Nos. 10-930 & 11-218

IN THE
Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,
v.

SEAN CARTER,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association ("APA"), with more than 36,000 members, is the Nation's leading organization of physicians specializing in psychiatry. APA has previously filed briefs for this Court's consideration in similar cases, including *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Sell v. United States*, 539 U.S. 166 (2003); and *Ford v. Wainwright*, 477 U.S. 399 (1986). APA's members are physicians engaged in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. APA and its members have substantial knowledge and experience relevant to the issues in this case. APA also has an interest in ensuring that this Court's decisions that concern individuals with mental disorders and disabilities are informed by the best available scientific knowledge.

In addition, as Part II of this brief sets forth in greater detail, APA has previously taken a position as a matter of policy on the question presented in this case. In 2003, the American Bar Association ("ABA") established a Task Force on Mental Disability and the Death Penalty (the "Task Force"), which

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represents that all parties have consented to the filing of this brief. Petitioner and respondent in No. 11-218 and respondent in No. 10-930 have filed with the Clerk letters granting blanket consent to the filing of *amicus* briefs; a letter reflecting the consent of petitioner in No. 10-930 is being submitted contemporaneously with the filing of this brief.

included mental health professionals who were members and representatives of APA.

The Task Force was convened in light of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Its function was to address unresolved issues concerning the application of the death penalty to persons suffering from impaired mental conditions. As relevant here, the Task Force recommended essentially that post-conviction proceedings initiated by a capital prisoner should be suspended when a mental disorder or disability prevents the prisoner from understanding his situation or communicating with his counsel, and when such communication would be necessary to the fair adjudication of that prisoner's legal challenges to his conviction or sentence. APA, ABA, and several other organizations adopted this recommendation, which is attached as an Addendum to this brief. APA has an interest in presenting arguments in support of its position to this Court.

Amicus American Academy of Psychiatry and the Law ("AAPL"), with approximately 1,800 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases, *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnso*n, 532 U.S. 782 (2001).

SUMMARY OF ARGUMENT

This Court has long recognized that federal district courts have inherent power to stay proceedings before them, and it has recently reaffirmed in *Rhines v. Weber*, 544 U.S. 269 (2005), that this discretionary stay authority extends to federal habeas cases. District courts can and should use that stay authority – consistently with venerable common law principles – to assure the reliability and integrity of habeas proceedings. That assurance is much needed when prisoners who have been sentenced to death are prevented by mental disorder or disability from necessary communication with counsel. Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), reinforces the importance of competency during post-conviction review, because Justice Powell relied on such review as part of a comprehensive process for ensuring the reliability of a conviction before a prisoner is put to death.

When using its stay authority for this purpose, a district court should focus its attention on whether the prisoner seeking habeas relief has shown a lack of the basic competence and ability to communicate with counsel that would be *necessary* for a *fair* resolution of his constitutional challenges to his conviction or death sentence. This standard, formulated by the Task Force and endorsed by APA and several other organizations, reflects an appropriate balancing of the relevant interests. In applying that standard, the district court should give adequate weight to the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in promoting comity and finality as part of its discretionary-stay analysis.

Although the decision whether to stay a particular habeas case will necessarily be judicial rather than medical, medical expertise can assist a court in making its determination. The forensic psychiatric analysis of competency to stand trial takes place in an area that has been researched extensively. Available tests for competence developed in the trial context are reliable, validated by studies, and continuing to improve. To the extent petitioners have raised concerns that capital prisoners will malinger or feign symptoms in order to delay execution, these problems are not different in kind from those that forensic practitioners deal with every day. Screening and testing instruments for malingering have been developed and tested, and work on them continues.

Finally, this Court should not be swayed by petitioners' predictions that an affirmance would lead to long-term delay. On the contrary, most defendants who are found to lack competence to stand trial are restored to competence within a reasonable period of time. Many prisoners in cases such as this one will likely return to competence relatively quickly, in much the same way. And, to the extent they continue to lack competence for a longer period, states' interests will be only minimally (if at all) injured, because the kind of long-term mental problem that could foreseeably lead to a truly indefinite stay of execution would be likely to render the individual incompetent to be executed under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford*.

