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1 P R O C E E D I N G S

2 (10:41 a.m.)

3 CHIEF JUSTICE ROBERTS: We will now hear  
4 argument in Case 10-930, Ryan v. Gonzales.

5 General Horne.

6 ORAL ARGUMENT OF THOMAS C. HORNE

7 ON BEHALF OF THE PETITIONER

8 MR. HORNE: Mr. Chief Justice and may it  
9 please the Court:

10 I'd like to start picking up on a question  
11 asked by Justice Ginsburg on the Rees case.  
12 The Rees case is pre-AEDPA. If there is one thing that  
13 Congress had in mind when it passed AEDPA, the  
14 Antiterrorism and Effective Death Penalty Act, it is  
15 that the death penalty process needs to be speeded up,  
16 and habeas should not result in undue delays to give  
17 effect --

18 JUSTICE SCALIA: You -- you don't think that  
19 AEDPA would alter the outcome of Rees? Do you think  
20 Rees would come out the other way after AEDPA?

21 MR. HORNE: Well, I think that Rees didn't  
22 really deal with our issue, which is competence to -- to  
23 aid counsel.

24 JUSTICE SCALIA: That's a different point.

25 MR. HORNE: Yes, I agree, Your Honor, but I

1 thought it -- it would be relevant to point out that it  
2 was pre-AEDPA.

3 And then, on that point, this Court has said  
4 several times that habeas should not be used to grant  
5 indefinite stays. In fact, there -- even pre-AEDPA, in  
6 the Barefoot case, this Court said that habeas is not a  
7 time to retry a case and even less is it a time to grant  
8 indefinite stays.

9 So the sentence with, "even less," followed  
10 the sentence with, "not." So it was even less than not  
11 that it should grant permanent stays.

12 JUSTICE SOTOMAYOR: Tell me how you define  
13 indefinite stays, meaning are you okay with the six  
14 months to a year stay, for a court to try to get someone  
15 back to competence, assuming that there is a claim in  
16 which the defendant's information is necessary?

17 MR. HORNE: Yes, Your Honor. We agree with  
18 the Ohio position. In the -- in the American  
19 Psychiatric brief, I think it's page 10, note 20, they  
20 said that up to 90 percent of the cases are solved in 6  
21 to 9 months. And I think that, if this Court set a  
22 standard of no more than a year for the successive  
23 stays, that would give some guidance to the courts.

24 JUSTICE SOTOMAYOR: So how do you deal with  
25 Justice Kagan's earlier question of what difference does

1 it make if the person's still necessary -- or the  
2 information -- potential information is still necessary,  
3 what makes it unnecessary after a year?

4 MR. HORNE: Because I think the -- the  
5 consequence of AEDPA is that a balance has to be drawn  
6 between the fact that there has to be finality. In  
7 fact, the -- this Court has said the purposes of AEDPA  
8 include finality, comity, federalism, and reduction of  
9 delays in death sentence cases. There needs to be a  
10 balance between that and the -- the need to have a  
11 competent defendant, if we can have one, in a case where  
12 the testimony is necessary.

13 This Court has said several times -- I was  
14 going to mention also the Heinze case, where this Court  
15 thinks that -- very clearly, that stays cannot be  
16 indefinite. So -- so I think it would be very helpful  
17 for this Court to give a guideline to the courts and say  
18 the way to balance this is that, if they get the time in  
19 which 90 percent of the cases are -- are --

20 JUSTICE SOTOMAYOR: But those cases didn't  
21 establish a limit on how long states needed to take to  
22 adjudicate claims. They just said a district court  
23 should put in conditions that move things along --

24 MR. HORNE: Yes. That's correct,  
25 Your Honor.

1 JUSTICE SOTOMAYOR: -- that -- that require  
2 defendants to press their claims within a reasonable  
3 time that required periodic updates, that required  
4 monitoring by the court, but it didn't set an artificial  
5 end time. It just said you can't just do an open-ended  
6 stay and not give conditions to comply with. Why should  
7 this be treated differently?

8 MR. HORNE: Your Honor, we think it would be  
9 helpful -- and we agree with Ohio on this -- we think it  
10 would be helpful if the Court gave some kind of a  
11 standard, so that there would be some guidance and  
12 uniformity, and so that -- so that courts did not get  
13 around this Court's --

14 JUSTICE KENNEDY: How -- how would you  
15 define that standard? What standard do you suggest?

16 MR. HORNE: The standard we would suggest  
17 would be that -- that 6 to -- 6 to 9 months would be the  
18 standard, and certainly no more than a year; that it  
19 would be in months and not years, including not just the  
20 first stay, but any successive stays.

21 JUSTICE SCALIA: In all cases?

22 MR. HORNE: In all cases. In all cases  
23 where a stay was appropriate. Now, in the record-based  
24 case, no stay is appropriate.

25 JUSTICE BREYER: What if the -- it might be

1 unusual, but you can't try a person who's not competent.  
2 You can't try him.

3 MR. HORNE: That's correct, Your Honor.

4 JUSTICE BREYER: So what about -- and now,  
5 he's been tried, and he's been convicted and been  
6 appealed and gone through the procedures. But some case  
7 could arise where, in habeas, they made like a prima  
8 facie showing or a -- convinced the judge that there  
9 really is a very good chance here, or maybe even I think  
10 it's probable that the basic trial was unfair, to the  
11 point where it's like not having a trial.

12 What about in that situation, if it ever  
13 arises? I mean, should we leave the door open just for  
14 that possibility?

15 MR. HORNE: I think the answer to that is  
16 no, Your Honor, because the assumption -- once -- once  
17 the conviction has occurred, the presumptions shift. In  
18 the criminal trial, all the presumptions are in favor of  
19 the defendant. The case has to prove -- the state has  
20 to prove its case --

21 JUSTICE BREYER: I have that. That's why I  
22 put in the possibility that, on the basis of what's  
23 presented to me, the judge, I think I have so much  
24 without this defendant's testimony here suggesting it  
25 was unfair, that maybe the presumption should shift

1 back. I'm -- that's what's worrying me in the back of  
2 my mind, that there could be such a case. There have  
3 been in history.

