No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

RICHARD C. TAYLOR,
Petitioner,

V.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

THIS IS A DEATH PENALTY CASE

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QUESTION PRESENTED

Does a capital defendant have the right under the Sixth, Eighth, and Fourteenth Amendments to be competent to pursue a direct appeal as of right?

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD C. TAYLOR
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Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF TENNESSEE

_____

Petitioner Richard Taylor respectfully petitions for a writ of *certiorari* to review the order of the Court of Criminal Appeals of Tennessee in his capital proceeding.

CITATION TO OPINIONS BELOW

The Order of the Court of Criminal Appeals of Tennessee, *State v. Richard Taylor*, Slip Op. No. M2005-01941-CCA-R3-DD (Sept. 22, 2006 Tenn.), denying Petitioner's motion for a stay and competency determination, is attached hereto as Appendix A. The Order of the Supreme Court of Tennessee, *State v. Richard Taylor*, Slip. Op. No. M2005-01941-SC-S10-DD (Nov. 20, 2006 Tenn.), denying Petitioner's application for discretionary review of the Order of the Court of Criminal Appeals is attached hereto as Appendix B.

JURISDICTION

The Order of the Court of Criminal Appeals of Tennessee was entered on September 22, 2006. See Appendix A. The Tennessee Supreme Court denied discretionary review of this

Order on November 20, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257. A fuller description of the basis for jurisdiction is provided in the statement of jurisdiction, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. U.S. CONST. amend. VI.
>
> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No state shall … deprive any person of life [or] liberty … without due process of law. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

In 2003, Richard Taylor, an actively psychotic schizophrenic, was convicted of first degree murder and sentenced to death at trial. Through counsel, he timely appealed his conviction and death sentence and his direct appeal is currently pending in the Tennessee Court of Criminal Appeals. Simultaneously with his opening state appellate brief, Mr. Taylor filed a motion seeking a stay and a determination of his incompetency, based, *inter alia,* on an affidavit of a psychiatrist stating that Mr. Taylor is currently incompetent. The Tennessee Court of Criminal Appeals denied the motion for a stay and competency determination, holding that Mr. Taylor did not need to be competent on direct appeal. The Tennessee Supreme Court denied Mr. Taylor's application for discretionary review.

The relevant background to this case begins in 1980. Mr. Taylor, whose history of severe mental illness is both long and well-documented, was diagnosed by the state mental health center

as a paranoid schizophrenic in 1980. (Vol. 2, 153)[1]; *Taylor v. State*, No. 01C01-9709-CC-00384, 1999 WL 512149, at *22 (Tenn. Crim. App. July 21, 1999) (citing Appellant's "family history of mental problems, [his] difficult upbringing, and [his] long history of diagnosed mental problems."); *State v. Taylor*, 771 S.W.2d 387, 391 (Tenn. 1989) (noting that a state hospital psychiatrist diagnosed Mr. Taylor at age 19 with psychosis and prescribed antipsychotic medication to control his hallucinations and paranoia). Mr. Taylor was twenty-years old at the time and had recently attempted to commit suicide by swallowing glass. (Vol. 2, 153).

The following year, Mr. Taylor was charged with first-degree murder in connection with the death of Ronald Moore, a Tennessee corrections officer, on August 29, 1981. Mr. Taylor was convicted as charged and sentenced to death and the conviction and sentence were upheld on direct appeal. *State v. Taylor*, 771 S.W.2d 387 (Tenn. 1989). Thereafter, a specially-designated state trial court held over eleven days of hearings in state post-conviction proceedings and then granted Mr. Taylor's state post-conviction petition for relief in 1997, holding that trial counsel had been ineffective at both the guilt-innocence phase and the sentencing phase because they failed to investigate adequately his severe mental illness. (Vol. 2, 133). The trial court determined that Mr. Taylor was incompetent to stand trial and incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). (Vol. 2, 115).

