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 WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SIXTH CIRCUITS

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Ohio and the ACLU of Arizona are two of its statewide affiliates. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and meaning of federal habeas corpus, both as direct counsel and as *amicus curiae*. Through its Capital Punishment Project, the ACLU also represents individuals charged with capital offenses, as well as those who have already been convicted and sentenced to death.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. As *amicus curiae*, the organization offers a unique perspective on federal criminal law questions because its members represent a majority of those individuals charged with federal crimes in every district, throughout all

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no one other than *amici curiae*, its members or its counsel made a contribution to fund the preparation or submission of this brief.

the circuits. Pertinent to Carter's and Gonzales's cases, NAFD members represent capital clients at trial, on appeal, and in federal habeas litigation. The questions before the Court are therefore familiar, and of substantial importance, to the NAFD and its members.

STATEMENT OF THE CASE

These cases involve two death row prisoners who have been found incompetent to participate in the litigation of their federal habeas petitions by virtue of their progressive mental illnesses.

Ernest Gonzales is an Arizona death-row inmate, found by a state psychologist to "suffer[] from a 'genuine psychotic disorder' and [to be] . . . 'unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. A3, C4-C6. Gonzales repeatedly refused visits from counsel (about whom he was irrationally suspicious), displayed delusions in letters to the courts, and appeared not to understand the legal proceedings. *See* Pet. App. A3, C2; Em. Motion for Writ of Mandamus 24; Supp. Br. in Support of Pet. for Mandamus 29, 33 and attachments. During state post-conviction proceedings, a state court found him incompetent and thus unable to represent himself (but ruled that state law did not require him to be competent for post-conviction proceedings to proceed). *See* Supp. Reply Br. in Support of Pet. for Writ of Mandamus 6; Dist. Ct. Doc. No. 102 (Mot. For Competency Determination and to Stay Proceedings and Attachments); Resp. Br. in Opp. 1; Pet. App. B3. The federal district court acknowledged expert reports for

both the State and Gonzales finding Gonzales incompetent to proceed, but ultimately held it was unnecessary to determine competency. *See* Pet. App. A3, C4-5, C24, C28. The Court of Appeals for the Ninth Circuit held that the record supported a finding that Gonzales was incompetent and that a stay of proceedings should issue. Pet. App. A1-A9.

Sean Carter is an Ohio death-row prisoner found by experts for both the State and Carter to suffer from debilitating schizophrenia. Pet. App. at 30-35a. Questions surrounding Carter's mental competence go back at least to the time of his 1998 trial, where this disputed issue divided the appointed psychiatric experts but was ultimately resolved by the trial judge against Carter. *State v. Carter*, 734 N.E.2d 345, 355-56 (Ohio 2000). Though the experts disagreed as to how well Carter could assist in his case, they both agreed that Carter could not "fully and articulately communicate with his counsel." *Id.* The federal district court credited these experts, and found Carter incompetent to proceed. Pet.App. 36a-42a, 47a. The Court of Appeals for the Sixth Circuit found that the district court determination was within its discretion based on the evidence, and directed the court to stay all claims requiring Carter's assistance. *Id.* at 8a-9a, 14a-15a.

SUMMARY OF ARGUMENT

1. For death-row prisoners, a federal habeas corpus petition under 28 U.S.C. § 2254 can be a life and death matter.[2] As this Court has acknowledged, "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).

Both Carter and Gonzales persuasively show that the lower courts properly stayed their federal habeas proceedings because, in both cases, mental illness makes them temporarily incompetent to participate. *Amici* endorse their legal arguments, but do not repeat them here. This amicus brief instead will answer, through case examples, two questions: First, in what ways might a competent death row prisoner meaningfully participate in the litigation of his petition? And second, by contrast, how might mentally incompetent prisoners be harmed by their inability to participate?

2. Contrary to the States' arguments, Pet. Tibbals Br. 25-26; Pet. Ryan Br. 14-15, a capital habeas petitioner's role is not limited to a passive wait on death row for the outcome of a "purely legal" proceeding handled exclusively by lawyers working remotely. The attorney-client relationship is a two-way street. See Br. for American Bar Association as *Amicus Curiae* (describing law and professional rules

[2] For economy, the habeas provisions contained in sections 2254 and 2244 of Chapter 28 of the United States Code are hereafter cited merely with their section number, such as §2254 or §2244.

undergirding attorney-client partnership). And if the lawyer is required by experience and role to be more active, it does not follow that the petitioner is or becomes entirely passive in the prosecution of what is "likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Holland v. Florida*, __ U.S. __, 130 S. Ct. 2549, 2564 (2010). As shown below, full access to that opportunity hinges on the prisoner's ability to be involved at various junctures that include: prompting counsel to timely file his habeas petition; prompting his lawyers to raise all viable federal claims; moving to substitute counsel when counsel fails to protect his rights; participating in the development of the facts where an evidentiary hearing has been ordered or sought; and participating in litigation of a variety of facts concerning the state-court proceedings that may well be significant, if not outcome determinative, in the litigation of the federal writ.