4 MR. HORNE: Well, this Court said in Daniels  
5 that the presumption is that the conviction was valid,  
6 and it becomes the burden of the petitioner to overturn  
7 that -- or the burden of the prisoner to overturn  
8 that --

9 JUSTICE BREYER: Which he can't do, if he's  
10 not competent.

11 MR. HORNE: Sorry.

12 JUSTICE ALITO: If there is a time limit --  
13 if there is a time limit of 6 to 9 months --

14 MR. HORNE: Yes.

15 JUSTICE ALITO: -- at what point does it  
16 begin to run? Does it begin to run at the time when the  
17 petitioner moves for a stay, even if no effort was made  
18 prior to that to restore the petitioner to competency?

19 MR. HORNE: I would believe the time would  
20 begin to run with the treatment because the basis for  
21 the 6 to 9 months was what was in the amicus brief  
22 against us by the American Psychiatric Association  
23 indicating that, in 6 to 9 months, almost 90 percent of  
24 the cases are cured. So we -- we needed to have some  
25 basis to suggest a standard to the Court.



1 JUSTICE ALITO: No, but my question is this:  
2 Suppose that no effort has been made by counsel to  
3 provide -- to obtain treatment for the petitioner to  
4 restore the petitioner to competency prior to the point  
5 when a motion is made to stay the proceeding. The 6  
6 to -- month period would still begin to run at the time  
7 when the motion for the stay is made? Or would it begin  
8 to run at some earlier point or some later point?

9 MR. HORNE: Your Honor, I would think, if  
10 the motion is made and the other requirements are shown,  
11 that it -- that the prisoner's testimony is essential,  
12 then -- and that it's not a record-based case, then I  
13 would think the 6 to 9 months would begin to run when  
14 treatment begins because that's our basis for the  
15 standard we are suggesting.

16 CHIEF JUSTICE ROBERTS: When treatment  
17 begins after some sort of initial hearing, right?

18 MR. HORNE: That's correct, Your Honor.

19 When the court -- if the court grants the  
20 motion for the temporary stay, and presumably treatment  
21 would begin right away, or perhaps treatment has been  
22 ongoing, but from that point on, we suggest a 6 to 9  
23 months standard.

24 JUSTICE GINSBURG: In which cases would you  
25 say the defendant's ability to assist counsel is

1    necessary?  On what issues?  You say that -- that if --  
2    the assistance has to be necessary to a fair  
3    adjudication.

4                   MR. HORNE:  Yes, Your Honor.

5                   JUSTICE GINSBURG:  In what cases would that  
6    be so?

7                   MR. HORNE:  We have difficulty coming up  
8    with cases at that stage of the proceeding, Your Honor,  
9    because presumably the information the prisoner would  
10   have would be known to others, especially if it's newly  
11   discovered evidence, that would typically be from  
12   outside, such as a -- somebody admitting -- somebody  
13   else admitting to the crime, DNA evidence, something of  
14   that sort.

15                  It -- it appears to us highly unlikely that  
16   the prisoner has information that he didn't disclose  
17   earlier when he was competent in the state proceedings  
18   and in the post-conviction proceedings at the state  
19   level, so we think it would be very, be a very rare  
20   case, Your Honor.

21                  But we are prepared to admit that, if a  
22   showing were made that his testimony is necessary, that  
23   a 6 to 9 month temporary stay be granted, as long as --

24                  CHIEF JUSTICE ROBERTS:  Why is it -- I don't  
25   mean to be nit-picking, but why is it 6 to 9 months?  8

1 months -- I mean, why isn't it 6 months? Or 9 months?  
2 I don't understand why there's --

3 MR. HORNE: We had to find something to  
4 suggest to the Court, and so we took it out of the --

5 CHIEF JUSTICE ROBERTS: So 6 months? Or 9  
6 months? What does it mean to be 6 to 9 months?

7 MR. HORNE: Oh, I agree, Your Honor. Then  
8 it should be 9 months because that's the point at which  
9 the American Psychiatric Association says almost  
10 90 percent of the cases are solved.

11 JUSTICE KENNEDY: And if it isn't solved  
12 after 9 months, then what?

13 MR. HORNE: Then the case proceeds --

14 JUSTICE KENNEDY: If competency cannot be  
15 restored?

16 MR. HORNE: Correct, Your Honor, then the --  
17 then the case proceeds, which was the --

18 JUSTICE KENNEDY: Based on the record.

19 MR. HORNE: Based on the record -- well, if  
20 it's record based, there should be no continuance at  
21 all.

22 JUSTICE SCALIA: Well, I don't really  
23 understand why the American Psychiatric Association said  
24 6 to 9 months, too. I mean, 90 percent are cured within  
25 9 months, right?

1                   MR. HORNE: Yes, Your Honor. That's  
2 correct.

3                   JUSTICE SCALIA: So you don't have to follow  
4 them in that non sequitur, it seems to me.

5                   MR. HORNE: No, we don't, Your Honor. We --  
6 we're just suggesting there should be a guideline, and  
7 we had to find some basis for the guideline.

8                   JUSTICE SCALIA: Because they are not  
9 lawyers, right? They are psychiatrists.

10                  MR. HORNE: That's correct, Your Honor.

11                  (Laughter.)

12                  JUSTICE ALITO: Well, what happens if, after  
13 9 months, mental health experts come in and they say  
14 there's a 90 percent chance of restoring the petitioner  
15 to competency in another 9 months or another 3 months or  
16 another month.

17                  MR. HORNE: Your Honor, we're suggesting  
18 that the Court should draw a line to guide the other  
19 courts, so that -- so that -- because once you allow one  
20 additional period, there can be successive additional  
21 periods, and then it becomes an indefinite stay.

22                  JUSTICE BREYER: Why? I mean -- sorry. I  
23 didn't mean to say it in that particular tone.

24                  (Laughter.)

25                  JUSTICE BREYER: But, I mean, trial judges

1 run their trials. You know, that's what they're hired  
2 for. And once we make it clear, it shouldn't go on  
3 forever. And -- and why can't we trust them to do their  
4 job?