From 1997 through 2002, the Tennessee courts consistently found that Mr. Taylor was incompetent to stand trial and incompetent to be executed. (Vol. 2, 115); (Vol. 30, 79); *Carobene v. Taylor*, No. 01P-1613, slip op. at 2 (Tenn. Prob. Ct. Nov. 5, 2001). In April 2003, after the State began to forcibly medicate Mr. Taylor, a new trial judge found him competent to stand trial following a two-day hearing. Mr. Taylor's competency was sharply contested at the hearing. All

[1] All citations are to the direct appeal record by volume and page number.

of the mental health experts called by the state and the defense agreed that Mr. Taylor continued to suffer from actively symptomatic schizophrenia. The new trial court permitted Mr. Taylor to waive counsel shortly after concluding that he was competent to stand trial. (Vol. 9, 1206).

Mr. Taylor was re-tried for first-degree murder on October 14, 15, and 16th, 2003. The trial court refused to allow counsel to serve as standby or elbow counsel. (Vol. 9, 1268). On October 14, the morning before jury selection, the trial court conducted non-adversarial proceedings at which Mr. Taylor was not represented by counsel, and again found him competent despite Mr. Taylor's on-the-record statement that he has been killed before and returned to life. (Vol. 17, 2, 35; Vol. 36, 78).

At trial, Mr. Taylor's mental state deteriorated even more precipitously. Mr. Taylor, who was forcibly medicated throughout the trial, represented himself while wearing prison clothes and sunglasses. He asked no voir dire questions. (Vol. 18, 51, 56, 78). After giving a brief opening statement at which he assured the jurors that they would hear from him in closing argument and after asking a handful of bizarre cross-examination questions of the state's first witnesses, Mr. Taylor lapsed into total and utter silence through the remainder of his capital trial. He presented no defense or further argument at either the guilt-innocence or penalty phases of his capital trial.

Mr. Taylor was convicted of first-degree murder and sentenced to death. Shortly thereafter, counsel were appointed to represent Mr. Taylor on his motion for new trial and on direct appeal. Appointed counsel immediately expressed their belief that Mr. Taylor was not competent. *See e.g.*, (Vol. 21, 20) ("It is our position that he is not competent today and that he was not competent during the trial, and that the testimony you just heard was not testimony of a competent man even though he was medicated."); (Vol. 21, 20; Vol. 23, 41-2). Despite counsel's

concerns, the trial court did not accept evidence of Appellant's competency – either at the time of the trial, or post-trial The judge ruled that considering evidence of Appellant's incompetency at trial was unnecessary, among other reasons, because Richard Taylor "seemed to the Court to be very in control of his trial strategy." (Vol. 25, 3.) The trial court denied Appellant's motion for new trial without addressing his post-trial competency.

On August 17, 2005 appointed counsel filed a notice of appeal. On August 25, 2006, by and through counsel, Appellant filed simultaneously in the Court of Criminal Appeals his opening brief and a motion seeking a stay of proceedings and remand to determine Mr. Taylor's competency to pursue the direct appeal. Counsel attached the affidavit of Dr. Keith Caruso, a Tennessee forensic psychiatrist who had testified for the defense at the competency hearing in April 2003. Dr. Caruso stated that Richard Taylor was not currently competent, and his affidavit set forth the substantial bases for this conclusion, including that Mr. Taylor suffers from "auditory and visual hallucinations" as well as "disorganization of his thoughts and persistent delusions." Caruso Aff. at ¶ 5. Appellant continues to delusionally believes that he has been killed before and returned to life and that if executed he will be come back to life, free of his criminal conviction. Id. Appellant also delusionally believe that an "unseen force" controls his current counsel and that counsel cannot be trusted. Caruso Aff. at ¶ 6.

On September 22, 2006, the Court of Criminal Appeals of Tennessee issued an order denying Appellant's motion for a competency hearing. Append. A. In relevant part, the order states:

> An appellant has no right to proceed pro se on appeal. *State v. Gillespie*, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994). Similarly, it has long been the rule that an appellant may not be represented by counsel in this Court and simultaneously proceed pro se. *State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976). Because "the determination of which issues to present on an appeal is a matter which addresses itself to the professional judgment and sound discretion of

> appellate counsel," *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn. 1993), *the determination of Appellant's competency is unnecessary*. As the State notes, the Appellant's active participation, beyond the initial decision to initiate an appeal, is not required.

