

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TERRY TIBBALS, WARDEN, :

4 Petitioner : No. 11-218

5 v. :

6 SEAN CARTER :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 9, 2012

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.

14 APPEARANCES:

15 ALEXANDRA T. SCHIMMER, ESQ., Solicitor General,
16 Columbus, Ohio; on behalf of Petitioner.

17 SCOTT MICHELMAN, ESQ., Washington, D.C.; on behalf of
18 Respondent.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-218, Tibbals v. Carter.

5 Ms. Schimmer.

6 ORAL ARGUMENT OF ALEXANDRA T. SCHIMMER

7 ON BEHALF OF THE PETITIONER

8 MS. SCHIMMER: Mr. Chief Justice, and may it
9 please the Court:

10 This case is here from the Sixth Circuit,
11 which held that habeas claims can be stayed indefinitely
12 because prisoners have a statutory right to competence
13 to assist in their case, but even Mr. Carter now disowns
14 the circuit's rationale, and the court's indefinite stay
15 order was wrong for two other reasons.

16 First, habeas claims cannot be stayed
17 indefinitely. Doing so is fundamentally incompatible
18 with the timeliness concerns underlying AEDPA.

19 Second, while we readily acknowledge that
20 limited stays will be appropriate in some situations,
21 this is not one of them. All of Mr. Carter's claims are
22 record based and, therefore, resolvable without his
23 assistance.

24 JUSTICE KAGAN: What situations would they
25 be appropriate in?

1 MS. SCHIMMER: Limited stays, we think, Your
2 Honor, would be stay -- appropriate in situations where
3 the prisoner's ability to effectively communicate with
4 his counsel or to disclose evidence would be necessary
5 to his claim. And we think that would be true in a
6 case, potentially, where AEDPA does not restrict Federal
7 review to the state court record.

8 So here, for instance, we think that the
9 prisoner's assistance would not be necessary, and
10 therefore, even a limited stay would not be appropriate
11 because all of Mr. Carter's claims were vetted before
12 the state courts and decided on the merits. And
13 therefore, under 2254(d), in this Court's decision in
14 Pinholster, the Federal court is limited to reviewing
15 the state court record.

16 We don't think that the prisoner's
17 assistance in that case is necessary. We don't think
18 Mr. Carter has made a case for why his assistance would
19 be necessary in this specific case.

20 JUSTICE KENNEDY: Well, why -- why shouldn't
21 the rule be that an indefinite stay is -- is never
22 necessary? You just proceed based on the evidence you
23 have?

24 Sometimes, we have evidence where a witness
25 is missing. We have to go on with the case. Then it

1 could be open to argue in a later case that there was
2 new evidence that was not available.

3 MS. SCHIMMER: Well, we absolutely agree,
4 Justice Kennedy, that indefinite stays are never
5 appropriate, regardless of the circumstances; that
6 indefinite stays contravene AEDPA's timeliness concerns.
7 And to the extent that all of the parties in this case
8 agree now that, to the extent district courts have some
9 power to issue stays -- we say only limited stays -- in
10 these cases, that power is grounded in equitable
11 discretion.

12 And we do not think that it comports with
13 equitable discretion to allow a prisoner essentially to
14 win his case, to obtain a suspension of his capital
15 sentence, the ultimate end relief that he seeks --

16 JUSTICE KENNEDY: What about the second part
17 of -- of the equation? So, suppose that there's no
18 stay, that the habeas proceeding is adjudicated against
19 the petitioner. He then becomes competent and claims
20 there's new evidence. Would -- would that be grounds to
21 reopen, you think?

22 MS. SCHIMMER: Well, we think in those
23 situations -- certainly, the State of Ohio wouldn't
24 contest, for instance, under 2254(b), that if you were
25 incompetent before, that that would be a legitimate

1 basis, potentially, for not having been able to
2 reasonably discover a new claim, if one had a new claim.

3 So we do think that -- moving forward, that
4 no indefinite stay should be permitted. And when the
5 courts move forward, yes, if someone's competency is
6 later restored, there are backstops. The person,
7 certainly in Ohio, can always go back to state court
8 and --

9 JUSTICE KENNEDY: And would the backstop be
10 newly discovered evidence?

11 MS. SCHIMMER: The backstop would be a newly
12 discovered claim, I would say. I think that would be
13 what --

14 JUSTICE KAGAN: Ms. Schimmer, if you are
15 right that no stay was appropriate in these
16 circumstances, we would never reach the question of how
17 much of a stay is appropriate in other circumstances;
18 isn't that right?

19 MS. SCHIMMER: I think that's right because
20 I think -- to the extent that, using this case as a
21 springboard, the Court could draw the boundary line --
22 could -- could draw one bright boundary line and say
23 indefinite stays are never permitted, but limited stays
24 might be permitted in cases where the claims are not
25 record based. I --

1 JUSTICE KAGAN: I'm saying the exact
2 opposite.

3 MS. SCHIMMER: Oh.

4 JUSTICE KAGAN: In other words, if there was
5 one bright line, which says that stays are not
6 appropriate in a record-based claim because there's
7 really nothing that the client can contribute, then we'd
8 have no need or cause to reach the second question of
9 what happens, in a case where a stay might be
10 appropriate, how long that stay should be.