5 MR. HORNE: Well, this Court in *Heinze* said  
6 that pre-AEDPA, the courts had discretion to grant  
7 stays, but AEDPA circumscribe -- circumscribes that  
8 discretion, and so I think this Court needs to give  
9 guidance to the courts as to the --

10 JUSTICE BREYER: You mean it shouldn't be  
11 indefinite. The object of this is you're trying to give  
12 -- like you would with any witness who's not around at  
13 the moment, you're trying to produce a hearing that will  
14 reach a result with this witness. And if you think,  
15 after a reasonable period of time, that witness will  
16 recover and be available, fine. And if there is no hope  
17 of that, forget it. I mean -- you know, something like  
18 that.

19 MR. HORNE: I understand, Your Honor. Our  
20 suggestion is -- is that the Court give a guideline. I  
21 understand Your Honor's position.

22 I do want to save some time for rebuttal. I  
23 just wanted to make one quick point about this -- that  
24 the -- that the witness has to be essential to the case  
25 being made. It was suggested in the *Ohio* case that --

1     that if there were a possibility that he could be  
2     helpful, that that would be sufficient.

3                 But the -- the American Psychiatric  
4     Association and the ABA both agree that there has to be  
5     a particularized and substantial case made that the  
6     witness is necessary or -- or they also use the word  
7     "essential or necessary," and we think that that -- that  
8     standard should prevail.

9                 And I'd like to reserve time for rebuttal.

10                Thank you.

11                CHIEF JUSTICE ROBERTS: Thank you, General.

12                MR. HORNE: Thank you.

13                CHIEF JUSTICE ROBERTS: Ms. O'Connell.

14                ORAL ARGUMENT OF ANN O'CONNELL,

15                FOR UNITED STATES, AS AMICUS CURIAE,

16                SUPPORTING PETITIONERS IN NOS. 11-218 & 10-930

17                MS. O'CONNELL: Mr. Chief Justice, and may  
18     it please the Court:

19                The United States agrees with Ohio and  
20     Arizona on the general framework for when no stay is  
21     allowed and for when a limited stay is allowed in  
22     Federal post-conviction proceedings. I'd like to  
23     provide the Court with a practical example of how a  
24     limited stay might work, since that seems to have been  
25     of some concern.

1           An analogous Federal statute is 18 U.S.C.,  
2   Section 4241, the Federal competency hearing statute  
3   that the Court cited or provided a CF citation to in  
4   Rees. That provides the framework for how a district  
5   court determines competency for a prisoner to stand  
6   trial and could provide a framework for how a district  
7   court should proceed with competency hearing in a case  
8   where it would be appropriate.

9           Under Section 4241, the criminal defendant,  
10   if he is found incompetent, the district court may give  
11   an initial period of up to 4 months for him to be  
12   treated to determine whether he can come back to  
13   competency.

14           If he cannot regain his competency at the  
15   end of that 4-month period, then the court can grant an  
16   additional reasonable extension of that time if the  
17   doctors say that there is a reasonable probability that  
18   this prisoner can be restored to competence.

19           That could provide a framework, if that's  
20   what this Court is looking to do, for showing district  
21   courts how they could enter a limited stay.

22           JUSTICE SCALIA: Well, what's a reasonable  
23   extension?

24           MS. O'CONNELL: Well --

25           JUSTICE SCALIA: Another 4 months? 6

1 months?

2 MS. O'CONNELL: I think we agree on the  
3 outer end that --

4 JUSTICE SCALIA: I was with you. It seemed  
5 to me you had something really, really clear and solid,  
6 until you said, "reasonable extension."

7 MS. O'CONNELL: Well, but this is what  
8 district courts do. They do it whenever a competency  
9 motion is filed in a Federal criminal trial, and we  
10 agree with the -- the outside limit of about a year. It  
11 depends on the -- the interests at stake -- the  
12 interests at stake in the state in proceeding with its  
13 judgment and the interests in finality and whether the  
14 doctors think that there's actually a chance that this  
15 prisoner could be restored to competence if they work a  
16 little harder.

17 If the -- if the evidence is crucial or  
18 necessary or there's some indication that we want to --  
19 to work hard to get this information from the prisoner,  
20 we would go for a little bit longer. But at some point,  
21 that attempt to restore the prisoner to competency has  
22 to end and the -- and the proceedings should move  
23 forward based on the best evidence that's available.

24 JUSTICE KAGAN: But, Ms. O'Connell, where  
25 does that outer limit come from? You suggested looking



1 to that statute as an analogy, but there would be no  
2 outer limit in application of that statute, would there?

3 MS. O'CONNELL: There's not. But -- but at  
4 some point, we do give up, and the district courts have  
5 discretion to determine how long that would be, and --  
6 and, again, we -- we propose an outer limit of about a  
7 year, but it's up to the district court in that  
8 particular circumstance, to see how hard they want to  
9 work to try to get that evidence into the proceeding.

10 JUSTICE SCALIA: Is that any different from  
11 what the defendants are arguing here?

12 MS. O'CONNELL: Well --

13 JUSTICE SCALIA: They're saying, you know,  
14 give a -- give a temporary stay and extend it as long  
15 as -- as you need to.

16 MS. O'CONNELL: Well, the --

17 JUSTICE SCALIA: So you're taking their  
18 position.

19 MS. O'CONNELL: No. The difference between  
20 our position and that position is that if, after a  
21 reasonable period of time, the prisoner cannot be  
22 restored to competence, the claim should move forward  
23 without him, using the best evidence that's available.

24 That's because, when we arrive at  
25 post-conviction proceedings, we have a conviction and a

1 sentence that have been affirmed on direct appeal and  
2 are presumed to be valid, and although it's a valid  
3 consideration for the district court to take into  
4 account whether the prisoner is competent and could  
5 assist his counsel has a role in these proceedings,  
6 there's no right for the prisoner to be competent during  
7 the post-conviction proceedings.