Order, *1 (emphasis added). Mr. Taylor timely filed an application for discretionary review with the Tennessee Supreme Court on October 20, 2006. The Tennessee Supreme Court issued an order denying review on November 20, 2006.

STATEMENT OF JURISDICTION

The question whether the order of the Tennessee Court of Criminal Appeals holding that Mr. Taylor does not have to be competent on direct appeal constitutes a final judgment under 28 U.S.C. § 1257 is admittedly a close one. Title 28 U.S.C. § 1257(a) limits review by this Court of state court decisions to those cases where the highest state court[2] in which a decision could be had has issued a final judgment or decree. Literally interpreted, this provision would preclude "review whenever further proceedings remain to be determined in a state court, 'no matter how dissociated from the only federal issue' in the case." *Nike v. Kasky*, 539 U.S. 654, 658 (2003) (J. Stevens, concurring), *quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). This Court has repeatedly rejected this literal interpretation, however, and has recognized exceptions when state-court judgments may be considered final despite the fact that there are further state court proceedings to follow. *Nike*, 539 U.S. at 658-59; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975); *Florida v Thomas*, 532 U.S. 774, 777 (2001).

In *Cox Broadcasting*, the Court set forth a non-exclusive list of four categories of state

[2] Here, the decision of the Tennessee Court of Criminal Appeals is the decision appropriately on appeal because the Tennessee Supreme Court denied discretionary review. *See e.g., Kaupp v. Texas*, 538 U.S. 626, 629, 633 (2003) (reviewing and reversing the judgment of the State Court of Appeals where the highest state court denied discretionary review); *compare*, *Banks v. California*, 395 U.S. 708 (1969) (holding that jurisdiction is lacking where petitioner failed to seek review by state supreme court of judgment of state appellate court) (per curiam).

cases over which the Court may nonetheless accept jurisdiction even though further proceedings remain in state court: (1) cases where the "federal issue is conclusive or the outcome of the further proceedings preordained;" (2) cases where the federal issue "will survive and require decision regardless of the outcome of the future state-court proceedings" because nothing "short of settlement of the case[] would foreclose or make unnecessary decision on the federal question;" (3) cases "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case;" and (4) cases where the party seeking review might prevail in further proceedings "on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court … where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action … [and where] a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 479-482.

Strong arguments can be made that this case falls within each of the last three of these categories. It arguably falls within the second category because, short of settlement, the legal question whether Mr. Taylor must be competent to appeal is likely to survive and require decision. The question of Mr. Taylor's right to be competent on direct appeal is a separate and distinct question from the claims of error at trial assigned in the appellate brief, which are now pending with the state intermediate appellate court. Regardless of the decisions on the merits of the brief, and regardless of whether Mr. Taylor prevails in the state court on other claims and the state seeks *certiorari* or whether the state prevails and Mr. Taylor seeks *certiorari*, the independent and threshold question of whether the constitution demands Taylor's competency while on appeal will remain. *See North Dakota State Board of Pharm. v. Snyder's Drug Stores, Inc*. 414 U.S. 156, 161-62 (1973) (explaining this Court's grant of jurisdiction in *Brady v. Maryland*, 373 U.S. 83 (1965) because the issue to be decided – whether due process entitled

defendant to a new trial at the guilt-innocence was "quite independent" of the punishment issues, under which the state court had previously determined entitled the defendant to retrial at the sentencing phase); *New York v. Cathedral Acad.*, 434 U.S. 125, 128 n. 4 (1977) ("Since further proceedings cannot remove or otherwise affect this threshold federal issue, the Court of Appeals' decision, is final for purposes of the review in this Court."); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (per curiam) *quoting Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 549 (1949) ("That order is a final judgment for purposes of our jurisdiction, since it involved a right 'separate from, and collateral to, the merits.'")

