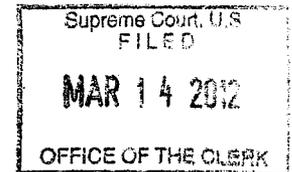


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No. 10-930

In the Supreme Court of the United States

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

v.

ERNEST VALENCIA GONZALES,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

SUPPLEMENTAL BRIEF FOR RESPONDENT

JON M. SANDS
Federal Public Defender
*LETICIA MARQUEZ
TIMOTHY GABRIELSEN
Office of the Federal Public Defender
for the District of Arizona
407 West Congress Street, Suite 501
Tucson, Arizona 85701
(520) 879-7614
Leticia_Marquez@fd.org
*Counsel of Record

Counsel for Respondent

March 14, 2012

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ARGUMENT

- I. Petitioners continue to ignore the capital prisoner's high burden and exaggerate potential impact of *Rohan* cases on capital habeas dockets.

Petitioners claim that “[b]y simply declaring they are incompetent to assist their post conviction counsel, [capital] prisoners thereby force psychological evaluations to be conducted and hearing to be held on this issue.” (Supp. Br. p. 7.) Petitioners are wrong. Were this the case, capital prisoners would have surely flooded the habeas dockets with *Rohan* requests and subsequent hearings. *Rohan ex. rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003) *cert denied*, 540 U.S. 1069 (2003). Petitioners’ characterization of competency proceedings at the habeas stage ignores what happens in practice; that the *Rohan* competency holding is narrow in scope and the *Rohan* standard is demanding in its enforcement.

A federal habeas petitioner may *initially* move for a *Rohan* determination *only* if he raises claims which could benefit from his ability to rationally communicate information that is within his own private knowledge, *Rohan*, 334 F.3d at 818-19, or if his incompetence prevents him from rationally making an important decision which he alone can make. *See also Holmes v. Levenhagen (Holmes II)*, 600 F.3d 756, 762 (7th Cir. 2010). In addition, counsel for the capital prisoner must make a threshold colorable showing of

potential incompetence with his motion for determination of competency.¹

Only after this threshold showing does the district court have the discretion to grant the prisoner's request for either a determination or a hearing.² Even if a hearing is granted, the district court is still the gatekeeper to a stay. Here, as in other competency settings the capital prisoner has the burden of proof. *See Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (the government may presume the defendant is competent and require the defendant to shoulder the burden of proving incompetence); *Medina v. California*, 505 U.S. 437, 452 (1992) (allows states to place the burden of proof on a defendant in competency hearings that occur at any stage of the proceedings).

¹ By way of example, in support of his *Rohan* motion in this matter, counsel for Mr. Gonzales filed 12 exhibits which included among other documents: 1) a declaration from counsel outlining observations and interactions with her client; 2) nonsensical and paranoid pleadings and letters by Mr. Gonzales; 3) a mental health report from a court-appointed psychiatrist finding Mr. Gonzales delusional; and 4) four additional mental health reports, all finding Mr. Gonzales psychotic and/or delusional. In one such report, the expert stated Mr. Gonzales was unable to understand the nature of the legal proceedings and further unable to assist counsel.

² *Rohan* competency is not required in cases where appointment of a next friend or guardian ad litem would adequately protect the petitioner's rights and interests. *See Rohan*, 334 F.3d at 816 (when grounds for relief are apparent even without a petitioner's assistance, a "next friend" or guardian is in the best interest of the petitioner).

Moreover, a district court may, as they often do, outright dismiss a request for a *Rohan* determination without evidentiary development of any type. See *Clayton v. Luebbers*, No. 4:02-cv-08001 (W.D. Mo. April 27, 2006); *Henry v. Ryan*, No. 2:02-cv-00656 (D. Ariz. Jan. 24, 2006); *Carpenter v. Ayers*, No. C 98-2444 (N.D. Cal. Dec. 2, 2008); *Mines v. Dretke*, No. 3:00-CV-2044 (N.D. Tex. Aug. 6, 2003); *Kirkpatrick v. Ayers*, No. CV 96-00351 (C.D. Cal. Nov. 13, 2009); *Cole v. Workman*, No. CIV-08-328 (N.D. Okla. Sept. 1, 2011); *Conner v. Florida Dep't of Corrections*, No. 1:07-cv-23009 (S.D. Fla. May 18, 2010); *Cummings v. Florida Dep't of Corrections*, (S.D. Fla. Aug. 8, 2007); *Gore v. Sec'y for the Dep't of Corrections*, (S.D. Fla. May 25, 2010); *Rodriguez v. McNeil*, No. 1:10-cv-22692 (S.D. Fla. Jan. 3, 2011).