8 CHIEF JUSTICE ROBERTS: You said shortly  
9 after a reasonable period of time. I thought you were  
10 saying after a year. I think it's -- it's some guidance  
11 to say no more than a year. It's really no guidance to  
12 say after a reasonable time.

13 MS. O'CONNELL: Yeah. We -- we think the  
14 outer limit should be presumptively about a year. It's  
15 not to say that the United --

16 JUSTICE GINSBURG: You're talking about a  
17 very narrow range of cases because I take it your  
18 principal position is it -- it would be unusual that the  
19 defendant needs to be competent in order for the lawyer  
20 effectively to represent him on habeas. So under what  
21 circumstances do you think competency matters, so that  
22 the lawyer should not be expected to go on without a  
23 competent client?

24 MS. O'CONNELL: Justice Ginsburg, we think  
25 that it would not be an abuse of discretion for the

1 district court to allow the defendant to try to regain  
2 his competence and help his lawyer with the proceedings  
3 if there is some opportunity for him to present evidence  
4 or to present new claims in his proceeding. That may be  
5 the case. It will often be the case for a Section 2255  
6 petitioner.

7           It is his first round of Federal  
8 post-conviction proceedings. It may be his first  
9 opportunity to present an ineffective assistance of  
10 counsel claim. And in those circumstances, if he has  
11 something that -- if the lawyer has something that he  
12 wants the prisoner's assistance with or may need  
13 testimony from -- from the prisoner, we think the  
14 district court has discretion to allow a stay -- a  
15 limited stay to allow the prisoner to regain his  
16 competence. But --

17           JUSTICE ALITO: So it's not limited to cases  
18 where the review is restricted to the record?

19           MS. O'CONNELL: Right. In those cases, we  
20 think that no stay is appropriate, that it would be an  
21 abuse of discretion to enter a stay. AEDPA doesn't  
22 tolerate delay without a justification, and if it's a  
23 record-based claim, like a state prisoner, where he's  
24 barred by Section 2254(d) in Pinholster from bringing in  
25 new evidence and that the review is strictly limited to

1 the state court record, then there is no role for the  
2 prisoner to play.

3 And it would be an abuse of discretion for  
4 the district court to stay the proceedings in an effort  
5 to bring him back.

6 CHIEF JUSTICE ROBERTS: What is the standard  
7 when the district court is deciding whether to stay the  
8 proceedings? We've heard a number of them, plausible  
9 basis in the record, truly plausible, Iqbal. Which --  
10 which -- what is the government's position on the  
11 appropriate standard?

12 MS. O'CONNELL: We -- we think that the  
13 district court has discretion to grant a stay when the  
14 prisoner's participation could be -- he could provide a  
15 useful source of evidence or guidance in the  
16 proceedings.

17 CHIEF JUSTICE ROBERTS: "Could"?

18 MS. O'CONNELL: Yes.

19 CHIEF JUSTICE ROBERTS: Your standard is  
20 "could provide"?

21 MS. O'CONNELL: Yes. In those  
22 circumstances, we don't think the district court would  
23 abuse its discretion by allowing him an opportunity to  
24 regain his competence.

25 JUSTICE SCALIA: "Could provide" means might

1 provide; is that it? Might?

2 MS. O'CONNELL: Yes, yes.

3 JUSTICE SCALIA: So just a possibility --

4 MS. O'CONNELL: Right.

5 JUSTICE SCALIA: -- that's all it takes?

6 MS. O'CONNELL: If there is an opportunity  
7 for this prisoner to present new claims or new evidence  
8 in his Section 2255 proceeding, that we don't think it's  
9 an abuse of discretion for the district court to allow  
10 him that opportunity.

11 JUSTICE SOTOMAYOR: But you cap it by saying  
12 as long as the discretion is not exercised for more than  
13 a year?

14 MS. O'CONNELL: That's right. We think it  
15 has to be just a limited stay. We -- the United States  
16 would be opposed in any circumstances to a stay that's  
17 conditioned only on the prisoner's ability to regain his  
18 competence. At some point, if he can't, we move  
19 forward.

20 JUSTICE SOTOMAYOR: Would that standard have  
21 been met in both of these cases? Meaning, Carter's  
22 claim -- and the one that concerns me the most is why he  
23 was excluded from trial and what if he did or did not do  
24 with his attorneys afterwards. And Gonzales is a  
25 slightly different case. But would your position be

1     that, in both cases, there was enough?

2                   MS. O'CONNELL:  Not just that there was  
3     enough, but that the Federal court would be prohibited  
4     from considering further information --

5                   JUSTICE SOTOMAYOR:  No, no, no.  My question  
6     was, on the facts of both of these cases, was there a  
7     basis for granting the stay with respect to --

8                   MS. O'CONNELL:  No.

9                   JUSTICE SOTOMAYOR:  -- their conditions?

10                  MS. O'CONNELL:  No.  Because both -- all of  
11     the claims involved in these two cases are limited to  
12     the state court record and Federal post-conviction  
13     proceedings under Section 24 -- 2254(d) and Pinholster.

14                  This prisoner could not provide any new  
15     evidence to his client that could be introduced at court  
16     or that could be relied on by the Federal court.

17                  JUSTICE SOTOMAYOR:  Neither Carter or  
18     Gonzales?

19                  MS. O'CONNELL:  That's right.

20                  JUSTICE BREYER:  Why would we, in this kind  
21     of case, as opposed to, say, some other case, where a  
22     witness is missing and it's crucial?  The district court  
23     does have authority to grant stays.  And we haven't  
24     said, but no longer than a year.  Why do we say, but if  
25     they do it in a reasonable time?

1           If they abuse their discretion, there is  
2   mandamus, or there are other ways of controlling the  
3   discretion. Why are we suddenly here, in this case,  
4   imposing a fixed number of days?

5           I mean, the reason, of course, that the  
6   Psychological Association says 6 months to 9 months is  
7   they have different studies. In some places, it's 6  
8   months; in some places, it's 9 months. And -- and so  
9   why are we picking a number out of a hat here, when we  
10   don't elsewhere?