This case may also fall within the third category because there is at least some possibility that later review of the federal issue will be unavailable. If either party- the State or Mr. Taylor – appeals a loss on the merits to the Tennessee Supreme Court, the issue of competency may potentially be unreviewable because it was raised separately from the appeal. The State might argue that Mr. Taylor is procedurally barred from raising again the competency issue to the Tennessee Supreme Court because it was not contained – and logically could not have been contained -- in his direct appeal brief in the lower appellate court, which under state law had to be limited to trial court errors.[3] If the Tennessee Supreme Court agrees, this Court may similarly decline to consider granting *certiorari* on the ground that the issue was denied on procedural grounds. As a result, Mr. Taylor will *never* have had an opportunity to appeal the ruling of the Court of Criminal Appeals that he does not need to be competent on appeal. This Court has

[3]Under the Tennessee Rule of Appellate Procedure 13, the reviewing court can consider any legal claim, but it may consider only " those facts established by the evidence in the trial court and set forth in the record and any additional facts that may be judicially noticed or are considered pursuant to rule 14." In this case, Mr. Taylor's motion for admission of additional facts under Rule 14 – facts that would establish his incompetency – was denied on the ground that his competency was not relevant. See Ex. A. Accordingly, there are not facts related to Mr. Taylor's current incompetency for the Tennessee Supreme Court to review.

repeatedly acted to accept jurisdiction in cases where the federal question might not survive the litigation below.[4] Similarly, this Court should accept jurisdiction in this case because the federal question may not survive the pending litigation.

This case also arguably falls within the fourth category. One of the traits of many of fourth category cases is that the issue on appeal is separate and independent of the merits questions still pending in state court. *See e.g., Mercantile Nat'l Bank*, 371 U.S. 555, 1963 (accepting jurisdiction because the issue was "a separate and independent matter, *anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action*."); *see also, Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). As in *Mercantile Nat'l Bank*, the issue presented in this petition, the right to competency on appeal, is separate from the factual and legal questions raised in the direct appeal brief.

Another trait of the fourth category is that review in this court might be unnecessary because the party seeking review might prevail on the merits of nonfederal grounds. *Cox*, 420 U.S. at 482. Here, Mr. Taylor may succeed in his direct appeal brief on state law grounds, in which case he would not seek review in this Court. Cases also qualify under the fourth category if reversal of the "state court . . . would be preclusive of any further litigation on the relevant

[4] *North Dakota State Bd. of Pharm. v. Snyders' Drug Stores*, 414 U.S. 156, 162 (1973) ("It is equally important that we treat the judgment in the instant case as 'final,' for we have discovered no way which the licensing authority in North Dakota has of preserving the constitutional question now ripe for decision."); *Kansas v. Marsh*, 126 S.Ct. 2516, 2521 (2006) (granting review although the case was remanded for a retrial because the State, the moving party, would be unable to obtain further review of the constitutionality of the statute later in the litigation); *Jefferson v. Alabama*, 522 U.S. 75, 83 (1997) (noting that the court in *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 n.7 (1987), exercised jurisdiction because there was unlikely to be a subsequent opportunity to raise the federal question and it would place the party in a difficult practical dilemma); *South Dakota v. Neville*, 459 U.S. 553, 558 n.6 (1983) (taking case despite remand and lack of final judgment "because if the state ultimately prevails at trial, the federal issue will be mooted; and if the state loses at trial, governing state law . . . prevents it from again presenting the federal claim for review").

cause of action." *Id* at 482-83. In *Mercantile Nat'l Bank*, the Court granted jurisdiction to determine where venue was appropriate. The Court explained that exercising jurisdiction under those circumstances "serve[d] the policy underlying the requirement of finality in 28 U.S.C. § 1257" because by determining at the outset the state court in which the appellants could be tried, the Court avoided "subject[ing] them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id*.