3. Although many condemned prisoners suffer from physical or mental illnesses or emotional problems that affect their ability to interact with counsel, few are ever found incompetent. For those who are found incompetent, like respondents here, their limitations severely constrain an attorney's ability to provide ethical and effective representation. Because the habeas petition belongs to the client, not counsel, the attorney carries specific duties with respect to the case, which are difficult, if not impossible, to fulfill without the active and able participation of the client. These include fact investigation, evaluation of the accuracy of the state court rulings and fact-findings, and determination and consideration of what may have transpired in

the proceedings but may not have been captured in the record. The second part of this brief illustrates the sort of problems that occur when a prisoner is held incompetent to participate in the proceedings, particularly in the needed development of facts at the federal writ level. These case stories demonstrate why it is necessary and appropriate for the district court to evaluate whether the habeas petition may proceed, given the client's condition.

4. Guided by section 2254 and other statutes, federal habeas courts root out unconstitutional death sentences and convictions. But they do so only with the participation of the litigants – the State, the prisoner's lawyer, and the prisoner. The reliability of their decisions would come into question if courts were forced to adjudge petitions with incompetent petitioners. A death-sentenced prisoner cannot be made an inanimate object, moved like a mere component of the court record through lawyer-driven litigation. He is instead a still-living, breathing person, with the combination of unique factual knowledge and unique motive that make his active involvement in the litigation vital.

The Court should affirm the judgments below.

ARGUMENT

I. COMPETENT DEATH-ROW PRISONERS CAN AND DO PLAY A CRITICAL ROLE IN HABEAS PROCEEDINGS.

The procedural and factual complexity of capital habeas litigation is well-known. *See, e.g., Martel v. Clair*, __ U.S. __, 132 S. Ct. 1276, 1285 (2012) (quoting Congress's statutory recognition of the "unique and complex nature of the litigation" in

18 U.S.C. § 3599 (d) (2006 ed.)). Before the constitutionality of a condemned prisoner's conviction or sentence may be even addressed, various rules, designed in part to uphold federalism and finality, must be followed. Some rules come from this Court's jurisprudence. *See*, *e.g.*, *Teague v. Lane*, 489 U.S. 288 (1989). Others come from Congress, including most notably the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

The merits briefs of the States in these matters assume that prisoners have little to offer in this process, except as witnesses. Pet. Ryan Br. 14-15; Pet. Tibbals Br. 25-26. As discussed below, however, competent death-row prisoners can – and have – played a critical role in habeas actions in assuring both the procedural fairness and factual accuracy of the proceedings.

a. Protective responses to attorney failures

As is familiar, a state prisoner must file his federal writ within one year of the petition becoming final in the state court, with the clock tolled during the pendency of properly filed state post-conviction motions. § 2244(d)(1).

A death-row prisoner may elect to rely on his counsel to calculate the deadline and timely file a meaningful writ. But recent history teaches that he would do so at considerable risk. The Court described the attorney-client relationship as one of agency in *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Absent extraordinary circumstances, *see Holland*, 130 S. Ct. at 2562-63, the prisoner will pay the price for the attorney's failure to file on time.

This juncture of the habeas litigation is the first of many in which the prisoner's competent participation can mean the difference between success or failure, life or death. As shown in the examples below, mentally competent prisoners have managed to overcome the failings of counsel who neglected to file their petitions, filed them late, or filed incomplete or inadequate petitions.[3]

1. Albert Holland might have sat in his Florida death-row cell and awaited word whether his appointed attorney had timely filed Holland's federal habeas petition (and for that matter the result of the petition). But Holland did not passively rely upon counsel. Rather, he did everything he could to protect himself. His effort proved central to the ultimate grant of relief in his case. *See Holland*, 130 S. Ct. at 2558.

Holland wrote his attorney "many letters emphasizing the importance" of filing a timely federal petition. *Id.* at 2552. He specifically asked his attorney "to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review." *Id.* at 2555. He frequently contacted the Florida Supreme Court to learn the date it would (as he expected) deny his pending state post-conviction petition. *Id.* at 2555-56. That date was of great interest because, upon its denial, Holland would have had only twelve days left under AEDPA's one-year statute of limitations. *Id.* at 2556.

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[3] These examples are intended to sketch the outlines of the broad range of ways in which a competent prisoner may contribute to his habeas case. In particular, this Court's recent cases demonstrate the surprising ways in which prisoners may be required to rise to their own defense in these proceedings.

When Holland learned, through his prison library research, that the court had denied his petition some five weeks earlier, he immediately wrote out his own *pro se* federal habeas petition and mailed it to the district court. *Id.* at 2557.

Holland could try to protect himself only because he was able to research and understand the law. Indeed, he sought to teach the law to his deficient lawyer: in his letters to counsel, he "[i]dentified the applicable legal rules" as well as the due date of the petition. *Id.* at 2552. When Holland disagreed with counsel about whether the petition would be tolled under AEDPA, he told counsel in a letter. And as this Court noted, while Holland "was right about the law," his lawyer "was wrong." *Id.* at 2558.[4]

Based on Holland's actions, the State agreed that he had exercised the requisite "due diligence" for equitable tolling of his tardy habeas petition. *Id.* at 2565. This Court concurred and remanded to the Eleventh Circuit, *see id.*,[5] which in turn remanded to the district court. *Holland v. Florida*, 613 F.3d 1053 (11th Cir. 2010). The district court then resolved the tolling issue in Holland's favor, heard the petition on the merits, and held that he was entitled to relief

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[4] *Holland* presents an extreme example, but – in amici's experience – it is not uncommon for attorneys and clients to engage in dialogue about the law, and for clients to meaningfully advance the litigation, substantively or procedurally, when capable counsel is responsive.