11           MS. O'CONNELL: Well, the Court doesn't have  
12   to do that. We're -- we were suggesting a year as the  
13   outer limit, just because that is sort of what the amici  
14   say is sort of the outer limit for when people will be  
15   restored to competency, if they are going to be able to  
16   be restored; but the Court doesn't have to -- to set an  
17   outer limit.

18           I mean, it -- it -- but it -- what we are  
19   most --

20           JUSTICE BREYER: It should, but it should be  
21   something like reasonable or -- or don't abuse your  
22   discretion or -- I mean, at the moment, I'm just not  
23   seeing why this is different than 10,000 other kinds of  
24   instances where we set that kind of limit, rather than  
25   days.

1                   MS. O'CONNELL: Well, perhaps it isn't. But  
2 to -- to go along with that analogy, if a different  
3 piece of evidence or a different witness were  
4 unavailable, we wouldn't allow the district court to  
5 hold up the proceedings indefinitely to wait for that  
6 witness. And so it should be no different when the  
7 petitioner --

8                   CHIEF JUSTICE ROBERTS: You don't mean --  
9 you're not suggesting that don't abuse your discretion  
10 is a limit, are you?

11                   MS. O'CONNELL: Well -- you know, if the  
12 Court wants to provide more -- more guidance to district  
13 courts, I mean, we would say that about a year is how  
14 long it would take for a person --

15                   JUSTICE GINSBURG: Well, why should the --

16                   MS. O'CONNELL: -- to regain their  
17 competence.

18                   JUSTICE GINSBURG: Why should the Court do  
19 that? Why should it provide any guidance if, as you  
20 say, in both of these cases, the review is limited to  
21 the record, and we would never get to the question of,  
22 if it weren't reviewed, limited to the record, then  
23 what?

24                   MS. O'CONNELL: That would be a perfectly  
25 appropriate -- also a perfectly appropriate way to



1 dispose of this case, to conclude that all of these  
2 claims were limited to the record, and that it was an  
3 abuse of discretion to grant a stay in these cases.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Ms. Marquez.

7 ORAL ARGUMENT OF LETICIA MARQUEZ

8 ON BEHALF OF THE RESPONDENT

9 MS. MARQUEZ: Mr. Chief Justice, and may it  
10 please the Court:

11 I'd like to begin by correcting a statement  
12 by the United States. Mr. Gonzales is not precluded by  
13 2254(d) or Pinholster. Mr. Gonzales has identified  
14 several ineffective assistance of counsel claims that  
15 would be ripe for review under this Court's decision in  
16 Martinez and, therefore, would be available in district  
17 court. And we would also be able to present new  
18 evidence.

19 JUSTICE KAGAN: Ms. Marquez, could you tell  
20 me, if it were the case that somebody was limited to the  
21 state court record, what's your best example of a case  
22 in which, nonetheless, a stay would be appropriate; in  
23 which, nonetheless, consultation with the client was  
24 necessary for a full and fair adjudication?

25 Because I have been trying to think of

1 examples, and -- you know, I'm not doing very well,  
2 quite honestly. So what's your best one?

3 MS. MARQUEZ: Well, in our particular case,  
4 we -- we raise several claims in habeas -- in habeas  
5 proceedings. We raise guilt claims, and we also raise  
6 sentencing claims. And it is often the case with our  
7 clients that, at their direction, they choose not to --  
8 not to pursue or do not want to pursue sentencing claims  
9 and want to only pursue guilt claims.

10 So those are claims that are strictly on the  
11 record. And under the ABA guidelines, the client is the  
12 ultimate decisionmaker as to where the particular  
13 representation is going. So that is a huge,  
14 all-encompassing decision that a client needs to make as  
15 to the ultimate outcome of his or her case.

16 JUSTICE SOTOMAYOR: Well, that is that  
17 you're -- that seems like almost a due process argument,  
18 that in every single case, you have to grant a stay.  
19 You're -- you're parting from the Respondent in Carter,  
20 and you are making a broader argument.

21 MS. MARQUEZ: Well, no, Your Honor, where it  
22 does -- just an example of where, if there is a client  
23 in -- in that particular situation --

24 JUSTICE SOTOMAYOR: No incompetent client,  
25 presumably, can help you make those decisions. So tell

1 me, are you saying that, in every single case, the  
2 client is entitled to a stay?

3 MS. MARQUEZ: No, Your Honor, we're not  
4 saying in every single case.

5 JUSTICE SOTOMAYOR: So why does that  
6 situation give you an entitlement, if it's not in every  
7 single case?

8 MS. MARQUEZ: The -- that situation goes  
9 with the ABA guidelines and what an attorney's duties  
10 are to maintain communication with the client. And  
11 that's just but one reason why we need a -- a competent  
12 client. But to answer your question --

13 JUSTICE SCALIA: Excuse me. If the client  
14 is incompetent, you -- you bring both claims, right?  
15 You -- you both -- you both challenge the guilt, and you  
16 challenge the sentence.

17 MS. MARQUEZ: That -- that is if a client is  
18 incompetent. I suppose, if that's -- if we were forced  
19 to do so, we would.

20 JUSTICE SCALIA: So why -- why -- why is  
21 it -- it is unfair to prevent -- to stop everything, so  
22 that the client can tell you not to bring one of those  
23 things? I don't know why that's unfair.

24 MS. MARQUEZ: That's just but one -- one  
25 reason why we would need a client.

1                   But to answer Justice Kagan's question,  
2   we -- we -- there are several claims. Ineffective  
3   assistance of counsel claims are -- are necessary for --  
4   for us to be able to talk to our client. And -- and  
5   especially in this case, where there was an antagonistic  
6   relationship between his -- the client and the trial  
7   lawyer, that would put the situation in context, and we  
8   would be able to -- be able to identify those facts.

9                   JUSTICE GINSBURG: Why couldn't you use the  
10   transcript? Everything -- all -- all the exchanges  
11   between the defendant -- defendant and the trial judge  
12   are in the transcript.