In this case, Mr. Taylor's direct appeal brief raises a number of difficult and complicated legal questions. If this Court reverses the Tennessee courts by ruling that the Constitution requires a competency on direct appeal, further litigation on Mr. Taylor's direct appeal brief will be stayed pending a determination on his competency. In the event that Mr. Taylor is found to be incompetent – a likelihood not challenged by the State in its responsive pleadings below - the direct appeal litigation will be stayed until he regains competency. Multiple judges and experts have predicted that Mr. Taylor may never regain competency – in which case, the courts need never decide the difficult and complex questions raised in his appeal. In addition, if this Court waits until after resolution of Mr. Taylor's direct appeal by the Tennessee courts before ruling that Mr. Taylor had a right to be competent on direct appeal, and if Tennessee courts then determine that a *nunc pro tunc* determination of Mr. Taylor's current competency cannot be made, the entire direct appeal procedure will have been a waste of precious judicial resources and will have to be repeated. In short, exercising jurisdiction now will serve the important interest of judicial economy. *See Rohan v. Woodford*, 334 F.3d 803, 807 (9th Cir. 2003) (accepting jurisdiction over interlocutory appeal to decide whether federal habeas petitioner must be competent because "judicial economy favored immediate solution").

Another trait of fourth category cases is the risk that without review the state court decision will erode federal policy. The importance of establishing the scope of protections of the Bill of Rights is a recognized important federal policy. *See e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 53-57 ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule."). In this case, if the protections of the Sixth, Eighth, and Fourteenth Amendments require competency on direct appeal, failing to take the case now would undermine this federal protection.

This Court should assume jurisdiction because: (1) this case involves a "a right 'separate from, and collateral to,' the merits," *Skokie*, 432 U.S. at 44; (2) assuming jurisdiction would "avoid the mischief of economic waste and of delayed justice," *Cox* 420 U.S. at 477-479, caused by failing to address the threshold question at the outset; and (3) this issue may not later be available to review, threatening the possibility that Mr. Taylor's claim of a constitutional right to competency may *never* be eligible for review.

REASONS FOR GRANTING THE WRIT

THE LOWER COURTS ARE DIVIDED ON WHETHER A CAPITAL APPELLANT HAS THE RIGHT UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO BE COMPETENT TO PURSUE A DIRECT APPEAL

A CAPITAL APPELLANT HAS THE RIGHT UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO BE COMPETENT TO PURSUE A DIRECT APPEAL

This Court has never squarely addressed whether a capital appellant has the right to be competent in his direct appeal under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The recognition at common law of the right to competency at all stages from indictment to execution and the line of cases applying the constitutional rights to

effective assistance of counsel and due process to appeals as of right compel the conclusion that competency is required.

Lower courts are sharply divided regarding whether competency is required to proceed in direct and habeas appeals. *Compare Rohan v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003) (Kozinski, J.) (federal habeas petitioners must be competent to proceed given their statutory right to counsel); *Commonwealth v. Haag*, 809 A.2d 271, 277 (Penn. 2002) ("[I]t is not proper for an appellate court to review a defendant's direct appeal if he or she is not competent enough to communicate with counsel"); *Reid v. State*, 197 S.W.3d 694, 699-701 (Tenn. 2006) (Defendant has a constitutional due process right to competency in post-conviction proceedings); *State v. Debra A.E.*, 188 Wis. 2d 111, 127-129 (Wis. 1994) (defining a standard of competency in post-conviction to be consistent with federal constitutional due process); *Carter v. State*, 706 So.2d 873, 875-76 (Fl. 1998) (holding that competency is required for some post-conviction claims based on a constitutional right to counsel and to ensure meaningful proceedings); *People v. Owens*, 564 N.E.2d 1184, 1190 (Ill. 1990) (holding that petitioner must be "competent to communicate his allegations of constitutional deprivations to counsel" in post-conviction proceedings under state statute and declining to decide constitutional claims), *with State v. Taylor*, Slip Op. No. M2005-01941-CCA-R3-DD (Sept. 22, 2006 Tenn.) (declining to find right to competency under federal or state constitution in direct appeal from capital conviction); *Ex Parte Mines*, 26 S.W.3d 910, 914-916 (Tex. Crim. App. 2000) (en banc) (holding that neither due process nor the right to counsel requires competency in state habeas proceedings but leaving open the possibility that for certain claims counsel may successfully demonstrate the need for defendant's competent participation); *People v. Newton*, 394 N.W. 2d 463, 466 (Mich. Ct. App. 1986), *vacated*, 399 N.W.2d 28 (Mich. 1987) (declining to hold that a defendant must be

competent to proceed with direct appeal, but noting that the court could entertain subsequent appeals if the defendant regained competency and raised new issues); *State v. White*, 815 P.2d 869, 878 (Ariz. 1991), *cert denied*, 502 U.S. 1105 (no constitutional right to competency on direct appeal); *People v. Kelly*, 822 P.2d 385, 413-14 (Cal. 1992) (same). *See also* Sup. Ct. R. 10 (b) (conflicts between decisions of state courts regarding important federal questions a consideration governing decision whether to grant petitions for *certiorari*).