[5] In *Holland*, this Court defined for the first time the extraordinary circumstances required for equitable tolling and remanded to the Eleventh Circuit to apply this new standard. *Id.* at 2565.

because he had unconstitutionally been denied his right to self-representation during the capital trial at which he had been sentenced to death. *See Holland v. Tucker*, __ F. Supp. 2d __, 2012 WL 1193294, *30 (S.D. Fla. April 03, 2012) (finding unreasonable application of *Faretta v. California*, 422 U.S. 806 (1975)). Holland now awaits a new trial, rather than execution.

If Holland had been mentally incompetent, like Carter and Gonzales, it is highly doubtful that his attorneys' errors would have ever been brought to light and he might never have been afforded the federal habeas review that ultimately remedied his unconstitutional capital trial.

2. Quintin Jones, who was sentenced to death in Texas, has also played a critical role in protecting his rights through active participation in his habeas litigation. *See generally Jones v. Thaler*, Case No. 4:05-cv-00638 (N.D. Tex) (docket and documents cited available on PACER).

During the pendency of his state post-conviction proceedings, Jones wrote his attorney at least eight times, requesting that the attorney look into various issues. *Jones*, Document 86, at 9. For example, Jones wrote in an early letter: "I don't know if you know about the *Wiggins* [*v. Maryland*, 539 U.S. 510 (2003)] case? Or the *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] case? What I'm saying I don't think or feel that my mental and social historys [sic] were really looked into . . . and I really think those cases would play a big role in my case if my history is really looked into and told the way it should have been . . ." *Id.* at 9. Initially, his lawyer failed to

respond; then, the lawyer failed to include the claims in his post-conviction application. *Id.* at 9-10.

When Jones learned that the Texas high court had denied that application, it was only because the State Attorney General's Office had copied him on a letter to his counsel. *Id.* at 4, 10. By this time, only six months remained on AEDPA's one-year clock. Jones immediately, and unsurprisingly, told counsel that he did not want him to continue on the case in the federal courts. *Id.* at 10. Jones also wrote the district court and asked that his counsel not be appointed on the federal case. *Id.* at 19. The court, however, appointed the lawyer over Jones's objection. *Id.* at 20.

The attorney again failed Jones. He filed the writ out of time and failed to respond to the State's motion to dismiss it, resulting in dismissal of the writ. *Id.* at 4-5.

On Jones's prompting, the district court later appointed new counsel, who immediately moved for relief from judgment, citing Jones's diligence in protecting and asserting his own rights. *Jones*, Document 35, at 18. The district court granted the motion and allowed new counsel to respond to the State's dismissal motion, which he did, arguing that the time for filing Holland's petition should be equitably tolled due to attorney abandonment. *Jones*, Document 86, at 5. That issue reached the Fifth Circuit, which remanded to the district court to consider Jones's request under *Holland*, *supra*. *See Jones v. Thaler,* 383 F.Appx. 380 (5th Cir. 2010).

At this time, that issue remains pending in the district court. And Jones remains alive. If

incompetent like Carter and Gonzales, he could not have taken the steps that have so far saved his life and allowed him a chance at federal review.

3. Chris Shuffield is another Texas death-row inmate whose ability to stand up for himself, in the face of attorney incompetence, has probably saved his life. *See Shuffield v. Thaler*, 6:08-cv-180 (E.D. Tex) (docket and documents cited available on PACER and on file with author).

After the Texas Court of Criminal Appeals denied his state post-conviction motion, Shuffield knew he needed better counsel,[6] and asked his attorney to withdraw from his anticipated representation in federal habeas proceedings. The attorney agreed, and the district court appointed new counsel. *Shuffield*, Document 1, at 1, ¶ 4; *Shuffield*, Document 19 (Order Granting Motion to Substitute New Counsel), at 1. But new counsel did no better.

New counsel filed a "skeletal petition" that contained "numerous typographical errors, and . . . nearly all of the arguments . . . were 'boilerplate' contentions which appear to have been copied from an application filed on behalf of a different inmate." *Id.* at 2. Shuffield then filed a *pro se* motion asking that counsel be substituted. *Id.* Counsel responded by sending Shuffield a "corrected" version, which Shuffield reported was "worse than the original skeletal application." *Id.* at 2. Noting this shoddy

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[6] The attorney filed only three claims, none of which were cognizable. *See Ex parte Shuffield*, Order, Case No. WR-69454-01, 2008 WL 1914747, *1 (Tex. Crim. App. April 30, 2008) (unpublished) ("Applicant has not raised any cognizable claims. Relief is denied.").

work, the district court again granted Shuffield's motion to substitute counsel. *Id.* at 3.

Shuffield's partnership with his second replacement counsel appears to have worked out better. The district court has granted substitute counsel's motion under *Rhines v. Weber*, 544 U.S. 269, 276-78 (2005), to stay the habeas proceedings so that he could return to state court to exhaust a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Shuffield*, Document 47, at 6. And the Texas Court of Criminal Appeals has recently found "that the requirements for consideration of a subsequent application have been met and . . . remanded [the case] to the trial court for consideration of" this claim. *Ex Parte Shuffield*, Order, Case No. WR-69454-01, 2012 WL 130275 (Tex. Crim. App. Jan. 11, 2012).