13                  MS. MARQUEZ: Well, in -- there -- there  
14   are -- transcripts are -- are available and -- but there  
15   are situations that are not transcribed. In -- in  
16   ineffective assistance of counsel claims, the  
17   interactions between the lawyer and the client at the  
18   prison, at the jail --

19                  JUSTICE SCALIA: But you can't get that in,  
20   right? I mean, aren't you limited to the record? So  
21   what -- what use is it --

22                  MS. MARQUEZ: Well --

23                  JUSTICE SCALIA: -- to -- to find out these  
24   little -- little secret things that your client knows,  
25   if they cannot be admitted?

1                   MS. MARQUEZ: Well, as this Court held in  
2 Pinholster, not all Federal habeas claims fall within  
3 the scope of 2254(d). And there are situations where we  
4 would be granted an evidentiary hearing.

5                   In this particular case, we have not yet  
6 been briefed our 2254(d) claims. We are at the stage  
7 where we're going to brief merits claims, and in  
8 addition to that, we are going to brief evidentiary  
9 development in this case, where we would have to assert  
10 what -- what facts need to be developed and, also, the  
11 diligence standard.

12                  JUSTICE SOTOMAYOR: What in the record could  
13 plausibly, certainly be seen, that would suggest that  
14 your defendant has information that could be valuable?  
15 Assume it's not the ABA standard, but the plausibility  
16 standard or the certainty standard or something.

17                  MS. MARQUEZ: Well, there was -- there is  
18 information in the record that the trial judge and our  
19 client had an antagonistic relationship. And there was  
20 comments -- the trial prosecutor was interviewed -- or  
21 said on the -- on the record that the judge and the  
22 defendant, Mr. Gonzales, snarled and snapped at each  
23 other.

24                  JUSTICE SOTOMAYOR: Well, that, you can see  
25 from the record.

1 MS. MARQUEZ: Right.

2 JUSTICE SOTOMAYOR: What would plausibly  
3 give rise to a belief that there was some ex parte  
4 exchange between the judge and the defendant? Is there  
5 anything to suggest that in the record?

6 MS. MARQUEZ: Well, we would -- we would  
7 suggest that the actual relationship itself, we would  
8 have to know where -- where this relationship went awry  
9 or why it is that Mr. Gonzales and the trial judge were  
10 basically at each other's throats. The intensity --

11 JUSTICE SOTOMAYOR: Do you have anything to  
12 suggest that there had been an ex parte exchange that  
13 would account for that snarling?

14 MS. MARQUEZ: We currently have not been  
15 able to get that information from our client as to -- to  
16 sit down to -- with our client and say, what happened in  
17 this situation?

18 JUSTICE GINSBURG: The district judge in  
19 this case explained why he concluded that there was no  
20 issue that couldn't be fairly adjudicated on the basis  
21 of the record. What was wrong with his -- his  
22 explanation? He looked at the case carefully, and he  
23 said, there's nothing that can't fairly be adjudicated  
24 on the record.

25 MS. MARQUEZ: Well, first, initially, the --

1 the district court judge agreed with -- with  
2 Mr. Gonzales that there was a need for Mr. Gonzales to  
3 be competent at his habeas proceeding. And we actually  
4 began a course of -- of a competency determination.  
5 And -- and that is a longer record. Also, our client  
6 went into -- was treated at the state mental hospital.

7           However, the -- we believe the trial -- or  
8 the district court judge was in error when he made that  
9 finding. The -- the trial judge did not have -- or the  
10 district court judge did not have all the evidence  
11 before it when -- when the district court looked at the  
12 particular claims. We were just asked to identify. We  
13 did not put forward a -- a complete briefing on that  
14 issue. And the --

15           CHIEF JUSTICE ROBERTS: Counsel? I'm  
16 sorry --

17           MS. MARQUEZ: The judge decided it just on a  
18 motion.

19           CHIEF JUSTICE ROBERTS: If -- if we think  
20 it's necessary to set some objective limit on how long  
21 an inherent authority could be exercised, is there any  
22 reason to adopt any limit, other than the one that the  
23 psychiatrists have suggested, which is, I gather, most  
24 people, if they're going to, will recover competence  
25 within 9 months?

1 MS. MARQUEZ: Excuse me, Your Honor.

2 No. We -- a year or 6 months, just by  
3 listening to the questions from the Court, seems to be  
4 problematic. We suggest that this is all within the  
5 district court's discretion.

6 CHIEF JUSTICE ROBERTS: So if we're looking  
7 for a little more guidance than that and feel the need  
8 for an objective standard, other than abuse of  
9 discretion, you don't have any number that has any basis  
10 in psychiatric evidence or anything else, besides the  
11 9 months?

12 MS. MARQUEZ: Well, Your Honor, we -- we  
13 would suggest that the Court look to -- to this decision  
14 in Rhines, where -- and my answer is we can look at a  
15 year. And possibly, if -- if the client is not  
16 competent at the end of that year, then explore other  
17 options, such as next friend or -- or perhaps  
18 proceeding.

19 But what we would do is direct the Court to  
20 this Court's decision in Rhines, where stays were --  
21 district courts are allowed to -- to stay proceedings,  
22 so that the petitioner could -- could go back to State  
23 court and exhaust. And in -- in that decision, the  
24 Court was specific as to guidelines for the district  
25 court to assert its discretion, 30-day updates, make



1     sure that clients are not -- are not being dilatory in  
2     seeking these stays, and so forth.

3                     And the -- and there has not been a problem  
4     with Rhines stays. The district courts have been able  
5     to handle those stays.

6                     JUSTICE SOTOMAYOR: Counsel, in this case,  
7     the district court denied a stay. If this is an  
8     equitable power, how can you be comfortable that the  
9     Ninth Circuit, as an appellate court, overrode the  
10    district court's equitable discretion?

11                    MS. MARQUEZ: We believe that the district  
12    court was -- abused its discretion, but first, did not  
13    apply the correct standard, which is essential  
14    communication. The district court erroneously decided  
15    that Mr. Gonzales was not essential -- or his  
16    communication was not essential to the proceedings.

17                    JUSTICE SOTOMAYOR: But you're not claiming  
18    that that issue is always in the district court's hands  
19    to start with?