The right to competency is deeply rooted in our common law. *See Ford v. Wainwright*, 477 U.S. 399, 406-408, 418 (1986) (J. Marshall and J. Powell, concurring); *Rohan*, 334 F.3d at 807; *Van Tran v. State*, 6 S.W.3d 257, 262 (1999). In *Rohan*, Judge Kozinski traced the common law roots of the prohibition against trying, sentencing, and punishing the insane. 334 F.3d at 807-09. He cited the common law standard quoted by Blackstone in his Commentaries:

> [I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; *and if, after judgment, he becomes of nonsane memory, execution shall be stayed*: for peradventure, says the humanity of the English law, *had the prisoner been of sound memory he might have alleged something in stay of judgment or execution.*

Rohan, 334 F.3d at 807-08; *see also, Rohan* at 807 (citing 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 34 (Prof'l Books Ltd. 1971) (1736) (pre-1676 manuscript) ("If a person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."). At common law, then, the law

required a stay or commutation of death sentence if the prisoner lost competency at any time between indictment and execution. *See* Blackwell, 1 Sir Mathew Hale. This stay or commutation was necessary because the common law recognized that an incompetent prisoner would be prevented from offering "some reason" in his defense that could require relief.

In the words of Justice Powell, the execution of the insane was barred at common law "precisely because it was considered cruel and unusual," compelling the conclusion that "executing the insane is barred by our own Constitution" under the Eighth Amendment. *Ford*, 477 U.S. at 418 (J. Powell, concurring). By the same unassailable logic, the broad scope of the common law right to competency requires the conclusion that the Eighth and Fourteenth Amendments prohibit a death-sentenced defendant from proceeding with his direct appeal if he is incompetent.

The right to competency on direct appeal is also rooted in the constitutional right to due process.[5] The law has long recognized that the "procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Although in *Rohan* the Ninth Circuit ultimately rested its conclusion that federal habeas petitioners must be competent to proceed on the statutory right to counsel, it noted that the "firmly entrenched common law right to competence persisting beyond trial is a strong indicator of a constitutional due process right." *Rohan*, 334 F.3d at 813;

[5] It is well established that the "*interests of justice ordinarily require that [a defendant] not stand convicted without resolution of the merits of his appeal*, which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.'" *United States v. Estate of Parsons*, 367 F.3d 409, 414 (5th Cir. 2004) (quoting *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980)) (emphasis in original). In the event that a defendant is not able to participate in his appeal because he dies while the appeal is pending, his case must be abated because the appeal "tests previously unforeseen weaknesses in the state's case or outright errors at trial" and accordingly, "neither the state nor affected parties should enjoy the fruits of an untested conviction." *Estate of Parsons*, 367 F.3d at 414.

see also, *Reid,* 197 S.W.3d at 700 (holding that constitutional due process requires that post-conviction petitioners meet the civil standard of competency because they must have an opportunity to raise "claims at a meaningful time and in a meaningful manner.")

Petitioner's right to competency also flows directly from his right to counsel. A prisoner is entitled to the effective assistance of counsel on direct appeal. *See e.g., Douglas v. California*, 372 U.S. 353, 357-58 (1963) (defendants are constitutionally entitled to counsel on first appeal as of right); *Evitts*, 469 U.S. at 393 (holding that the procedures used in appeals as of right "must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution," and accordingly, that appellants are entitled to effective assistance of counsel on appeal). To be meaningful, the right to counsel on direct appeal must encompass a right to competence and the right to communicate rationally with counsel. *Rohan,* 334 F.3d at 814 (finding that statutory right to counsel would be "eviscerated" by compelling petitioner to pursue habeas relief while incompetent because "[c]ounsel's assistance, however, depends in substantial measure on the petitioner's ability to communicate with him."); *see also, Calderon v. U.S. District Court*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc) (holding that mental incompetency could "eviscerate" the right to counsel) *overruled in unrelated part by Woodford v. Garceau*, 538 U.S. 202 (2003); *People v. Owen*s, 564 N.E.2d 1184, 1190 (Ill. 1990) (holding that a petitioner must be "competent to communicate his allegations of constitutional deprivations to counsel" in post conviction proceedings).