11 MS. SCHIMMER: That's correct, Your Honor.
12 I'm sorry, I agree -- I agree with you that the Court
13 could rule on that ground.

14 JUSTICE SCALIA: Alternatively, we could --
15 we could rule that indefinite stays are never
16 appropriate; in which case, it would be unnecessary to
17 decide whether any stay is appropriate where -- for a
18 record-based claim, right?

19 MS. SCHIMMER: That is true, too. That
20 is --

21 JUSTICE SCALIA: We can do it from either
22 end.

23 MS. SCHIMMER: That is true, too --

24 JUSTICE SCALIA: Or we could decide both, I
25 suppose.

1 MS. SCHIMMER: I suppose, yes. I mean, we
2 would -- we would -- we would urge the Court to, I
3 think, do both, to say --

4 JUSTICE SOTOMAYOR: Am I -- am I
5 understanding that your position, in response to the
6 question from Justice Scalia and Justice Kennedy, is
7 that, for you, indefinite is any stay whatsoever?

8 It sounds like what you are proposing -- or
9 in response to them, is that no stay for purposes of
10 determining competence, whether it's short or long, is
11 permissible. Is that your argument?

12 MS. SCHIMMER: That is not our argument,
13 Justice Sotomayor. Our -- our definition of an
14 indefinite stay is a stay that is imposed until the
15 prisoner is restored to competence. That --

16 JUSTICE GINSBURG: Like -- like the stay in
17 Rees?

18 MS. SCHIMMER: Like -- like the stay in
19 Rees, or, really, like the stay the Sixth Circuit has
20 issued.

21 JUSTICE GINSBURG: You would have to -- to
22 maintain your position, the Court would have to qualify
23 Rees, or at least the interpretation that says the stay
24 should be indefinite once the petitioner is found
25 incompetent because that's what has happened there. The

1 court said, find out if he's competent. The answer was,
2 he is incompetent. And then the court just let it sit
3 until the man died.

4 MS. SCHIMMER: Well, Your Honor, we don't
5 think that Rees really has any force or provides any
6 guidance in this case. That, of course, was a case
7 where a prisoner was seeking to abandon his further
8 appeals.

9 There are multiple reasons why we -- why we
10 think that Rees does not endorse the power of Federal
11 courts to indefinitely stay habeas proceedings.

12 One is the fact that the Court's stay order
13 was completely unexplained and very terse. It didn't
14 announce any rule of law.

15 Second, the historical record shows that the
16 Court's stay in Rees was, at most, a judicially
17 negotiated settlement, meaning far from a demonstration
18 of the Court's inherent power. It seemed to be a very
19 carefully orchestrated exercise of consented-to power.

20 The third point is that --

21 JUSTICE SOTOMAYOR: I could take objection
22 to that characterization because the clerk of the court
23 told the court that neither party was happy with what
24 was happening, and the court still entered the order.

25 But let me go back to my question a moment.

1 Amici say that most competency issues are resolved
2 within months and that many individuals -- the vast
3 majority, are restored to competency with proper
4 medication within months. Are you opposing those kinds
5 of stays?

6 MS. SCHIMMER: For -- not in -- not where
7 it's appropriate, no, Your Honor. And again, Your
8 Honor, our definition of an indefinite stay is --

9 JUSTICE SOTOMAYOR: But under your
10 definition, it's never appropriate, really.

11 MS. SCHIMMER: No.

12 JUSTICE SOTOMAYOR: You argue -- you argue
13 two things. You say, under Pinholster, they -- courts
14 always have to rely on the record.

15 MS. SCHIMMER: Correct. We would -- here's
16 how we would taxonomize the appropriateness of stays:
17 We would say indefinite stays are never permitted,
18 meaning a court can never premise a stay exclusively on
19 the restoration of the prisoner's competency, in saying
20 however long it takes --

21 JUSTICE SOTOMAYOR: Even though a doctor
22 says, it can be done, we have to try?

23 MS. SCHIMMER: If -- if a doctor says, it
24 can be done, we have to try, and it's a situation where
25 it's appropriate --

1 JUSTICE SOTOMAYOR: Well, they can never
2 say, it can be done. They can say --

3 MS. SCHIMMER: Right.

4 JUSTICE SOTOMAYOR: -- we have to try.

5 MS. SCHIMMER: There is a reasonable
6 probability that it can be done. We would say,
7 Your Honor --

8 JUSTICE SOTOMAYOR: That -- that's also --
9 I'm not sure how they can do that until they try.

10 MS. SCHIMMER: Right. So we would say, in
11 certain situations, yes, that would be perfectly
12 appropriate.

13 The State of Ohio certainly agrees that
14 having a competent prisoner is a desirable thing in a
15 habeas case and that courts do have some discretion to
16 try to vindicate that goal.