ARGUMENT

I. DISTRICT COURTS HAVE DISCRETION TO STAY A FIRST FEDERAL HABEAS PROCEEDING WHILE A HABEAS PETITIONER LACKS COMPETENCE BECAUSE OF MENTAL ILLNESS OR DISABILITY

District courts generally have discretionary authority to stay proceedings before them for any number of potential reasons. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.) (observing that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket"). This Court has recognized that this general principle applies to federal habeas review of state convictions and that discretionary stay authority remains an inherent power of the federal courts in the post-conviction context. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (holding that "AEDPA does not deprive district courts of th[e] authority" recognized in *Landis*, though "it does circumscribe their discretion"). Although petitioners and the United States urge this Court to craft and impose strict limits on district court authority to issue stays based on a habeas petitioner's lack of competence resulting from a mental disorder or disability, none of them appears to dispute (at the level of principle) that district courts have authority to impose a stay under sufficiently compelling circumstances.[2]

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[2] *See* Ryan Br. 20-21 ("Some rare circumstances might justify a federal district court's *limited* stay based on the inmate's alleged incompetence."); Tibbals Br. 31 (stating that a district court could impose "a limited stay [that] advances an important objective . . . while imposing minimum delay"); U.S. Br. 29 ("In [certain] circumstances, AEDPA would not necessarily foreclose a stay for a limited period to afford the prisoner the opportunity to regain his competence (on his own or with medication).").

That general discretion is also supported by traditional understandings of procedural fairness and judicial integrity in capital cases. As this Court recognized in *Ford*, one of the key justifications at common law for the requirement that an individual be competent at the time of execution was the inability of an individual lacking such competence to give reasons why he should not be executed. *See Ford*, 477 U.S. at 407 (quoting, among others, Blackstone: "[I]f, after judgment, [the prisoner] becomes of non-sane 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.");[3] Carter Br. 19-20 (collecting additional quotations from Blackstone, Hawles, and Hale).

The modern federal habeas process is designed to discourage (or to prevent outright) prisoners seeking review of their capital convictions from attempting to give such reasons only at the last minute. In particular, AEDPA channels review of post-conviction challenges first into the state courts (as the "main event," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (internal quotation marks omitted)) and then into the first federal habeas petition, *see* 28 U.S.C. § 2244, with only a few "exceptions." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). This staged process presupposes that anything an individual might have to say to the state and federal courts can be said well before execution is imminent. *Cf. McCleskey v. Zant*,

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[3] The term "peradventure" indicates that Blackstone was referring not to any specific cause to believe that a prisoner could make any such allegation, but to a mere "possibility . . . ; uncertainty, [or] doubt." XI *The Oxford English Dictionary* 517 (2d ed. 1989).

499 U.S. 467, 492 (1991) (explaining that unnecessary "second or subsequent federal habeas petition[s]" give rise to a "[p]erpetual disrespect for the finality of convictions [that] disparages the entire criminal justice system").

Indeed, Justice Powell's concurrence in *Ford* argued that the Eighth Amendment standard for competence at the time of execution did not need to include the ability to raise legal or factual objections precisely because any such objections should already have been raised much earlier in the collateral-review process. Justice Powell noted that "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review," and including "access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims," all of which made it "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment).[4]

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[4] *See also Ford*, 477 U.S. at 420 n.2 (Powell, J., concurring in part and concurring in the judgment) (arguing that a standard that required a defendant to be competent to assist counsel at the time of execution would give too little weight to "States' . . . strong and legitimate interest in avoiding repetitive collateral review through procedural bars"). Petitioner Ryan argues that Justice Powell's opinion in *Ford* weighs against considering competence to assist counsel at the time of post-conviction proceedings because taking that factor into account would "negate the *Ford* standard," which does not require such competence at the time of execution. Ryan Br. 17-18. That argument lacks force if (as appears) Justice Powell found such a requirement