The history of how the *Rohan* decision has been applied in the district courts is evidence the burden for claimants is a high one. In the almost *nine* years since the *Rohan* decision, Petitioners are able to point to only a few cases to support hyperbolic claims of chaos in the federal courts. Nothing can be further from the truth; the flood gates have not been opened.

Respondent has attempted to capture an accurate number of the affected cases. As can best be assessed from a search of all the district courts dockets nationally, less than 2% of all capital habeas cases in federal courts are currently stayed pursuant to a request for a *Rohan* determination.³ The Solicitor

³ In October 2011, the Office of the Federal Defender, District of Arizona (FPD) created a CM/ECF query to locate all death penalty cases where claims of incompetency based on *Rohan* were alleged.

General is correct in his assertion that in the years since the original decision, “the [*Rohan*] issue appears to have arisen infrequently.” (Solic. Gen. Br. 18.)

In fact, contrary to their position in this case, Petitioners have recently not only recognized the *Rohan* decision, but have embraced it and stipulated to a capital prisoner’s incompetency, resulting in a stay. See *White v. Ryan*, No. CV 08-08139 (D. Ariz. Sep. 29, 2010.)

As Respondent set forth in his brief in opposition, a number of these cases involve stipulated stays.

This query was sent to all of the district and circuit court clerks. For any district that did not return a CM/ECF query result, FPD staff performed a PACER search of each docket individually. The cases cited as a result of the queries were individually evaluated for *Rohan* claims and those cases were summarized.

Any docket that did not have “competency,” or one of the designated terms, in the pleading description section on PACER would not appear in the results. The results would also not include any case where a *Rohan* claim was initiated in a court. The results were measured against the most current available statistics to obtain the percentage above. See <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C03ASep10.pdf>

II. Even the few cases cited by Petitioners in their supplemental brief do not support their argument claims of substantial harm.

A. The cases relied upon concern stays, not habeas grants.

Petitioners leap bounds beyond the scope of *Rohan*. As set forth above although *Rohan* stays are rare, indefinite stays are even more rare. For most of the cases cited, the delays are not significant and do not compromise state interests. In the only case cited illustrating an indefinite stay, *Holmes v. Buss (Holmes I)*, 506 F.3d 576 (7th Cir. 2007), the district court found the capital prisoner competent on remand, a result which was overturned again on appeal in *Holmes II*, 600 F.3d at 763. The court declined to appoint a guardian *ad litem* because the decision of whether to claim competence would be “exceedingly difficult” under the circumstances. *Id.* An indefinite stay is an atypical result, but even this extreme case did not result in a grant of habeas relief.

Furthermore, as stated above, in cases involving stays on competency grounds, a district court may appoint a next friend to litigate the habeas claims. Additionally, the prisoner may regain competence, whether as a result of medical treatment or simply due to the passage of time. Thus, the truly indefinite stay as above is highly unusual.

B. In the cases cited by Petitioners in their supplemental brief, and by *amici*, there were legitimate reasons to suspect incompetency, or other reasons for delay.

Capital prisoners who requested competency hearings in the cases cited by Petitioner were of legitimately uncertain competency. Evidence in the record and court decisions demonstrate that the ability of these prisoners to assist in their own defense was highly questionable. Therefore, their requests for competency hearings were legitimate measures to resolve open questions of fact, rather than mere delay tactics.