The indestructible link between the constitutional rights to counsel and to competency is apparent in the pertinent jurisprudence of this Court. The *Dusky* standard for competency demands that the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

The right to competence ensures a defendant's ability to communicate with counsel, a necessary prerequisite to a defendant's ability to exercise his other fundamental trial rights. *Cooper v. Oklahoma,* 517 U.S. 348, 364 (1996). "Implying a right to competence from a right to counsel breaks no new ground." *Rohan,* 334 F.3d at 813 (citing, *inter alia, Cooper,* 517 U.S. at 354).

The Tennessee Court of Criminal Appeals denied the motion for competency hearing because "beyond the initial decision to initiate an appeal," an appellant's active participation is not required. This finding unjustifiably eviscerates a defendant's Sixth Amendment constitutional rights. A defendant is entitled under the Sixth Amendment to communicate with his or her lawyer about his appeal and, under canons of professional responsibility, counsel is required to listen. *See e.g., Franklin v. Anderson,* 434 F.3d 412 (6th Cir. 2006), *cert denied. sub nom. Houk v. Franklin,* 127 S.Ct. 941 (2007) (appellate counsel were ineffective for failing to consult with the client and failing to meet the ABA standards in their dealings with him concerning his appeals); ABA Criminal Justice Standard 7-5.4(a) (Defendants have a right to consult rationally with counsel during the pendency of their appeals). By holding that Appellant has no right to participate in his appeal in any way, the Tennessee court mistakenly conflated the difference between authority to decide which issues will be raised on appeal and communication about the appeal. While counsel has the authority to ultimately decide which issues should be raised on appeal under Tennessee state law, *Cooper v. State,* 849 S.W.2d 744, 747 (Tenn. 1993), this does not mean that counsel can refuse to discuss the claims with the client before making such a decision. The defense lawyer's ultimate power to exercise strategic judgment when finalizing an appellant's claims does not exempt him from discussing the legal arguments and considering appellant's input.

In *Jones v. Barnes*, 463 U.S. 745, 747-78 (1983), the Court concluded that appellate counsel was not ineffective for strategically choosing to omit claims on appeal requested by his client, but did so only after carefully detailing the correspondence between counsel and his client. The Court never suggested that it would have been acceptable for counsel to have declined to read appellant's letters or refused to discuss the appeal with his client before making the strategic decision regarding which claims to raise. *Id*. Indeed, shortly after *Barnes*, the Court noted that appellate counsel "must be available *to assist* in preparing and submitting a brief to the appellate court." *Evitts*, 469 U.S. at 394 (1985). The very concept of "assistance of counsel" encompasses rational communication between attorney and client.

In addition to his constitutional right to participate by discussing his appeal and claims with counsel, the appellant alone has the authority to make the decision to file his appeal, waive his appeal, and – in the event the opportunity arises – accept or reject a plea bargain. *See e.g.*, *Jones*, 463 U.S. at 751 (A competent defendant may choose "whether to plead guilty, waive a jury testify in his or her own behalf, or take an appeal.") The fact that these decisions are entirely left to the appellant necessarily assumes the appellant's competency to understand and carry out these decisions. *See Haag*, 809 at 277 (holding that a defendant "must possess some level of competence [on direct appeal] because he or she may waive his or her right to appeal only through knowing, voluntary, and intelligent waiver" and citing the state constitution).