This reasoning presumes that a prisoner who is to be executed has previously had access to the state and federal processes available for raising factual and legal challenges to his conviction and death sentence.[5] After AEDPA, those opportunities still include the "opportunity for . . . federal review" of constitutional challenges to a state conviction, and this Court has recognized the "gravity of th[e] problem" posed for the federal courts when a petitioner "ha[s] no way of controlling" whether such review will occur. *Rhines*, 544 U.S. at 275.[6] To make that opportunity fair and meaningful, federal district courts must retain the ability to stay their proceedings when, because of a prisoner's lack of competence, going forward would render a federal habeas petition a hollow exercise as to important claims.

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unnecessary based on his assumption that fair and reliable post-conviction proceedings had already by that point occurred.

[5] *See* Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1178 (2005) (observing that "Justice Powell must have been assuming that prisoners on the threshold of execution have already taken advantage of . . . post-conviction opportunities," but that such an assumption is "warranted . . . only if a prisoner's impaired capacity to assist in post-conviction litigation would have been identified during the post-conviction proceedings" and would have "le[d] the courts to take appropriate precautionary action").

[6] *See Panetti*, 551 U.S. at 946 (explaining that the Court has "resisted an interpretation of [AEDPA] that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent'") (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2003)); *cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (explaining that a "*first* federal habeas petition" embodies the traditional "protections of the Great Writ").

II. A STAY IS APPROPRIATE WHEN NECESSARY TO ENSURE A FAIR RESOLUTION OF SPECIFIC CLAIMS BEARING ON THE VALIDITY OF A CONVICTION OR DEATH SENTENCE

In 2005, APA adopted a position statement entitled Mentally Ill Prisoners on Death Row. As most relevant to this case, the statement proposes the following standard:

> If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings.

Add. 2.[7] APA's position statement was based on the work of a Task Force on Mental Disability and the Death Penalty,[8] formed by ABA in 2003. *See*

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[7] A copy of APA's position statement is attached to this brief as an Addendum. The statement goes on to say that, "[i]f the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment." Add. 2. Whether and under what circumstances a federal habeas court can order a sentence reduction on this basis are questions not presented by the present cases.

[8] The Task Force was composed of "professionals knowledgeable in law, psychology, and psychiatry, some of whom [we]re advocates for people with mental disability." Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1123 (2005).

ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) ("Task Force Report"). The Task Force's recommendation was adopted not only by APA, but also by ABA, by the American Psychological Association, and by the National Alliance for the Mentally Ill (now known as the National Alliance on Mental Illness). *See id.*

The proposed standard is intended to reflect a balancing of the concerns that apply when competence is assessed in the post-conviction setting, as distinct from those that apply when a defendant's competence to stand trial is in question. It acknowledges that, because a prisoner seeking habeas review of a capital sentence is already the subject of a "presumptively valid" conviction, *Daniels v. United States*, 532 U.S. 374, 382 (2001), it would not be appropriate to forestall the state from executing its sentence without "a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims." Task Force Report 674. The Task Force also made clear, moreover, that "[m]any issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice." *Id.*

At the same time, "[t]horough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law," so that "[a]ny impediment to thorough collateral review undermines the integrity of the review process and therefore of the death sentence itself." *Id.* As the Task Force further explained, "this rule 'rests less on sympathy for the sentenced convict than on concern

for the integrity of the criminal justice system,'" especially in light of the "[s]cores of people on death row [who] have been exonerated based on claims of factual innocence, and [the] many more offenders [who] have been removed from death row and given sentences less than death because of subsequent discovery of mitigating evidence." *Id.* at 674-75 (quoting ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 291 (1989) (commentary to Standard 7-5.6)).