17 Our point, though, is simply that it cannot
18 come at all cost, meaning --

19 JUSTICE SCALIA: Rees -- Rees was not an
20 indefinite stay in -- in the absolute sense, was it?

21 MS. SCHIMMER: No.

22 JUSTICE SCALIA: Because the trial
23 proceeded. There -- there was going to be an end,
24 right?

25 MS. SCHIMMER: Well, the court -- the court

1 in the end held up the cert petition for several decades
2 without deciding the case. So -- and in the end,
3 Mr. Rees died and then the cert petition was ultimately
4 later dismissed.

5 CHIEF JUSTICE ROBERTS: I don't understand
6 how your approach works. We, the defendant, the habeas
7 petitioner, the allegation is made, I'm incompetent,
8 there is support for it. The district court says, okay,
9 I can't enter an indefinite stay, but you are going to
10 be treated; I want you to come back in 6 months, okay?
11 And we will look at it then.

12 He comes back in 6 months, and there's been
13 no change. What happens then? Another 6 months? At
14 what point does it become indefinite?

15 MS. SCHIMMER: Right. Well, since we are
16 playing on the field of equitable discretion,
17 Your Honor, it's going to be difficult to put forward a
18 hard and fast rule.

19 But Justice Sotomayor rightly points --

20 CHIEF JUSTICE ROBERTS: Well, give me a
21 loose and soft rule. I mean, is it --

22 (Laughter.)

23 MS. SCHIMMER: Sure. A loose and soft rule.

24 CHIEF JUSTICE ROBERTS: Is it two years? Or
25 is it ten years?

1 MS. SCHIMMER: We would say, presumptively,
2 a year. And we think there is support for that, even
3 from Mr. Carter's own amici. The brief of the American
4 Psychiatric Association, pages 19 to 21, and especially
5 footnote 30, talks about how most prisoners who are
6 ultimately successfully restored to competency, that
7 does happen in a matter of months, 6 to 9 months at the
8 longest end. About 90 percent of them are restored
9 within 6 to 9 months.

10 So we think, presumptively, a year would be
11 an appropriate period of time for --

12 JUSTICE KAGAN: Well, Ms. Schimmer, why
13 would that be? I mean, assume a case where you say a
14 stay would be appropriate. So it's not a closed record
15 case. It's a case where the client might be expected to
16 provide information that's -- let's -- let's assume it's
17 necessary to a full and fair adjudication of the habeas
18 claim.

19 Why would you cut it off at a year? Why
20 wouldn't it be still true in 2 years, that a full and
21 fair adjudication couldn't take place in those
22 circumstances.

23 MS. SCHIMMER: Well, we think, Your Honor,
24 at the point at which you say that the test for a
25 limited stay is however long it takes to restore

1 somebody's competency is the point at which we have
2 returned to the definition of saying that indefinite
3 stays are proper.

4 And the bottom line is that we think that --

5 JUSTICE KAGAN: Well, it's not an indefinite
6 stay. I think the judge would do what the Chief Justice
7 suggested, that -- you know, it's not for ever and ever.
8 We're just going to come back to it periodically. But
9 if the answer is the same, which is that the client's
10 participation is necessary for a full and fair
11 adjudication, then the court's answer should be the
12 same, too. Why isn't that right?

13 MS. SCHIMMER: Because we do think that
14 there comes a point, given the finality concerns
15 underlying AEDPA, that a limited stay, when that window
16 expires -- the person has a reasonable period of time to
17 be restored to competency; that when that window
18 expires, at some point, the proceedings do have to
19 continue.

20 JUSTICE SCALIA: Well, it's really -- it's
21 really not the same question when it comes back, is it?
22 Because there are two questions: Is -- is reasonable
23 competence useful for his defense? But, also, the
24 second question, is there a reasonable probability that
25 he can be restored to competence?

1 The first time, there obviously is that, and
2 you give him a year. When you come back a second time,
3 you say, well, it's been a year, they usually come back
4 within 6 to 9 months, there is no longer a reasonable
5 probability.

6 MS. SCHIMMER: That's exactly right,
7 Justice Scalia. And to the extent that we are balancing
8 different parties' interests in these cases, after the
9 preliminary limited stay expires, we believe at that
10 point the prisoner's interest in a continued stay has
11 diminished, and the state's interest in the proceedings
12 continuing and moving forward has then increased, and
13 that the court should then move on.

14 JUSTICE GINSBURG: And there'd be no stay at
15 all, unless it's necessary for just adjudication of the
16 claim, so that would be a threshold question.

17 MS. SCHIMMER: That would be the threshold
18 question, and there seems to be a good amount of
19 consensus on that point. It's the test articulated by
20 the Sixth and Ninth Circuits and by my colleague here
21 today. And we're -- we're willing to accept that as the
22 test for when limited stays can be imposed.

23 And with that, if there aren't further
24 questions, I'll reserve the remainder of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Michelman.

2 ORAL ARGUMENT OF SCOTT MICHELMAN

3 ON BEHALF OF THE RESPONDENT

4 MR. MICHELMAN: Mr. Chief Justice, and may
5 it please the Court:

6 Ohio and the United States have agreed today
7 that courts have the authority to stay habeas
8 proceedings when the petitioner is mentally incompetent.
9 So then the questions for this Court are when may such
10 stays issue and how long may such stays be?