Multiple courts have recognized a right to competency in habeas proceedings. *Rohan*, 334 F.3d at 817 (9th Cir. 2003) (federal habeas petitioners must be competent); *Reid*, 197 S.W.3d at 699 (Tennessee prisoners have a right to competency in post-conviction proceedings); *Owens*, 564 N.E.2d at 1190 (petitioners must be "competent to communicate his allegations of constitutional deprivations to counsel" in post conviction proceedings). Surely, if petitioners

have a right to be competent in post-conviction, they have a right to be competent on direct appeal because the jurisprudence of this Court has consistently accorded direct appeals greater constitutional protection than post-conviction. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required . . . and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) (upholding a less protective state procedure in post-conviction proceedings by differentiating the protections required in post-conviction from "the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position at trial and on first appeal as of right."); *see also*, Tenn. Code Ann. § 40-30-103 (authorizing review of only constitutional claims in post-conviction); Tenn. Code Ann. § 39-13-206(b) (authorizing review of "all assigned errors" in capital cases in direct appeal); Tenn. R. Crim. P. 37 (providing for direct appeal in criminal cases as of right). Given the constitutional grounding of the rights to a direct appeal and to effective counsel on direct appeal, prisoners should be entitled *at a minimum* to possess the same level of competency required in post-conviction proceedings. *See People v. Owens*, 564 N.E.2d at 1189 (holding that the standard for competency in post-conviction proceedings is lower than in direct appeal proceedings because right to counsel is "a matter of legislative grace and favor").

The appellant's competency is of particular importance in cases such as this one where the defendant represented himself at trial. Because Mr. Taylor represented himself at the trial without even standby counsel, he *alone* can report meaningfully about the events at trial not apparent from a cold record or outside the record and identify areas misreported in the record. *Cf., Ex parte Mine*s, 26 S.W.3d at 916 (declining to find a right to competency in habeas proceedings because, *inter alia*, "[c]urrent defense counsel have access . . . to the knowledge and

experience of trial counsel.") (quotations omitted); *Reid*, 197 S.W.3d at 702 (noting that counsel have "access to the appellate record and trial counsel's files" as factors in favor of permitting the appeal to proceed via next friend).

As noted above, the Supreme Court has never directly addressed whether an appellant on direct appeal is entitled to be competent. The litigation of a capital habeas petitioner in *Rees v. Peyton* (*Rees I*), 384 U.S. 312 (per curiam) (1966), is the closest it has come. In *Rees*, the petitioner sought to withdrawal his petition over the protestation of his counsel that he was not competent to make the decision. The Court noted that the petitioner's mental competent was of "prime importance" to the question whether he could withdrawal his petition and ordered the case remanded to the federal district court for a competency determination, while retaining jurisdiction. *Id*. at 314. The following year, the Court issued a short order directing that the case would be held without action. *See* 386 U.S. 989 (1967) (*Rees II*). Almost thirty years later, in 1995, the Court dismissed the petition. *Rees v. Superintendent*, 516 U.S. 802 (1995).

Although not evident from the Court's short orders, the petitioner in *Rees* had been found incompetent by the district court between the first 1966 remand order and the 1967 abeyance order. *Rohan, 3*34 F.3d at 815 (citing documents from the unpublished Rees court record); *see also* Phyllis L. Crocker, *Not to Decide Is To Decide: The U.S. Supreme Court's Thirty-Year Struggle With One Case About Competency To Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885, 888-91 (2004). The parties returned to the Supreme Court and the petitioner's counsel sought both a grant of *certiorari* and a stay of proceedings. *Id.* The State attorneys emphatically opposed a stay. *Id*. By entering its 1967 order, the Court rejected both the petition for a writ of *certiorari* and the state's request to deny a stay. Mr. Rees died of natural causes in 1995, while

in custody at the federal medical center. 29 WAYNE L. REV. at 935. The case was dismissed shortly thereafter. *Id.*

The recognition in *Rees* that competency is of "prime importance" to a petitioner's appeal is consistent with the common law demand for competency at all stages of a capital defendant's case, certainly including his direct appeal.

CONCLUSION

Accordingly, Petitioner respectfully requests that this Court grant the petition for a writ of *certiorari* and hold that an appellant is constitutionally entitled to be competent on direct appeal.

Respectfully submitted,

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