In leaving the stay decision within the discretion of the district court, moreover, this Court can provide guidance that its resolution should take into account both "AEDPA's objective of encouraging finality" and the statute's "goal of streamlining federal habeas proceedings." *Rhines*, 544 U.S. at 277. These concerns can and should be part of the determination whether, on the facts of a particular case, a prisoner's participation is necessary for a fair resolution of specific claims identified by his counsel during the period that the prisoner lacks competence. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (explaining that AEDPA has not changed the "basic rule" that "the decision to grant an evidentiary hearing [is] generally left to the sound discretion of district courts," but those courts must "take into account [AEDPA's] standards" in making their decisions). These policies can best be weighed against the loss of the petitioner's personal participation on the case after a careful "appraisal of the facts by the court whose function it is to exercise discretion." *Landis*, 299 U.S. at 258.[9]

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[9] Petitioner Ryan urges that the Court should permit stays only when the claim that a habeas petition cannot press for lack of competence involves an "assertion of actual innocence." Ryan Br. 20-21 (citing *House v. Bell*, 547 U.S. 518 (2006), and *Schlup*

III. FORENSIC EXAMINERS CAN PROVIDE USEFUL INFORMATION TO SUPPORT JUDICIAL DECISIONS IN POST-CONVICTION PROCEEDINGS

The ultimate determination whether a capital habeas case should be stayed on the basis of a prisoner's lack of competence to assist counsel will necessarily be judicial, not medical, in character. That discretion should nevertheless be informed and guided by the judgment of medical professionals for its proper exercise. The types of assistance that such professionals would likely provide, and the tools that they would use to provide that assistance, may inform the Court's decision in this case. These types of assistance would include assessing an individual's ability to assist counsel; detecting individuals who are or may be feigning symptoms in order to delay the legal process; and providing information about the likelihood that an individual who presently lacks the ability to assist counsel will gain or recover that ability within a reasonable time.

In considering the importance of the information that forensic psychiatrists can provide, and the appropriate response to that information by the district

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v. Delo, 513 U.S. 298 (1995)). This suggestion lacks merit because the purpose of the actual-innocence standard that this Court adopted in *House* and *Schlup* is to identify the rare case in which a prisoner has committed a procedural default without cause or has abused the writ, yet the federal courts should nevertheless overlook the prisoner's procedural error in order to avoid a miscarriage of justice. *See House*, 547 U.S. at 536. A prisoner in respondents' position, however, has not triggered a procedural bar, but has (through counsel) sought timely relief based on a temporary inability to invoke the writ's protections in the first instance. That situation is not comparable to the ones this Court addressed in *House* and *Schlup*.

courts, the Court should bear in mind that serious mental disorders, including schizophrenia and bipolar disorder, can interfere with the ability to assist counsel in a variety of ways. Delusion ideation in particular may lead a prisoner to misconstrue his situation.[10] Driven by paranoid ideation, a prisoner might conclude that his attorney is in fact conspiring against him and cannot be trusted;[11] or, under the influence of a grandiose delusion, he may believe that, because he is God's agent on earth, he cannot be harmed and will be released, and therefore an appeal need not be pursued.[12] Hallucinatory voices may warn the prisoner against cooperating with his

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[10] *See generally* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299 (4th ed. Text Revision 2000) ("DSM-IV-TR") (describing different types of delusions associated with schizophrenia); Bruce G. Link et al., *Real in Their Consequences: A Sociological Approach to Understanding the Association between Psychotic Symptoms and Violence*, 64 AM. SOC. REV. 316, 316 (1999) (proposing that "people's definitions of situations shape their behavior" and so have real consequences, even when those definitions are delusional).

[11] *See*, *e.g.*, Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S49 (Supp. 2007) (advising that it is appropriate to include a diagnosis of "paranoid schizophrenia" in a forensic report in order to make clear that a defendant's refusal to "cooperate with his attorney because he irrationally perceives the attorney as plotting against him . . . stem[s] from a well-known form of mental illness and not from quirkiness or unwillingness to cooperate").