11 The Court's answers should reflect the
12 important principle that no individual should lose
13 potentially meritorious claims because of mental
14 illness.

15 I'd like to begin by addressing --

16 JUSTICE SOTOMAYOR: Petitioner says they
17 won't because they can come back with new evidence after
18 habeas is closed. Why is that inadequate?

19 MR. MICHELMAN: I -- I think that's --
20 that's a crucial question, Justice Sotomayor, that
21 Justice Kennedy asked as well, and -- and it goes to the
22 limits on second or successive petitions. They can't
23 come back if they are later competent, if they first
24 lose their claims, because they didn't have the evidence
25 they needed and then try again later.

1 They are subject to the bar on second or
2 successive petitions, which requires, not only that they
3 have new facts, but also that they have new law. So
4 that's a very restrictive standard that would not allow
5 them to simply pick up where they left off.

6 CHIEF JUSTICE ROBERTS: I'm sorry. I -- I
7 didn't follow that exactly. What -- what prevents them
8 from picking up where they left off?

9 MR. MICHELMAN: Mr. Chief Justice,
10 Section 2244(b), the bar on second or successive
11 petitions.

12 Imagine Mr. Carter has a potentially
13 meritorious claim now that he can't speak to because of
14 his incompetence, it's adjudicated without him, he loses
15 it.

16 CHIEF JUSTICE ROBERTS: Oh, it's
17 adjudicated. Okay. Sorry.

18 MR. MICHELMAN: Imagine it's adjudicated
19 without him, he loses it. And then he can't simply
20 waltz back into court and say, I'm here, I'm competent,
21 hear me out.

22 JUSTICE SOTOMAYOR: I'm presume -- I presume
23 that the one claim among your many -- yours is the
24 defendant who was excluded from trial, correct?

25 MR. MICHELMAN: Yes, Justice Sotomayor.

1 JUSTICE SOTOMAYOR: So that if he comes back
2 and says, I told my attorneys I would behave, and I
3 wanted to come back earlier, and they never let me back
4 in, this would not be a new claim, this would be part of
5 the old claim that has been adjudicated, correct?

6 MR. MICHELMAN: Yes, Justice Sotomayor.

7 JUSTICE SOTOMAYOR: But without his
8 information?

9 MR. MICHELMAN: Yes. And, in fact, the --
10 the record lends some support to this suggestion by
11 showing that counsel frequently put their own safety and
12 their own concerns ahead of my client's interests, for
13 example, stating on the record -- and I'm quoting here
14 from trial counsel -- "I am still worried about him
15 behaving during this phase, so the bottom line is he
16 wants to stay where he is." So there is a question of
17 whether trial counsel was -- was really looking out for
18 Mr. Carter's interests at that time.

19 There's also the question of whether --

20 JUSTICE SOTOMAYOR: Well, that, you could
21 see from the record. The question in my mind would be
22 whether he told counsel he would behave, and counsel
23 ignored that information, correct?

24 MR. MICHELMAN: Yes, Justice Sotomayor.
25 There is strong support in the record to suggest that

1 Mr. Carter has additional information to provide, both
2 about his desire to return to the courtroom and about
3 his competence once he was removed from the courtroom.
4 Was he hallucinating during the trial? Could he see it?
5 Could he communicate with counsel?

6 JUSTICE KENNEDY: Could -- could you help me
7 with your discussion of 2244(b)? I have it in front of
8 me. And the hypothetical was that he's incompetent, the
9 claim is adjudicated, then he becomes competent, and he
10 says now is there some new evidence, which could not
11 have been discovered.

12 I thought you told us that you not only have
13 to have new evidence, but new law. That's not the way I
14 read --

15 MR. MICHELMAN: I'm -- I'm sorry.

16 JUSTICE KENNEDY: -- (b)(2)(B)(1), unless I
17 misunderstood you.

18 MR. MICHELMAN: You're -- no, you're right,
19 Justice Kennedy. I misspoke. He needs new law or new
20 facts, but the new facts have to come with a showing of
21 actual innocence. I misstated that. I apologize.

22 But, either way, new law is --

23 JUSTICE KENNEDY: No, no, no.

24 MR. MICHELMAN: -- new facts are not enough.

25 JUSTICE KENNEDY: No, no. This says, "or

1 the factual predicate for the claim could not have been
2 discovered previously through the exercise of due
3 diligence," period.

4 MR. MICHELMAN: And --

5 JUSTICE KENNEDY: Yes?

6 MR. MICHELMAN: And (b)(2) --

7 JUSTICE KENNEDY: Yes?

8 MR. MICHELMAN: -- "the facts underlying the
9 claim, if proven, would show that, but for the
10 Constitutional error" --

11 JUSTICE KENNEDY: Yes, clear and convincing,
12 that's true.

13 MR. MICHELMAN: Right. So he needs not only
14 the new facts, but needs to meet that higher standard,
15 showing that no reasonable factfinder would have found
16 him guilty.