Like Holland and Jones, Shuffield remains alive and his case remains in litigation. But if he had been mentally incompetent when professionally incompetent attorneys were handling his case, he could well have lost, if not his life, at least his opportunity for important federal habeas review of his conviction and death sentence.

b. Petitioner involvement in evidentiary hearings

Even in the wake of *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388 (2011), this Court has acknowledged a continuing need for evidentiary hearings in some circumstances. *Id.* at 1401. *See also id.* at 1412 (Breyer, J., concurring in part and dissenting in part) (suggesting scenarios in which

hearings would be appropriate).[7] As the Court is well aware, the condemned prisoner has the right to be present for an evidentiary hearing. *See* 28 U.S.C. §2243 (guaranteeing prisoner's right to be present at evidentiary hearing); *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (noting that presence of petitioner at hearing "is inherent in the very term 'habeas corpus'"). In order to exercise that right, the prisoner must, of course, be competent. *See* U.S. Br. 29. If he is not, he will be unable to follow witness testimony, inform counsel if the testimony appears untruthful or inaccurate, propose lines of cross-examination and, in some cases, take the witness stand and testify himself. It is, therefore, beyond any reasonable dispute that when a court holds an evidentiary hearing, "a capital prisoner's testimony or assistance might be crucial to a potentially

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[7] When appropriate, lower courts have approved evidentiary hearings post-*Pinholster*. *See, e.g., Winston v. Pearson*, __ F.3d __, 2012 WL 2369481, at *7-11 (4th Cir. June 25, 2012) (rejecting State's new argument under *Pinholster* and reaffirming *Winston v. Kelly*, 592 F.3d 535, 552-53 (4th Cir. 2010) (finding no abuse of discretion to hold hearing on colorable *Atkins* claims on which the state court had never provided a hearing)); *Lee v. Glunt*, 667 F.3d 397, 406-07 (3rd Cir. 2012) (remanding to district court and granting discovery and possible evidentiary hearing depending on outcome of discovery); *Thompson v. Parker*, No. 5:11–CV–31, 2012 WL 1567378, at *4-6 (W.D. Ky. May 2, 2012) (granting evidentiary hearing to death-sentenced inmate in Kentucky whose federal claim had not been addressed on the merits during state-court review); *Brumfield v. Cain*,__ F. Supp. 2d __, 2012 WL 602163, at *11-12 (M.D. La. Fed. 23, 2012) (rejecting State's claim that, under *Pinholster*, evidentiary hearing already held by district court was improper because state court decision on federal claim satisfied both § 2254 (d)(1) and (d)(2), and granting habeas relief).

meritorious habeas claim." *Id*. *See also* Resp. Carter Br. 30-37.

To be effective, however, a prisoner's involvement in the proceeding can and must begin long before an evidentiary hearing is even granted. As this Court has noted, the course of an investigation "depends critically" on information obtained by counsel from the client. *Cf. Strickland v. Washington*, 466 U.S. 668, 691 (1984). As a result, a prisoner in habeas proceedings must be and remain competent throughout the course of representation, so that he may suggest investigation to conduct and witnesses to interview to develop claims that might warrant a hearing. The case law illustrates how important a competent client's input in an investigation may be. *See, e.g., Johnson v. Secretary, Dep't of Corrections*, 643 F.3d 907, 933 (11th Cir. 2011) (describing case as one "in which counsel failed to adequately investigate what his client did tell him"); *Goodwin v. Johnson*, 632 F.3d 301, 319 (6th Cir. 2011) (in finding inadequate investigation by trial counsel after evidentiary hearing, noting that counsel "had little contact with [the client] and his family . . ."); *Lockett v. Anderson*, 230 F.3d 695, 712 (5th Cir. 2000) (relying, after evidentiary hearing, in part on client's statement that counsel "only met me twice in the entire time he was preparing my cases" to find inadequate investigation).

It is not enough that the client be competent at the outset of representation, and then competent again at the hearing. Both the attorney-client relationship and the development of the case require collaboration during the interim, particularly in the

run up to a hearing. *See* Br. for American Bar Association as *Amicus Curiae*.

c. Participation in fact-bound determinations in federal litigation looking back on state-court proceedings

Under AEDPA, a federal habeas court reviews the state court decision not only to see if it is contrary to, or involves an unreasonable determination of, clearly-established federal law, § 2254 (d)(1), but also to decide if it involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254 (d)(2).[8] Such factual review is necessarily aided by the participation of the prisoner who can assist counsel in identifying facts relevant to his federal claims from what can be a "voluminous record," *Miller-El v. Dretke*, 545 U.S. 231, 256 n.15 (2005), interpreting the cold state record, and seeing that the state record before the federal court is complete.[9]

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[8] A preliminary question before the section 2254 (d) analysis is purely factual: did the state courts rule on the federal claim? *See Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* [*v. Maryland*, 373 U.S. 83, 83 (1963)] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA . . . [and instead] . . . the claim is reviewed de novo."). When they have not, the federal court will be forced into the position of the first review court to address the factual aspects of the federal claim. *Id.* at 473-76 (engaging in fact-intensive analysis of materiality of evidence suppressed by State). Here, again, prisoner participation is inherently important.