[12] *See*, *e.g.*, Jennifer L. Kunst, *Understanding the Religious Ideation of Forensically Committed Patients*, 36 PSYCHOTHERAPY 287, 294 (1999) (explaining that "[p]atients who believe they are God or will be miraculously saved do not have the felt need to grapple with their real-life situation" and "rarely settle into the difficult task of dealing with the reality of their incarceration").

attorney or threaten him with harm if he does so.[13] The confusion associated with psychosis itself, the result of a tumultuous mixture of delusional perceptions and hallucinatory stimuli, can leave the prisoner unable to attend to his legal situation or to communicate coherently with legal counsel.[14]

A. Assessing an Individual's Ability To Participate in the Legal Process

The assessment of an individual's ability to participate in the legal process is a well-established part of forensic psychiatric practice that has been studied and discussed extensively in professional literature.[15] This study has so far largely occurred in the context of competence to stand trial, which is a different *legal* situation from competence to assist counsel with pursuing post-conviction remedies. The *medical* issues that arise in the two contexts nevertheless overlap

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[13] *See generally* DSM-IV-TR 313-14 (identifying "prominent delusions or auditory hallucinations" as one "essential feature" of paranoid schizophrenia); *cf.* Carter Br. 3 (noting statements in record concerning Carter's hallucinations).

[14] *Cf. Ford*, 477 U.S. at 403 ("[I]n an interview with his attorneys, Ford regressed . . . into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word 'one,' making statements such as 'Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.'").

[15] *See*, *e.g.*, GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS § 6.05, at 141 (3d ed. 2007) ("PSYCHOLOGICAL EVALUATIONS") ("Since 1970, a substantial literature has developed about the nature of the competency evaluation."); Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCHOL. PUB. POL'Y & L. 1, 3 (2011) ("*Competency Research Review*") (noting that "hundreds of articles and numerous books have been published since the 1960s aimed at developing and refining practice standards in the competency arena").

considerably, so existing studies provide useful information about the types of information that medical practitioners can provide to district courts.

Forensic mental health professionals use a range of different approaches when assessing competence. Competence assessments were historically made on the basis of relatively unstructured interviews, and some still are.[16] A growing number of assessments now rely on more structured methods, however, including systematic clinical evaluations,[17] general protocols that are used in both forensic and non-forensic contexts, and specialized protocols such as the MacArthur Competence Assessment Tool – Criminal Adjudication ("MacCAT-CA") and Evaluation of Competence to Stand Trial – Revised ("ECST-R") that have been developed specifically for use in criminal proceedings.[18]

The MacCAT-CA and ECST-R evaluations each consist of a series of standardized items that are designed to test the subject's ability to understand the legal system on both a factual and a rational level,

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[16] *See* PSYCHOLOGICAL EVALUATIONS § 6.06(b), at 147; Robert P. Archer et al., *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, 87 J. PERSONALITY ASSESSMENT 84, 91-92 (2006) ("*Psychological Test Use*").

[17] *See* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 239-41 (4th ed. 2007) (describing a structured process for evaluating a patient's competence to stand trial).

[18] *See Competency Research Review* 3-4; *Psychological Test Use* 87, 89 & tbl. 9; *see also id.* at 92 (discussing the "marked and continuing popularity of traditional clinical assessment instruments in forensic evaluations," and the "increasing popularity of specialized assessment forensic instruments," though also noting that some "traditional assessment practices are retained in the absence of empirical support").

and to provide assistance to counsel in defending the subject's case.[19] Both were designed to shed light on the factors set forth by this Court in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), and were tested in multiple studies.[20] Other protocols perform more specialized functions. For example, the Competency Screening Test is intended not to provide a comprehensive evaluation of an individual's competency to stand trial but instead to "screen" for individuals who appear likely to be of questionable competency and therefore would benefit from a more comprehensive evaluation.[21]