17 But one of his claims, his ineffective
18 assistance of counsel in mitigation, goes to not his
19 guilt, but his punishment. So that claim would be
20 barred under 2254. Additionally, his competence doesn't
21 go to his guilt either.

22 JUSTICE ALITO: Well, is it your position
23 that any time a petitioner raises an ineffective
24 assistance of counsel claim, the habeas proceeding can
25 potentially be stayed indefinitely?

1 MR. MICHELMAN: That's potentially correct,
2 Justice Alito. But I would emphasize the role of the
3 district courts as gatekeepers for only potentially
4 meritorious claims that are -- are truly suggested on
5 the record that someone --

6 CHIEF JUSTICE ROBERTS: I'm sorry. Go --
7 finish your answer to Justice Alito.

8 MR. MICHELMAN: It's -- where it's truly
9 suggested on the record that the petitioner could help,
10 if competent, so that we wouldn't be engaging in
11 imaginative speculation or claims that were purely
12 record based.

13 CHIEF JUSTICE ROBERTS: So what -- it's a
14 truly suggested by the record standard?

15 MR. MICHELMAN: Well, I would say that --
16 that it would be suggested by the record. I'm not sure
17 the adverb "truly" is necessary, but -- you know.

18 CHIEF JUSTICE ROBERTS: Well -- well, how is
19 it compared to a motion to dismiss standard?

20 MR. MICHELMAN: Well, I would look to this
21 Court's decision --

22 CHIEF JUSTICE ROBERTS: Is it more
23 stringent?

24 MR. MICHELMAN: I think it would be -- well,
25 I guess not -- not compared to the Iqbal standard, Your

1 Honor. Probably the plausibility standard would
2 actually be somewhat analogous, although --

3 CHIEF JUSTICE ROBERTS: Well, now we've gone
4 from plausible to truly -- plausible -- well, truly
5 suggested by the record. I mean, suggested by the
6 record might be plausible.

7 It seems to me that it's a pretty loose
8 standard that entitles the defendant to a stay.

9 MR. MICHELMAN: Well, that -- but that --
10 that's not the only criterion, Mr. Chief Justice. It
11 would be not only that it was suggested by the record
12 that it was a potentially meritorious claim, as the --
13 as the district court found and the standard this Court
14 endorsed in Rhines, but also that the petitioner is
15 genuinely incompetent. This doesn't happen very often.

16 In fact, in the state's amicus brief
17 discussing how, in -- in their characterization, this
18 type of litigation has exploded in the Ninth Circuit, in
19 their characterization, they pointed only to nine cases
20 in the past nine years, so -- and not all of those
21 resulted in --

22 JUSTICE ALITO: Well, why isn't what you're
23 proposing just a mechanism that will permit stays in
24 virtually every capital case, if that's what the
25 petitioner wants -- if that's what petitioner's counsel

1 wants?

2 Let's say you have a case where there is a
3 small amount of mitigating evidence about the
4 petitioner's childhood, but not enough to -- to sway
5 the -- the sentencing authority. It's alleged that if
6 the petitioner had been -- if the petitioner was
7 competent, the petitioner could provide a lot more
8 information about what went on during his childhood
9 years; and, therefore, the -- the proceeding has to be
10 stayed indefinitely until the petitioner is restored to
11 confidence or he dies, as happened in Rees.

12 What do you do with that situation?

13 MR. MICHELMAN: Justice Alito, I think
14 district courts have a wide amount of discretion in that
15 matter, and they could say, well, it looks like there is
16 a little evidence here, but based on what I think you
17 could tell me, I don't think there is enough.

18 Here, by contrast, the district court did
19 find that Mr. -- Mr. Carter's competent assistance was
20 necessary. So I think we have to trust the district
21 courts to be gatekeepers --

22 JUSTICE ALITO: So if the -- if the district
23 court says, well, there's a little bit here, and I can't
24 rule out the possibility that there might be a lot more
25 that's locked in the petitioner's mind, but he is unable

1 to provide it because he is incompetent, then I'm going
2 to grant a stay until he is restored to competence; and
3 then that would be insulated from being overturned on
4 appeal by abuse of discretion standard. That's what
5 you're arguing?

6 MR. MICHELMAN: That's -- that's correct,
7 Justice Alito. That would be something --

8 JUSTICE ALITO: Do you think that is
9 consistent with AEDPA? That Congress, knowing, in
10 particular, that a lot of district judges and a lot of
11 court of appeals judges don't like the death penalty and
12 will go to some length to prevent the imposition of that
13 sentence, that we're just going to leave that all to the
14 discretion of every individual district judge?

15 MR. MICHELMAN: I think it is consistent
16 with AEDPA, Your Honor, because of this Court's recent
17 jurisprudence in Martinez, in Holland, in Rhines, which
18 make clear that AEDPA did not pursue finality at all
19 cost. It did not eliminate the discretion, the
20 equitable discretion of the district courts that they
21 traditionally enjoyed, as this Court stated in Holland.