[9] What constitutes the state record to be reviewed under section 2254(d) is not always self-evident. *See*, *e.g.*, *Miller-El,* 545 U.S. at 241 n.2 & 256 n.15 (conducting analysis under § 2254 (d)(2)

Section 2254 (d)(2) review is a key component of AEDPA, requiring the federal court to determine whether a state court's decision rested on an unreasonable determination of the facts. Although this provision contemplates respect for state judgments, it does not *preclude* a finding that the state court's factual determinations were unreasonable. *See*, *e.g.*, *Miller-El*, 545 U.S. at 240, 266 (finding state courts' ruling that the prosecutor's peremptory challenges were not "racially determined" an unreasonable determination of the facts in light of the evidence presented in the state proceedings).[10] A federal court's review of the state

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and considering "juror questionnaires, along with juror information cards, . . . added to the habeas record after the filing of the petition in the District Court" and observing "it is not clear to what extent [this] material expands upon what the state judge knew"); *id.* at 279 (Thomas, J., dissenting) (stating that the majority "bases its decision on juror questionnaires and juror cards that Miller-El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts"). *See also* Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (permitting, under designated circumstances, the district court to expand the record under review).

[10] *See also Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (finding the state court erred in using pre-*Atkins* sentencing evidence related to competency to decide an *Atkins* issue and thus made "an unreasonable determination of the facts in light of the record evidence (or lack thereof) before it in violation of § 2254(d)(2)."); *Brumfield*, __ F. Supp. 2d __, 2012 WL 602163, at *11; *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (7th Cir. 2005) (finding unreasonable determination of facts involving prosecutor's comments at trial); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003) (finding unreasonable determination of facts involving affidavit submitted in state courts).

court's application of federal *law* to the given facts under Section 2254 (d)(1) can also involve thorny factual issues. *See*, *e.g.*, *Wiggins*, 539 U.S. at 532-34 (finding, after extensive review of the facts, including seemingly conflicting facts, that by "deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*").

Fact-bound inquiries require a competent prisoner. State post-conviction counsel often changes when the case moves to federal court. A prisoner's memory of facts and nuances (such as the demeanor of a witness on the stand if there was a hearing) are as critical to effective representation and fact determination in federal habeas as in the earlier assessment of trial.

These backward-looking reviews are informed by the client's real-time experience of the events documented in the cold record. And, as the Court has repeatedly recognized, the cold record does not always tell the whole story. *See Skilling v. United States*, 130 S. Ct. 2896, 2918 (2010) ("In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service."); *Snyder v. Louisiana*, 552 U.S. 472, 490 (2008) (Thomas, J., dissenting) ("The trial court, *with the benefit of contextual clues not apparent on a cold transcript*, was better positioned to evaluate whether Ms. Scott was merely soft-spoken or seemed hesitant in her responses.") (emphasis added); *Uttecht v. Brown*, 551 U.S. 1, 17 (2007) ("We do not know anything about

his demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal.").

The prisoner's perspective of the state proceedings under federal review thus will often be indispensable.

d. *Prisoner's role in questions of procedural default*

A state prisoner seeking federal habeas review of federal claims must demonstrate that any state procedural defenses were not proper bars to review, as federal habeas review will generally not be available if the state court rejected the claim based on a firmly-established and regularly-followed state procedural rule. *See*, *e.g.*, *Walker v. Martin*, __ U.S. __, 131 S. Ct. 1120, 1128 (2011). Again, this requires a backward look at the facts of the state-court proceeding. Like any fact-based review, it requires client participation.

1. Eric Clemmons's case provides an example. Clemmons spent over a decade on Missouri's death row for a murder he did not commit. *See generally* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3110 (last visited on July 25, 2012). His habeas petition hinged on claims that he presented in a *pro se* appeal in state court, but which did not appear in his counseled appeal. The federal district court initially rejected them, but Clemmons was able to persuade the federal appellate court that his claims were not procedurally barred, because they had been raised in his *pro se* brief. *See Clemmons v. Delo*, 124 F.3d 944, 948 (8th Cir. 1997).

If Clemmons had become mentally incompetent between state and federal post-conviction review, the significance of his *pro se* filings might well have been lost and, with it, his one chance at federal review of his unconstitutional trial. [11]

In ruling for Clemmons, the circuit court noted that whatever a lawyer does, the client "is and always remains the master of his cause. Here, Clemmons did the only thing he could do [to preserve a claim his counsel refused to bring]: he tried to bring the issue to the attention of the Missouri Supreme Court himself." *Id.* The court therefore held that "the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus." *Id.* at 949. The court then found Clemmons's constitutional claims meritorious, granted the writ, and ordered that the State release him or provide him with a retrial free from constitutional taint. *Id.* at 956.

Clemmons could not have participated in federal review if, like Carter and Gonzales, he had been incompetent and unable to communicate with his lawyers. Without his active participation in both the state and federal courts, he could well have been executed for a crime he did not commit.

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[11] *Cf. Taylor v. Wilkinson*, 389 F.Appx. 380, 382 (5th Cir. 2010) (noting that the district court did not have a copy of "the complete state court record and specifically did not have a copy of" the prisoner's state post-conviction application, which the prisoner provided to the appellate court). As noted above, for a federal judge reviewing state proceedings to which she was not party, the four corners of the state record are not always readily identifiable. But the same is not true for the prisoner, who was present and party to the state proceedings.

Clemmons never returned to death row. On retrial, the jury acquitted him. *See Clemmons v. Armontrout*, 477 F.3d 962, 965 (8th Cir. 2007).