The reliability and quality of competence testing are difficult to demonstrate empirically because the practitioners' findings are ultimately used as an input to a judicial decision, and there is no external means to determine whether the medical information helped the judge rule correctly.[22] Nevertheless, some light can be shed on the issue by comparing different experts' assessment of the same individuals. A recent study using statistical techniques to conduct such a comparison estimated that participating experts could "correctly distinguish a randomly selected competent defendant from a randomly selected incompetent

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[19] *See* PSYCHOLOGICAL EVALUATIONS § 6.06(c)(1), at 149-52 (MacCAT-CA); *id.* § 6.06(c)(2), at 152-54 (ECST-R).

[20] *See id.* § 6.06(c)(1), (2), at 149, 153.

[21] *See id.* § 6.06(a)(1), at 146.

[22] *See* Douglas Mossman et al., *Quantifying the Accuracy of Forensic Examiners in the Absence of a "Gold Standard,"* 34 LAW & HUM. BEHAV. 402, 403 (2010) (discussing the difficulty of determining "how accurate [competency] judgments are" in light of the absence of a "gold standard to establish absolute truth in any particular case").

defendant in 29 out of 30 attempts."[23] Other studies have similarly found that experts tend to reach the same results when assessing the same individuals, which suggests that the criteria they are applying are at least objective and consistent.[24] Other studies have found that only about one-quarter of criminal defendants who are referred for a competency assessment are found to lack competence to stand trial,[25] which suggests that medical evaluations serve as a meaningful check on such claims.

B. Tools for Detecting Malingering

One question of particular concern to practitioners and courts in connection with forensic assessments of mental illness has been the risk that defendants or prisoners who are undergoing assessment for competence may inappropriately delay or even avoid legal proceedings by malingering – that is, by the "intentional production of falsely or grossly exaggerated . . . psychological symptoms, motivated by external incentives." DSM-IV-TR 739.

The threat of punishment in the case of a criminal defendant before trial, or of execution in the case of a prisoner who has been sentenced to death, can

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[23] *Id.* at 409. The study's authors did, however, indicate that more research would be needed to improve the "generalizability of [their] conclusion" and that in the interim it should be "viewed with caution." *Id.* at 402, 412.

[24] *See* PSYCHOLOGICAL EVALUATIONS § 6.05(c), at 145 ("[E]valuations of competency to stand trial [are] usually highly reliable and potentially highly valid, [and] these levels of psychometric rigor can be achieved in a relatively brief interview.").

[25] *Competency Research Review* 28 (after reviewing a large number of quantitative studies, estimating the "base rate of incompetency" among defendants referred for evaluation at 27.5%).

provide an obvious incentive to present false or exaggerated symptoms of a mental disorder or defect. Although neither petitioner in this case discusses malingering extensively, both argue that this Court should constrain or eliminate district courts' ability to stay habeas proceedings for lack of competence to proceed based in part on concerns that prisoners will deliberately delay such proceedings. *See* Ryan Br. 19; Tibbals Br. 28. Similarly, several states contend as *amici* that prisoners will likely raise "frivolous . . . challenge[s]" to competence because it "costs [a habeas] petitioner nothing" to do so. Utah et al. Br. 5.

In evaluating these concerns, the Court should take into account the substantial amount of professional effort that has gone into ensuring that forensic psychiatrists are able to provide the courts with objective evidence about whether a particular individual's symptoms are real or feigned.[26] A number of instruments are available to assess whether an individual is feigning mental disorder or disability. The ECST-R, for example, includes a section that is "designed specifically to assess feigned incompetency."[27]

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[26] *See*, *e.g.*, Randy K. Otto, *Challenges and Advances in Assessment of Response Style in Forensic Examination Contexts* ("*Challenges and Advances*"), *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 365, 375 (Richard Rogers ed., 3d ed. 2008) (stating that "considerable gains" have been made "in the understanding and assessment of response style" – a term that includes the detection of malingering). The author indeed argues that forensic mental health professionals have placed *too* much emphasis on malingering and that the field should shift towards a broader understanding of response styles that takes into account other ways in which examinees' responses may not present an accurate picture of their condition. *See id.* at 366.