22 And as this Court stated in Martinez, the
23 Court is concerned that there could be claims that no
24 court will have heard, not the state court, not the
25 Federal court.

1 JUSTICE SCALIA: Mr. Michelman, we -- we
2 have established a different standard for the degree of
3 competence that has to exist in order to prevent
4 execution, right? The -- the prisoner has to be aware
5 of what is being done and why it's being done.

6 MR. MICHELMAN: Yes, Justice Scalia.

7 JUSTICE SCALIA: And that's a much lower
8 standard than the standard of competence required for
9 deciding whether he can assist counsel, right?

10 MR. MICHELMAN: It's a different standard,
11 Justice Scalia.

12 JUSTICE SCALIA: Well, it's -- no, it's a
13 much -- it's a much easier standard for the state to
14 establish.

15 MR. MICHELMAN: Well, it could be easier in
16 some cases, but harder than others. Mental -- mental
17 health science is complex, so one might be competent
18 to because --

19 JUSTICE SCALIA: Well, wait. All he has to
20 know to prevent -- to prevent execution is he has to
21 know that he's being executed for a crime, right?
22 And --

23 MR. MICHELMAN: And he has to understand
24 why.

25 JUSTICE SCALIA: -- in order to assist

1 counsel, doesn't he have to know a lot more than that?

2 MR. MICHELMAN: That's -- that's true,
3 Justice Scalia. The test --

4 JUSTICE SCALIA: Well, just make believe
5 that I'm right about that, okay?

6 (Laughter.)

7 JUSTICE SCALIA: That there are two
8 standards, and one is really quite more difficult than
9 the other. Why isn't the difference between the
10 standards utterly eliminated? Because whenever there is
11 a capital case, a habeas petition is filed, and counsel
12 says, my -- my client cannot -- cannot -- cannot assist
13 me. Oh, yes, he understands why he's being executed,
14 but he may have a new claim, he may be able to tell me
15 stuff, so we have to stay the execution indefinitely
16 until he can assist -- assist me in -- in continuing his
17 defense.

18 You've just converted the standard for
19 proceeding with the execution from an easier one to a
20 much more difficult one.

21 MR. MICHELMAN: I -- I don't think that's
22 true, Justice Scalia, because the -- the two standards
23 are different and for different purposes. So there
24 could be individuals who meet one and not the other.
25 It's not -- it's not an either/or choice.

1 JUSTICE KENNEDY: But then -- but then you
2 are fighting the -- the arguendo assumption.

3 Let's assume that the Ford standard -- the
4 standard for competence should be executed, is more
5 lenient, less -- less forgiving than competence to
6 assist counsel. Let's assume that. Then Justice Scalia
7 has to be right. You've -- you've simply eliminated the
8 Ford standard altogether.

9 MR. MICHELMAN: Not necessarily, Your Honor,
10 because even if one is easier --

11 JUSTICE GINSBURG: At least only -- only in
12 cases where the competence -- the claim of incompetence
13 is genuine. I mean, if anyone says, oh, I want to
14 make -- take advantage of the more defendant-friendly
15 standard, all I have to do is allege I'm incompetent.

16 But that's not the case. He has to be --
17 there has to be a hearing that determines he is, indeed,
18 incompetent. So - and -- and most defendants I don't
19 think would be able to establish that they are, indeed,
20 incompetent.

21 MR. MICHELMAN: That's right,
22 Justice Ginsburg. We -- our standard builds in the
23 assumption that there will be mental health experts that
24 will testify to the condition of the petitioner.

25 So the petitioner can't simply select a

1 standard and declare that he meets it. He would have to
2 satisfy mental health professionals that he meets that
3 standard, whether it's competency to be executed or
4 competency for these purposes. And so that will --

5 JUSTICE SCALIA: Mental health experts
6 always agree, don't they? Those provided by the defense
7 always agree with those provided by the prosecution.
8 Yes.

9 (Laughter.)

10 MR. MICHELMAN: I understand sometimes
11 that's not true, Justice Scalia, but that's -- that's
12 why we rely on the district courts to do what they do
13 every day in the trial competency context and adjudicate
14 conflicting claims about a petitioner's mental
15 competence --

16 JUSTICE KENNEDY: Am I -- am I -- is it
17 correct that the petitioners in both cases -- pardon me,
18 that the criminal defendants in both cases here, the
19 Respondents, have all but conceded that there is no
20 Constitutional basis for the right to competency during
21 habeas, or am I overstating that?

22 MR. MICHELMAN: I don't think you are,
23 Justice Kennedy, though I won't speak for Mr. Gonzales.

24 Mr. Carter does not press a Constitutional
25 argument here, only the argument that a district court's

1 discretion, which the State of Ohio recognizes, to stay
2 habeas proceedings should cover --

3 JUSTICE KENNEDY: But once you concede the
4 Constitutional point, so that there's no fundamental
5 unfairness, then it seems to me that -- that you have
6 all but given away your case.