20                    MS. MARQUEZ: Yes, Your Honor.

21                    JUSTICE SOTOMAYOR: So please identify for  
22    me what -- how we establish or set a standard so that  
23    appellate courts are not overriding that at whim?

24                    MS. MARQUEZ: Well, we would -- we would  
25    urge the Court to adopt the district -- or the Ninth

1 Circuit essential communication standard, where you  
2 first have a finding of competency and then a  
3 determination of whether that client's communication is  
4 essential to the proceeding.

5 JUSTICE SOTOMAYOR: Oh, you're flipping it.  
6 You're saying, first, you give a stay for competence.  
7 You've determined competency first and not essentiality  
8 first?

9 MS. MARQUEZ: Well, that's how the cases  
10 are -- are being raised. Always, there is a question of  
11 competency, and then the courts are looking to whether  
12 or not there is essentiality.

13 I would also like to address the -- the  
14 argument that the AEDPA somehow -- or AEDPA -- somehow  
15 forecloses any types of stays. The Congress recognized  
16 the need for finality to be balanced against a firm  
17 regard for due process and full Constitutional  
18 protections. So we are --

19 CHIEF JUSTICE ROBERTS: Nobody here thinks  
20 today -- no one's arguing that it prevents any kind of  
21 stay today, right?

22 MS. MARQUEZ: I -- but I would just -- I was  
23 just letting the Court know that the AEDPA does not  
24 foreclose stays. I thought I heard --

25 CHIEF JUSTICE ROBERTS: No. I didn't

1 understand -- I thought everybody was focusing on  
2 limitation on stays. And surely, AEDPA is pertinent  
3 when it comes to recognizing the need for those limits,  
4 right?

5 MS. MARQUEZ: Exactly, Your Honor.

6 Also, I would like to address the Court's --  
7 or the government's concern as to whether or not these  
8 cases -- or Rohan decisions, would open the floodgates  
9 to district court stays. The -- we've pointed out in  
10 our briefs on page 32, 33, the -- the few stays that  
11 have actually been granted. The district courts have  
12 been handling these motions.

13 And unless there's any further questions --

14 JUSTICE ALITO: Well, if there -- if the  
15 Court were to point to some guideline as to the maximum  
16 length -- or the presumptive maximum length of a stay,  
17 what -- because that's the period within which there's a  
18 good chance in most cases of restoring the petitioner to  
19 competency -- at what point would that begin to run?  
20 Would there be any obligation to begin the treatment  
21 prior to the -- to the time when the motion for a stay  
22 is -- is filed?

23 Now, could many years go by with the same  
24 attorney representing a client, and then at the very  
25 last minute -- and no effort is made to obtain treatment

1 that would restore the petitioner to competency, and  
2 then at the very last minute, a motion to make -- a  
3 motion for a stay is entered, and then this period of  
4 time -- 6 months, 9 months, a year, whatever it is --  
5 would begin to run?

6 MS. MARQUEZ: I believe there's an  
7 obligation for counsel to continue to try to effectively  
8 communicate with his client. And once that attorney  
9 gets to a point where that incapacity forestalls that  
10 attorney from being able to move forward on his case,  
11 then that attorney is, at that point, under a duty to  
12 raise this claim with the district court.

13 JUSTICE KENNEDY: Well, is he under duty to  
14 raise it as soon as possible, at the risk of forfeiture  
15 if he doesn't? That's the import of the question.

16 MS. MARQUEZ: Well, that's -- that's the  
17 million dollar question. I would think that the --

18 JUSTICE KENNEDY: Well, that's why I'm  
19 asking.

20 (Laughter.)

21 MS. MARQUEZ: I -- I think the ABA  
22 guidelines on ethical duties guide attorneys to -- to  
23 make that decision. And yes -- I'm sorry -- if there is  
24 dilatory action on the part of the attorney, that is  
25 something for the district court to consider in issuing

1 its stay.

2 JUSTICE ALITO: Well, here, the -- the  
3 motion -- when was the motion made? The motion for a  
4 competency determination and a stay?

5 MS. MARQUEZ: The motion in this case was  
6 made when we -- the stay was lifted in district court,  
7 and we were ordered to do -- to do merits briefing.

8 JUSTICE ALITO: And when was that? Do you  
9 remember the date, roughly?

10 MS. MARQUEZ: That -- that was in 2000 --  
11 February 2006.

12 JUSTICE ALITO: And when was the initial  
13 habeas petition filed in district court?

14 MS. MARQUEZ: It was filed in July 2000.

15 JUSTICE ALITO: Of 2000?

16 MS. MARQUEZ: Yes.

17 JUSTICE ALITO: So why wasn't there -- then  
18 there was no obligation to do anything between 2000 and  
19 2006?

20 MS. MARQUEZ: The counsel was attempting to  
21 communicate with the -- with Mr. Gonzales the entire  
22 time. At that point, the case was stayed in district  
23 court for Rhines and Ring and Summerlin determinations.  
24 And --

25 JUSTICE ALITO: It was only after 6 years of

1 being unable to communicate with him, that the attorney  
2 said maybe there's a competency problem here?

3 MS. MARQUEZ: No. We -- we were having  
4 difficulty with the client the entire time, since we  
5 started -- since we first got on the case. And after --  
6 and we just thought he was a difficult client. And  
7 after we -- we filed the amended petition, which was  
8 basically a notice pleading, the -- within a month of  
9 that, we first got in contact with mental health  
10 experts, saying, there's something wrong with this guy,  
11 and sought to put together his mental health history.

12 At that point, Mr. Gonzales was back in  
13 state court, exhausting issues and raising Ring claims.  
14 In -- in that court -- because we were stayed in  
15 district court -- in that court, his post-conviction  
16 counsel raised ineffective assistance -- I'm sorry,  
17 competency issues -- and it was -- and it was an  
18 incompetency to assist in post-conviction -- stay  
19 post-conviction -- and that claim was denied.

20 CHIEF JUSTICE ROBERTS: So did -- did he  
21 begin treatment prior to the district court order on  
22 Federal habeas?