[27] Michael J. Vitacco et al., *An Evaluation of Malingering Screens with Competency to Stand Trial Patients: A Known-Groups Comparison*, 31 LAW & HUM. BEHAV. 249, 250-51 (2007);

There are also a number of specialized instruments designed specifically to assess the possibility of malingering or otherwise feigned symptoms.[28] These issues have been the focus of considerable research in the last 15 years, and the instruments available can be expected to improve over time.

In light of the information that forensic practitioners can provide to district courts on this issue, APA and AAPL do not believe that the concerns advanced by petitioners justify eliminating or categorically restricting district courts' discretion to stay a habeas case based on a finding that a particular prisoner suffers from a mental disorder or disability that prevents the court from fairly resolving his claims. Instead, district courts should have discretion to deal with such problems on a case-by-case basis.

IV. CONCERNS ABOUT LONG-TERM DELAY DO NOT JUSTIFY CATEGORICAL RESTRICTIONS ON JUDICIAL DISCRETION

Another concern that petitioners and their *amici* press is the risk that allowing district courts broad discretion in staying federal habeas proceedings on competence grounds will lead to long-term delays that are inconsistent with the purposes of AEDPA. *See* Ryan Br. 19 (expressing concern that a prisoner could "stay [federal habeas] proceedings . . . indefinitely if the inmate is found to be incompetent to assist counsel"); Tibbals Br. 29 (warning that discretionary stay authority would be a "mechanism for

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see id. at 258 (finding that the ECST-R is "generally effective at identifying possible cases of malingering").

[28] *See id.* at 252-53 (describing different tests that can be used to detect malingering, of varying length, complexity, and effectiveness); *see also Challenges and Advances* 370-72 (discussing additional tests).

capital prisoners to forestall – and in many cases, frustrate – a State's enforcement of its criminal judgments"); U.S. Br. 27 (arguing that an "indefinite stay issued solely in the hope that the prisoner might some day regain competence" is inconsistent with AEDPA's purposes).[29]

As an initial matter, petitioners offer no evidence to support their suggestion that this problem will arise in "many cases." Tibbals Br. 29. In the pre-trial context, most defendants who are found to lack competence to stand trial recover such competence within a finite period of time.[30] Although it is not clear whether these results can reliably be generalized to include capital prisoners in post-conviction proceedings, as many factors may differ between the two populations, they nevertheless provide a useful benchmark for evaluating issues related to possible restoration of competence.

Petitioner Ryan and the United States argue, however, that stays based on lack of competence will lead to delay because capital petitioners lack an "'incentive to obtain federal relief as soon as possible.'"

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[29] APA and AAPL take the view as a policy matter, as did the Task Force, that, if a district court cannot fairly adjudicate a capital prisoner's habeas petition because of his lack of competence, and there is no reasonable likelihood the prisoner will become competent in the future, the appropriate result is an order reducing the capital sentence to a lesser punishment. *See supra* note 7 (noting that neither prisoner has requested such relief in this case).

[30] *See* PSYCHOLOGICAL EVALUATIONS tbl. 6.6, at 163 (in Florida from 2002 to 2004, 78.5% of defendants were restored to competence within 180 days, and 87.3% within 270 days); *see also id.* (in Michigan from 2002 to 2005, defendants stayed in a hospital for competence restoration an average of 134 days and a median of 100 days).