2. Even if there is a procedural default, the federal claim may still be reviewed if the prisoner can show "cause and prejudice." *Maples v. Thomas*, __ U.S. __, 132 S. Ct. 912, 919 (2012). Again, this requires a factual review of what happened in the state courts, in which client participation is important. *Maples* provides a good example.

Cory Maples waited on Alabama's death row for a decision from the trial court on his post-conviction motion, which had included a claim of ineffective assistance of trial counsel. If the trial court denied the motion, he would inch one step closer to execution and would have just 42 days to file a notice of appeal. *Id.*

But word from his lawyers, associates in a large New York law firm, never came. *Id.* Maples only learned of the trial court's denial when the *state's* attorney wrote him. *Id.* The letter informed Maples of the missed deadline, and notified him that four weeks remained during which he could file a federal habeas petition. *Id.* No copy was sent to Maples's attorneys of record, or to anyone acting on Maples's behalf. It was up to Maples to respond to try to save his appeals and his life. *Id.*

Maples "immediately" contacted his mother, who in turn contacted the law firm. *Id.* at 920. Then, Maples learned that his attorneys had left the firm, and abandoned his case. Different attorneys from the law firm got involved and made attempts to resurrect the time-barred appeal.

The Alabama courts held the ineffectiveness claim time barred, and then the lower federal courts sitting in habeas review held that Maples had procedurally defaulted the claim. *Id.* at 920-21. Ultimately, this Court held that attorney abandonment served as cause for the procedural default.[12] *Id.* at 928.

Maples was able to begin to repair the damage from his attorney abandonment because he read, understood, and acted on the letter from the State's attorney. He could not have done so if he had been incompetent.[13] And, if incompetent at the federal habeas stage, he would have been no help to his attorneys in untangling the fact-bound question of his attorney abandonment in the state courts.

e. *Cause and prejudice due to ineffective assistance of post-conviction counsel*

The district court will sometimes need to engage in a related fact-based cause and prejudice inquiry when the first opportunity a prisoner has to raise a claim of ineffective assistance of trial counsel arises in a state post-conviction proceeding in which he has no Sixth Amendment right to the effective assistance of counsel. Under this Court's recent

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[12] The Court remanded to the Eleventh Circuit to determine whether Maples could show prejudice sufficient to permit his federal claims to proceed. *Id.* at 928. *See also id.* at 922 (explaining cause and prejudice test).

[13] Although the attorney-failure Maples responded to occurred in the state courts, as the Texas cases above show, it could just as easily happened in other cases in the federal courts. In such circumstances, only a competent prisoner would have the capacity to protect his own rights, and in turn his life.

decision in *Martinez v. Ryan*, 566 U.S. __, 132 S. Ct. 1309 (2012), a prisoner in these circumstances who has procedurally defaulted his trial ineffectiveness claim, may show cause and prejudice sufficient to allow federal review of the claim if he had no state right to counsel in this proceeding or if post-conviction counsel was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

Under *Martinez* then, just as the trial ineffectiveness question is a fact-bound inquiry in which the prisoner would certainly participate at the state post-conviction level, the question of post-conviction counsel's ineffectiveness (necessary to resolve cause and prejudice) is one in which the prisoner would need to communicate with counsel during federal habeas litigation.

The facts of *Martinez* show just how involved a prisoner may need to be in this inquiry. Martinez had one lawyer appointed at trial, and another on direct appeal. *Martinez*, 132 S. Ct. at 1314. Arizona law did not permit appellate counsel to argue on direct appeal that trial counsel was ineffective; such claims are reserved for state collateral proceedings. *Id.* But although Martinez's attorney initiated post-conviction proceedings, she "made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all." *Id.*

Martinez then received notice that he would be required within 45 days to file a *pro se* petition in support of the motion for post-conviction relief. *Id.* "Martinez did not respond. He later alleged that he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to

file a *pro se* petition to preserve his rights." *Id.* Based on his inaction and the statement by counsel that he had no colorable claim, the Arizona courts dismissed his post-conviction petition. *Id.* A year and a half later, represented by new counsel, he filed a second notice of post-conviction relief. *Id.*

This Court decided in *Martinez* that the cause and prejudice requirement would be satisfied if post-conviction counsel were found to have performed ineffectively, but the Court did not decide if that were so. *Id.* at 321. Rather, it remanded to the circuit court for a determination of that question. Litigation of this intensely fact-bound claim, in which Martinez himself played a central role, could only proceed with his active participation.

f. *Prisoner role in stay and abeyance*

District courts have the authority, under certain circumstances, to temporarily stay section 2254 proceedings, and to hold the petition in abeyance, so that a prisoner may return to the state courts and exhaust a (theretofore unexhausted) federal claim. *See Rhines v. Weber*, 544 U.S. 269 (2005).

Charles Russell Rhines was a prisoner on South Dakota's death row when he filed his *pro se* petition for a writ of habeas corpus, followed by a *pro se* motion to toll the time on the AEDPA one-year clock. *Rhines v. Weber*, 408 F. Supp. 2d 844, 847-48 (D.S.D. 2005). Later, with appointed counsel, he filed an amended petition and, after the one-year clock had expired, the district court ruled that several of his claims had not been exhausted in the state courts. *Id.* at 846. Rhines asked the court to

stay and abate his habeas petition while he returned to state court to exhaust the claims. *Id.* The district court did so, but the court of appeals reversed.

