners where their assistance is necessary in order for their appointed counsel to represent them. If the Court so holds, the stay in Carter's case should be upheld under that statute.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Sixth Circuit remanding for the district court to determine the scope of an incompetency stay.

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