Ryan Br. 19 (quoting *Rhines*, 544 U.S. at 277-78); U.S. Br. 27 (same). These contentions rest on an implied assumption that the prisoners being discussed have the capacity to perceive their situation, assess their incentives, and behave strategically. In fact, however, the lack of that capacity may be precisely why the individuals are adjudicated incompetent. One textbook gives the real-life example of a pretrial defendant who held the "strong although highly delusional belief that he would go free regardless of the case outcome," because, as the defendant stated:

> "My real name is John Jones Jesus 2000. God has ordered that on January 1, 2000, I be ordained the chief religious order for the state of Florida in a ceremony on the steps of the capital in Tallahassee. If they try to interfere, God will kill all the white people, and they won't stand for that. They'll have to let me go."

PSYCHOLOGICAL EVALUATIONS § 6.06(c)(1), at 151. A capital prisoner holding similar delusional beliefs would be no more likely to delay proceedings intentionally than he would be to participate constructively in them. Indeed, the description in respondent Carter's brief of his "false belief that he could not be executed unless he volunteered," Carter Br. 9, suggests that he would be similarly nonresponsive to incentives in his case.[31]

Further, any threat that indefinite delay will harm legitimate state interests appears slight when

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[31] The members of APA and AAPL who have reviewed this brief have not evaluated respondents and cannot attest to their actual medical condition. The discussion above and on page 22 assumes that the descriptions of respondents' condition by their counsel are true solely for the purpose of illustrating the general points advanced in this brief.

one considers that a prisoner cannot ultimately be executed unless he meets the Eighth Amendment test for competence under *Ford* and *Panetti*. This is a practical argument, not a legal one: as a legal matter, the *Ford* test is distinguishable from the appropriate test for post-conviction proceedings. Nevertheless, it seems likely that many prisoners with mental disorders or disabilities sufficiently severe to render them permanently unable to assist their counsel in post-conviction proceedings would likewise prove unable to comprehend the reasons for their execution.

Taking examples from the present cases, respondent Gonzales's brief states that, at the time of his federal habeas proceedings, he "experienced continuing decline in his mental health," as a result of which he "no longer understood his legal situation, and particularly the impending sentence of death." Gonzales Br. 5. Respondent Carter's brief describes statements in the record that he has lost the ability "'to comprehend or respond to communications from others,'" or to "remember his trial [or] the penalty-phase verdict." Carter Br. 9. These descriptions at least raise significant questions whether these individuals "comprehend[] the meaning and purpose of the punishment to which [they] ha[ve] been sentenced," *Panetti*, 551 U.S. at 960, and therefore whether they could be constitutionally put to death without showing significant medical improvement.

As a result, the interests in finality and promptly executed sentences that petitioners stress so heavily may often be "empty formalit[ies]," *id.* at 946, of the sort this Court has disregarded in the past. The substantive question before the Court is instead: assuming that respondents recover some day to the point where they can understand their situation,

should the courts then permit them to resume their first federal habeas petitions at the point where they left off? Or should those petitions instead be litigated in respondents' effective absence, treating their own memories of what happened at their own trials as mere "missing piece[s] of evidence," Tibbals Br. 31, on which they have no special claim to rely? Nothing in AEDPA requires the latter answer, and concerns for the reliability and integrity of the courts' decision-making processes strongly argue in favor of the former. Accordingly, this Court should adhere to its teaching that it will not "close [its] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent," *Castro*, 540 U.S. at 381, and hold that the district courts have sufficient discretion to save the claims of capital prisoners such as respondents in these cases.

CONCLUSION

The judgments of the Sixth and Ninth Circuits should be affirmed.

Respectfully submitted,

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ADDENDUM

APA Official Actions

Position Statement on Mentally Ill Prisoners on Death Row

Approved by the Board of Trustees, December 2005

Approved by the Assembly, November 2005

> "Policy documents are approved by the APA Assembly and Board of Trustees . . . These are . . . position statements that define APA official policy on specific subjects . . ." – *APA Operations Manual*.

(a) Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forego or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

(b) Procedure in Cases Involving Prisoners Seeking to Forego or Terminate Post-Conviction Proceedings. If a court finds that a prisoner under sentence of death who wishes to forego or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision,

the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

(c) Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings. If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment.

(d) Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose. If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.