This Court upheld the authority of district courts to stay and abate petitions while unexhausted claims are pursued in state court, provided that certain conditions are met. *Rhines*, 544 U.S. at 277-78. First, the prisoner must show "good cause" for failing to exhaust the claims in the state courts. *Id.* at 277. Second, he must show the claims were not "plainly meritless." *Id.* Third, "if a [prisoner] engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.* at 278.

Here again is a fact-intensive test to be resolved in federal habeas review, and one hinging on facts not necessarily in the existing state record. Whether or not claims (never previously heard) are "plainly meritless" requires a fact-based review of the trial or direct appeal; "good cause" for failure to exhaust will require review of state post-conviction proceedings as well. The petitioner's right to proceed with federal review of constitutional claims will be determined by these fact-based inquiries. Professionally competent counsel will, of necessity, depend upon a mentally competent client's memory and understanding of what are often extra-record facts underlying such claims.

For Rhines, these questions were ultimately answered on remand to the district court. *See Rhines*, 408 F. Supp. 2d at 853. The district court engaged in this three-part inquiry, finding that Rhines was "confused" about the exhaustion issues and that his post-conviction counsel had been

ineffective for failure to raise the unexhausted claims. *Id.* The court also commented that Rhines himself had not been derelict in pursuing his claims: "there is nothing in the record to indicate that Rhines's allegations of ineffective assistance of counsel are frivolous or that Rhines should have been aware that his post-conviction counsel should have raised the issues on appeal." *Id.* at 849. The court then conducted a preliminary analysis of the merits of the claims Rhines sought to exhaust in the state courts, all claims involving the facts of his trial, including a claim of ineffective assistance of trial counsel. *Id.* at 850-54. Lastly, in analyzing whether Rhines had engaged in delay tactics, the district court found he had not and cited, in part, Rhines's initial *pro se* filing of his habeas petition.

The analysis of the availability of stay and abeyance in *Rhines* involved facts and questions about which Rhines obviously had peculiar knowledge, and claims which had never before been heard. His participation was undeniably important. But he could not have participated at all – or won his stay and abeyance – if he had been mentally incompetent.

Under *Rhines* then, motions for stay and abeyance are yet another part of the federal habeas landscape involving intensive factual explorations of the state-court proceedings in which the prisoner's participation and ability to communicate is vital.

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At numerous junctures in the litigation of federal habeas petitions, a death-row prisoner's competent participation can prove crucial. Without

it, the prisoner would risk forfeiting, through no fault of his own, the full and fair federal habeas review that plays "'a vital role in protecting constitutional rights.'" *Holland*, 130 S. Ct. at 2562 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)).

II. INCOMPETENT DEATH ROW PRISONERS CANNOT PROVIDE COUNSEL WITH THE NECESSARY ASSISTANCE IN FEDERAL HABEAS PROCEEDINGS.

Given their incompetence, neither Carter nor Gonzales would have been able to protect their own interests or assist counsel, as outlined above. The cases that follow offer additional examples of critical tasks incompetent clients cannot perform during federal habeas proceedings. These incompetent clients were unable to assist in needed fact development, answer questions propounded by the district court, and participate in psychological testing fundamental to resolving their federal claims.

a. Like Cory Maples, Clarence Simmons faced possible execution in Alabama. But Simmons's situation was the reverse of Maples's. Unlike Maples, Simmons was mentally incompetent; unlike Maples's lawyers, Simmons's lawyers were remarkably diligent in protecting him. *See generally Simmons v. Culliver*, Case No. 2:08-cv-00419-RDP (N.D. Ala. Aug. 13, 2008).

Cognitive and neuropsychological testing showed that Simmons had "severe, multi-factoral dementia, as well as potential onset Alzheimer's disease." Motion for Hearing to Determine Competency (on file

with author of this brief), at 2.[14] As a result, Simmons experienced "disorientation to person, place and time, and profound loss of short term memory" as well as "widespread impairment of personal historical memory." *Id.* at 5. In 2004, Simmons had suffered a stroke resulting in additional cognitive impairment, including an inability "to understand simple questions, and the inability of the examiners, at times, to understand Mr. Simmons." *Id.* at 6.

On Simmons's behalf, his federal habeas counsel raised claims of ineffective assistance of counsel and a claim questioning Simmons's competency at the time of trial. There were no hearings in state court on these claims, and "[m]any of the facts necessary to support or litigate these claims [were] in the sole possession and knowledge of Simmons." *Id.* at 8. That left litigation of the factual issues to begin, for the first time, at the federal habeas stage. But counsel was unable to do so with Simmons so incompetent that he could neither understand nor be understood.

Indeed, Simmons was unable to undertake basic tasks asked of him by the district court. In July of 2008, the district court issued an order requiring Simmons to certify that he met with his attorney, understood the concept of "waiver" of claims, and was satisfied with the representation of counsel. *Id.* at 3.