7 MR. MICHELMAN: Well, I don't think there
8 needs to be Constitutional unfairness for there to be
9 unfairness. For instance, this Court's opinion in
10 Martinez --

11 JUSTICE KENNEDY: Well, it's fairness that's
12 not fundamental -- or --

13 MR. MICHELMAN: Well --

14 JUSTICE KENNEDY: It's unfairness that's not
15 fundamental.

16 MR. MICHELMAN: I think Martinez v. Ryan is
17 an excellent illustration of that point,
18 Justice Kennedy, because, there, the Court held -- not
19 that there was a Sixth Amendment right to effective
20 assistance of counsel at the habeas stage, but that
21 ineffective assistance on initial review collateral
22 proceedings could provide cause and prejudice to
23 overcome a procedural default, in order that the
24 petitioner would not lose his claim, and that -- to
25 prevent a situation where no court would hear the claim

1 before he was executed.

2 CHIEF JUSTICE ROBERTS: Well, but in that
3 case, the -- the whole basis of the analysis was that,
4 although it was collateral, it really was the first
5 opportunity to raise a particular claim.

6 You say that, earlier, that trial judges do
7 this all the time in the trial context. It's an
8 important distinction in our jurisprudence if there's a
9 difference in terms of the rights to which you are
10 entitled preconviction and post-conviction.

11 MR. MICHELMAN: That's -- that's correct,
12 Mr. Chief Justice. But if the facts haven't been
13 presented -- and here what the district court found was
14 there were facts missing, facts that were exclusively
15 within Mr. Carter's knowledge.

16 They weren't presented to the state court,
17 they haven't been available to either the state court or
18 the Federal court, so it's possible this man could be
19 executed and no one could have fully heard these
20 potentially meritorious claims.

21 CHIEF JUSTICE ROBERTS: What is your -- what
22 is your limit? You think there is no limit on the
23 inherent authority, that these things can go on and on?
24 Or as -- I mean, your -- your friend on the other side
25 suggested, 1 year as a presumption? Do you have any

1 limit?

2 MR. MICHELMAN: Well, we -- we would leave
3 it, in the first place, to the district court's
4 discretion. We -- as far as the question of indefinite
5 stays go, we agree with the State of Ohio that most
6 competency issues are resolved within a matter of
7 months. So we can expect --

8 JUSTICE GINSBURG: But not this one because
9 the claim is he was never competent; isn't that so? He
10 wasn't competent to stand trial, and he never --

11 MR. MICHELMAN: That's --

12 JUSTICE GINSBURG: And his mental condition
13 never improved. So this person, if -- if the -- the
14 standard is he's got to be competent, the likelihood is
15 he will never be competent because he wasn't even,
16 according to him, competent at the time he was tried.

17 MR. MICHELMAN: Yes, Justice Ginsburg. And
18 this -- this would be a rare case in which a stay might
19 need to be more than 6 months, 9 months, a year. But
20 because most -- most situations, the competency issue
21 will resolve in a short period of time, this Court
22 shouldn't fear that it's opening the floodgates to long
23 stays in many, many cases.

24 There -- this is a rare case with a very
25 severely ill man, with potentially meritorious claims

1 that require his assistance. That's not something
2 that --

3 JUSTICE ALITO: Well, why can't the
4 competency -- why can't the issue of competency at trial
5 be resolved?

6 MR. MICHELMAN: Well, because the issue --

7 JUSTICE ALITO: You have to be competent
8 during the habeas proceeding in order to assist in
9 proving that he was -- that he was incompetent at the
10 time of trial?

11 MR. MICHELMAN: Yes, Justice Alito. And
12 that's because the competency question at this point is
13 retrospective. We're not talking -- it's not a matter
14 of simply examining Mr. Carter today and saying, How do
15 you feel? What do you experience? Are you hearing the
16 voice of the devil?

17 But it's a question of was he doing that
18 during his trial 14 years ago? And that's why it's
19 important that he be able to participate now.

20 What the Sixth Circuit ordered in this case
21 was a remand for a narrow stay with appropriate
22 monitoring by the district court, to make sure that this
23 didn't become -- just sit around on the docket for years
24 with nobody looking at it.

25 CHIEF JUSTICE ROBERTS: Did you say that the

1 question is whether or not -- not whether he is
2 competent today to assist his counsel, but whether he
3 was 14 years ago?

4 MR. MICHELMAN: Yes, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: How in the world --
6 I mean --

7 MR. MICHELMAN: With respect to the
8 underlying claim. That's the question.

9 CHIEF JUSTICE ROBERTS: Right. How is a --
10 do mental health professionals make those determinations
11 on a regular basis?

12 MR. MICHELMAN: I understand that they do,
13 Your Honor. I understand it is possible for a person
14 with a psychosis to recover and have memories of
15 experiences during that psychosis. Now, I admit that's
16 not a fact in -- in the record, but that's something
17 that, if we're dispositive, could be established on
18 remand in this case.

19 So it's because of the -- the rarity of
20 these claims, because they are not going to come up
21 every day, and because district courts exist as strong
22 checkpoints to prevent non-genuine claims of competence
23 or not potentially meritorious claims for which the
24 petitioner's assistance is necessary, a narrow stay
25 authority should be preserved and should be applied to

1 Mr. Carter's case.

2 JUSTICE GINSBURG: But not staying
3 everything, according to the Sixth Circuit. The Sixth
4 Circuit said that -- that there are issues or may be
5 issues that can go forward right away. And as to that,
6 is there any issue that could be argued, despite the
7 incompetence?