In *Holmes II*, Judge Posner found the petitioner seeking an incompetency ruling to be “deeply confused, obsessed, and delusional,” based on defendant’s own recent testimony. 600 F.3d at 762. Similarly, in *Ferguson v. Sec. for the Dep’t of Corrections*, that petitioner testified that he had been placed in a mental hospital and diagnosed with schizophrenia, psychosis, and hallucinations over a period of several years. 580 F.3d 1183 (11th Cir. 2009). The district court found credible evidence that petitioner had at one point had a mental disorder that included symptoms indicating possible paranoid schizophrenia. *Id.* at 1221. In *Clayton v. Roper*, jail officials suspected petitioner’s psychosis, and the prison staff psychologist concluded petitioner was likely incompetent to assist his attorney. 515 F.3d 784, 789 (8th Cir. 2008) *cert. denied*, 129 S. Ct. 507 (2008). Thus, the cases cited by Petitioner as an illustration of a system run amok feature evidence of genuine concerns about the competency of the habeas petitioners.

In one case cited by Petitioners, the capital prisoner received stays for a myriad of reasons, not simply due to claiming incompetence. *Blair v. Martel*, 645 F.3d 1151, 1153 (9th Cir. 2011) (Multiple rounds of habeas claims, based on grounds other than incompetence, were filed which cumulatively led to the delays in the proceedings.)

III. The Court's recent decision in *Martel v. Clair*, at minimum, signals the "interest of justice" standard is applicable regarding the attorney-client relationship at the habeas stage.

In his brief the Solicitor General suggested that the question presented in *Martel v. Clair*, pending before the Court, may illuminate the scope of 18 U.S.C. § 3599, the statute at the crux of this matter. Since the Solicitor General's filing, the Court decided *Martel v. Clair*, – S.Ct. –, 2012 WL 685759 (March 5, 2012).

This Court's reasoning in *Clair* reaffirms the significance of counsel's role in capital representation, specifically as it relates to the attorney-client relationship.

The question before this Court was essentially whether district courts deciding substitution of counsel motions, brought pursuant to § 3599, should utilize an "in the interests of justice" standard, derived from 18 U.S.C. § 3006A, an appointment of counsel statute for non-capital litigation. *Clair*, 2012 WL 685759, at *7. This Court rejected the State's proposed higher standard for substitution of counsel of "actual or constructive denial" of counsel. *Id.*

In support of that decision, this Court set forth its belief that § 3599, “aims in multiple ways to improve the quality of the representation afforded to capital petitioners and defendants alike.” *Clair*, 2012 WL 685759, at *7. The Court also reaffirmed that this statute “‘reflects a determination that quality legal representation is necessary’ in all capital proceeding to foster ‘fundamental fairness in the imposition of the death penalty.’” *Clair*, 2012 WL 685759, at *7, citing *McFarland v. Scott*, 512 U.S. 849, 855, 859 (1994). The Court further acknowledges the “myriad ways that § 3599 seeks to promote effective representation for persons threatened with capital punishment.” *Id.*

Although Petitioners infer that since there is no constitutional right to counsel in habeas, and as such no right to competency as implicated in the *Rohan* decision. (Pet. at 7.) In an analogous context, the Court rejected this position. *Clair*, 2012 WL 685759, at *9.

At minimum, the Court has signaled that an “interest of justice” standard is necessarily implicated with respect to these sorts of questions, i.e., the role of counsel in habeas proceedings. That being the case, if an “interest of justice standard” is applied to habeas competency matters, where the crux of the claim is the attorney-client relationship, it dictates that counsel should be able to meaningfully communicate with his client.

Clair thus encourages a broader reading of § 3699, rather than the cribbed reading offered by the Petitioner to justify going forward with executions, despite the capital prisoner’s proven inability to assist counsel appointed under § 3599.

CONCLUSION

For the foregoing reasons, and those set for by the Solicitor General, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted this 14th day of March 2012.

JON SANDS
Federal Public Defender
*LETICIA MARQUEZ
TIMOTHY GABRIELSEN
Office of the Federal Public Defender
for the District of Arizona
407 W. Congress, Ste. 501
Tucson, Arizona 85701
(520) 879-7614
Leticia_Marquez@fd.org
*Counsel of Record

Counsel for Respondent