In response to the order, counsel stated that Simmons was not able to comply because Simmons could not understand the content of the order, could

[14] PACER does not make available the docket or the pleadings in this case, saying merely that the case was "closed 09/01/2011."

not communicate with counsel, and could not comply with his obligations under the order. *Id.* at 18. Counsel explained that the "comprehension required to understand the court's [o]rder reaches far beyond Simmons's present abilities." *Id.*

The order also required counsel to explore with Simmons "'all potential grounds for relief including . . . whether the petitioner was not mentally . . . competent to stand trial.'" *Id.* Counsel explained that "Simmons does not understand the concept of competency. He is unaware that he is currently incompetent and is thus unable to speak in any meaningful way regarding his competency eleven years ago at trial." *Id.*

Finally, the order required Simmons to register complaints about habeas counsel immediately with the court or waive any claim about counsel's incompetence. *Id.* at 19. Counsel, however, explained that Simmons neither recognized counsel after meeting them repeatedly nor understood counsel's job or reason for assisting him. *Id.*

Because Simmons was mentally unable to provide his counsel with the facts they needed to litigate his petition, and unable to provide the district court with what it required of habeas litigants, the district court correctly found Simmons incompetent and, on September 1, 2011, issued an order removing Simmons's case from the active docket.

b. Joe Luis Dansby sat on Arkansas death row, and "refused to meet with either his counsel or mental health professionals employed by his counsel for over two years." *Dansby v. Norris*, No. 02-4141,

2009 WL 485418, at *2 (W.D. Ark. Feb. 26, 2009). As a result of Dansby's refusal, counsel and their experts could not prepare for a scheduled federal hearing on the issue of whether Dansby was mentally retarded and therefore could not be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The district court noted that Dansby "must be able to communicate and cooperate with counsel and mental health professionals to elicit information to support his claim of mental retardation; at a minimum, [he] must be able to participate in a mental health evaluation on the issue of intelligence." *Id.* at 2. Based on this need, the court granted Dansby's counsel's motion to allow a cell-side visit by their mental health expert. *Id.* at 3. Currently, all litigation is stayed until the district court determines if Dansby is competent to proceed.

Jack Gordon Greene is also on Arkansas's death row. And his lawyers also believe he is mentally retarded. *See generally Greene v. Norris*, No. 5:04-cv-00373-SWW (E.D. Ark.) (docket and cited documents available on PACER).

Greene testified in the federal court that he wished to withdraw his *Atkins* claim. *Greene*, Document No. 101 (Order), at 1. His attorneys told the court that Greene "lacks the capacity to appreciate his position and make a rational choice with respect to pursuing or abandoning an *Atkins* claim and that Greene is incompetent to proceed with any aspect of this litigation." *Id.* The district court ordered that Greene be taken to a medical facility for evaluation. *Id.* at 2.

In both cases, the factual issue of mental retardation requires resolution at the federal habeas stage. And in both cases, possible mental incompetence makes the prisoners' knowing, intelligent and voluntary participation in the *Atkins* claim impossible. But for a district court's ability to stay proceedings due to a habeas petitioner's incompetence, these prisoners and others like them would be at risk of being executed without ever having a full and fair hearing under *Atkins*.

c. In 2001, while on Nevada's death row, Michael Mulder suffered a stroke. As a result, he has "irreversible brain damage, is intellectually disabled (mentally retarded), has receptive and expressive aphasia, is incompetent, cannot assist counsel" and "cannot direct or meaningfully participate in his federal habeas proceedings." Petitioner's Pre-Hearing Brief Regarding Counsel's Motion To Stay Federal Habeas Corpus Proceedings at 3, *Mulder v. McDaniel*, 3:09-cv-00610-PMP, 2011 WL 4479771 (D. Nev. filed July 20, 2011) (docket and documents cited available on PACER).

These problems arose during state post-conviction proceedings, when post-conviction counsel was trying to elicit information needed to litigate Mulder's claim of ineffective assistance of trial counsel. *Mulder*, Document 71 (Evid. Hr'g Tr.) at 451-52. Mulder's stroke caused him great difficulties in communicating with post-conviction counsel. *Id.* at 436-37. Indeed, counsel would later testify that Mulder had been incapable of assisting him with these fact-intensive post-conviction claims. *Mulder*, Document 71 at 452. Counsel's motion to stay the litigation due to Mulder's incompetency, was

however denied. *Mulder*, Document 74 (Order Granting Stay), at 2.

In 2009, Mulder was appointed federal habeas counsel, who experienced the same communication issues. Counsel was particularly concerned with his ability to raise a claim of ineffective assistance of counsel given that the issue had not been raised on direct appeal, *Mulder*, Document 74, at 2, and had only been raised in post-conviction under similarly inadequate circumstances: that is, uninformed by any meaningful conversation with Mulder.

Under these circumstances, the district court found Mulder incompetent because he is unable to rationally communicate with his lawyer concerning claims that require his participation. *Mulder*, Document 74 (Order Granting Stay), at 31.

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A mentally competent death-row prisoner can contribute in multiple ways in the process of federal habeas review. The judge hearing such claims can do her job with confidence that the attorneys have not missed or misinterpreted important facts crucial to the federal claim. The attorney with a competent client has a partner with first-hand knowledge of crucial facts and the motivation to see that those facts come to light. And the State can draw comfort knowing that the adversarial process in a life-and-death case has been fair and complete. But without the prisoner's competent participation, the prisoner risks losing what is "likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Holland*, 130 S. Ct. at 2564. As Respondents Carter and

Gonzales have shown, district courts should be entrusted with the authority to manage this risk by staying petitions of incompetent death-row prisoners when necessary.

CONCLUSION

The judgments below should be affirmed.

Respectfully Submitted,

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