8 MR. MICHELMAN: Yes, Justice Ginsburg.

9 JUSTICE GINSBURG: And what -- what are
10 those?

11 MR. MICHELMAN: Well, in this case -- and I
12 think it really illustrates the narrowness of -- of the
13 Sixth Circuit's order. In this case, he had, for
14 example, claims about the jury instructions. He had
15 claims about prosecutorial misconduct. He has a claim
16 about the method of execution that the State of Ohio
17 uses.

18 These claims may go forward because they
19 don't require his assistance. And it's -- it's a
20 measure of the Sixth Circuit's moderation and discretion
21 that they held that only the claims that genuinely
22 require his assistance should be stayed; the others may
23 go forward with the help of the next friend.

24 CHIEF JUSTICE ROBERTS: That's a pretty
25 inefficient system, isn't it? That the judge has to

1 learn a particular record to dispose of claims 1 through
2 9, when he knows that he's not going to be able to
3 dispose of the petition until -- until the petitioner is
4 competent, maybe a year later, then he has to go through
5 the whole thing again?

6 MR. MICHELMAN: Well --

7 CHIEF JUSTICE ROBERTS: I don't see a
8 district court saying, well, I'm not going to get into
9 this until I can dispose of the whole thing.

10 MR. MICHELMAN: Well, I -- I suppose there
11 would be some appeal to the notion that the district
12 court might stay the rest of it, simply waiting, Your
13 Honor; but we -- we don't think that's likely to happen
14 frequently.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Ms. Schimmer, you have three minutes
18 remaining.

19 REBUTTAL ARGUMENT OF ALEXANDRA T. SCHIMMER

20 ON BEHALF OF THE PETITIONER

21 MS. SCHIMMER: Thank you.

22 First off, there is nothing narrow about
23 what the Sixth Circuit held. At page 15-A of the
24 petition appendix, the Sixth Circuit ordered that all of
25 the ineffective assistance of counsel claims be stayed

1 until Mr. Carter is competent, meaning these claims will
2 be stayed at any and all cost to the progress and
3 finality of the proceedings. I --

4 JUSTICE SOTOMAYOR: Could you tell me what
5 the value is to wait for the Ford analysis or the Ford
6 examination to the time of execution?

7 MS. SCHIMMER: We think there are a few
8 values, Justice Sotomayor. First of all is that the
9 state has -- still has an interest -- first of all, we
10 don't concede that Mr. Carter is Ford incompetent.
11 Those -- that --

12 JUSTICE SOTOMAYOR: Putting that aside.

13 MS. SCHIMMER: Putting that aside, though,
14 the State's interest is that it still has a powerful
15 interest in the finality of its conviction and sentence.

16 JUSTICE SOTOMAYOR: "At all costs" is what
17 you seem to be saying.

18 MS. SCHIMMER: No. But even if the
19 implementation of that sentence is ultimately
20 forestalled by a Ford ruling, that's true in a dignitary
21 sense, but it's also true in a practical sense, meaning
22 the State should not -- if somebody regains competence
23 many years down the line, the whole point of AEDPA is
24 that the State at that time should not have to be
25 litigating a stale case.

1 And to wait potentially 5 and 10 and
2 15 years until someone's competency is restored on this
3 total speculation that something might happen runs --

4 JUSTICE SOTOMAYOR: Well, your adversary has
5 not said it's total speculation. He suggests that, if
6 we set a standard that requires -- we can talk about
7 what the terms are, suggestive in the record, plausible
8 in the record, typical sort of situation -- but assuming
9 that there is some basis to believe that the defendant
10 can provide information of importance to the claim, why
11 should that be -- that door be shut?

12 MS. SCHIMMER: Well, again, Your Honor --

13 JUSTICE SOTOMAYOR: And how do you deal with
14 his answer that, if the claim is not a new claim, but
15 just new information about an old claim, that he will be
16 barred from a successive petition?

17 MS. SCHIMMER: Right. Well, we still don't
18 see how that has any traction in a case like this where,
19 whether competent or not competent, 2254(d) and
20 Pinholster say this claim -- all of these claims were
21 adjudicated on the merits in state court and, therefore,
22 no new evidence can be considered by the Federal court.
23 So that, we think, resolves that.

24 And in terms of how do you deal with limited
25 stays and then going on, we would say simply that the

1 State of Ohio's experience in this case has been that
2 the State of Ohio has been standing ready for 10 years
3 to defend the judgment of its state courts in this case,
4 even though all of Mr. Carter's claims are record based.

5 There is no right to competence. Everybody
6 seems to now agree on that. Indefinite stays contravene
7 AEDPA, and we don't think that any stay is justified
8 here because of the record-based claims.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 (Whereupon, at 10:40 a.m., the case in the
12 above-entitled matter was submitted.)

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