23 MS. MARQUEZ: No. It was not until the  
24 district court ordered -- or, actually, the district  
25 court ordered him transported back to -- or transported

1 to the state mental hospital. And there, he was to be  
2 evaluated, to finally determine competency.

3 And while there, he was -- he was treated.  
4 And while he was being treated, he was starting to  
5 regain competency, at least to some extent. Then  
6 treatment stopped.

7 JUSTICE GINSBURG: Treatment stopped because  
8 he -- he said there were side effects?

9 MS. MARQUEZ: Because he had back pain. And  
10 then we began briefing on what the course of treatment  
11 should be, if any.

12 CHIEF JUSTICE ROBERTS: Well, so how -- what  
13 is this 9 months or 1 year? The amount of time he's  
14 under treatment or the amount of time from the district  
15 court determination?

16 MS. MARQUEZ: I believe he was at the state  
17 mental hospital for about 6 months, and he was being  
18 evaluated. And as -- inadvertently, then, the state  
19 mental hospital began treatment.

20 JUSTICE SOTOMAYOR: The million dollar  
21 question: Assume we say you have to spend a reasonable  
22 time trying to get someone to competency. And, here,  
23 there appears to have been efforts to do so. And your  
24 client is saying, I can't be treated because the drugs  
25 make me sick. So when does all of this end?

1 MS. MARQUEZ: Well, first, our client did  
2 not say he couldn't be treated because -- that he  
3 couldn't be treated. It was just these specific drugs.  
4 And we were on a course of -- of trying to figure out  
5 what, if any, other regimen was available. And we  
6 believe that it is within the district court's --

7 JUSTICE SOTOMAYOR: Well, that time has  
8 passed by now, hasn't it? That that -- they stopped  
9 treating him?

10 MS. MARQUEZ: They -- they quickly  
11 transported him back to DOC, and he is not being treated  
12 currently.

13 JUSTICE SOTOMAYOR: No one's continuing to  
14 monitor him or trying to treat him?

15 MS. MARQUEZ: No, Your Honor. And we are --  
16 we do not have -- he will not see us, and we do not have  
17 access to medical records because we do not have a  
18 current release. And the district court did not grant  
19 us an order to get those records on a consistent basis.  
20 So we have no access to our client whatsoever.

21 JUSTICE SOTOMAYOR: I'm a little confused as  
22 to -- I think the Ninth Circuit remanded, so that  
23 treatment could be had. So why has it stopped?

24 MS. MARQUEZ: Well, we haven't moved forward  
25 in district court. We've been here appealing the



1 decision -- or the State has appealed the decision.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 General Horne, you have three minutes  
4 remaining.

5 REBUTTAL ARGUMENT OF THOMAS C. HORNE

6 ON BEHALF OF THE PETITIONER

7 MR. HORNE: Thank you, Your Honor.

8 I -- I need to disagree with  
9 the Solicitor General on one point about the standard.  
10 The standard has to be essentiality. The witness has to  
11 be essential. In fact, you heard my friend representing  
12 Gonzales emphasize essentiality. And it was emphasized  
13 in their -- in their responsive brief, at pages 1, 2, 9,  
14 10, 11, 12, 21, 30, and 39. On all of those pages, they  
15 said the witness' testimony must be essential.

16 JUSTICE KAGAN: General, could I ask you,  
17 you have been arguing on two different axes. One is how  
18 tight the standard should be to grant any stay at all,  
19 and the other is what limits there should be on how long  
20 a stay can be if a stay is warranted.

21 And I'm just curious, if I forced you to  
22 prioritize, in terms of the state's interests in  
23 effective habeas adjudication, which is more  
24 important -- you know, cranking up the standard or  
25 making sure that there is a time limit in place?

1           MR. HORNE: Well, I think the first -- the  
2 first priority is that there should be no indefinite  
3 stay. And the second priority is that there should be  
4 no stay in a records-based case. Those are the two  
5 prongs of the Ninth Circuit decision, which we think --

6           JUSTICE KAGAN: But ordered in that way,  
7 that, for you, the time limit is the more important?

8           MR. HORNE: The time limit is -- is crucial,  
9 but I have to say no stay on a records-based case is a  
10 matter of pretty clear law that is --

11          JUSTICE KAGAN: Yes, I know. But, really, I  
12 said, if I forced you to prioritize between the two.

13                   (Laughter.)

14          MR. HORNE: I would say it can't be  
15 indefinite. That would be the first priority. But I  
16 think it's also clear from this Court's very definite  
17 statements in a number of cases that -- that there  
18 cannot be a stay in a records-based case. Now --

19          JUSTICE GINSBURG: Opposing counsel said  
20 that there is an exception for ineffective assistance of  
21 counsel under our decision in Martinez.

22          MR. HORNE: Your Honor, in this case, the  
23 district judge specifically found that there is no  
24 possibility for a case of ineffective assistance of  
25 counsel, that those were waived by the -- by -- when the

1 case was sent back to the State for additional  
2 post-conviction relief proceedings, that claim was  
3 waived. It's in the district court's order, Appendices  
4 B and C to our -- to our petition.

5 And even the Ninth Circuit didn't argue  
6 that. The Ninth Circuit argued that there was an issue  
7 as to whether there was prejudice by the judge. But  
8 there is a very detailed analysis, again, in the  
9 district court's order, showing that every time that  
10 claim was made and was claimed -- made a number of times  
11 in the State proceedings, it was clear that those were  
12 on-the-record comments.

13 There was nothing secret. There was nothing  
14 ex parte. Those were on-the-record discussions that  
15 were being complained about. And the district court  
16 judge found that if there was something secret, then  
17 those have been waived by -- by the petitioner because  
18 he didn't bring it up in the numerous case -- times that  
19 it came up at the State level, and he was talking only  
20 about on-the-record comments by the trial judge.

21 CHIEF JUSTICE ROBERTS: Thank you, General,  
22 counsel.

23 The two cases are submitted.

24 (Whereupon, at 11:27 a.m., the case in the  
25 above-entitled matter was submitted.)

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