Florida Law Review

Volume 65 | Issue 4 Article 12

July 2013

Ryan v. Gonzalez and the Potential Elimination of the Ineffective Assistance of Counsel Post Conviction Failsafe

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CASE COMMENT

RYAN V. GONZALES AND THE POTENTIAL ELIMINATION OF THE INEFFECTIVE ASSISTANCE OF COUNSEL POST CONVICTION FAILSAFE

Ryan v. Gonzalez, 133 S. Ct. 696 (2013)

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Recently, the United States Supreme Court addressed in *Ryan v. Gonzales* "whether the incompetence of a state prisoner requires suspension of the prisoner's federal habeas corpus proceedings."[1] In a unanimous decision, the Court held that "the Courts of Appeals for the Ninth and Sixth Circuits both erred in holding that district courts must stay federal habeas proceedings when petitioners are adjudged incompetent."[2] The decision leaves unanswered questions with regard to a petitioner's ability to protect himself from ineffective or incompetent counsel both before and during the habeas proceeding.

While it is clear that the decision in *Ryan* foreclosed the possibility that either 18 U.S.C. §§ 3599 or 4241 grant the right to competency, there are some policy considerations that the Court did not address. Adding further confusion to this issue the Supreme Court stated:

> If a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment.[3]

This language indicates that the Court recognizes that some cases—presumably those involving ineffective assistance of counsel claims—would benefit from the petitioner's participation. However, the decision discourages courts from granting stays to those petitioners who stand no reasonable hope of regaining competency.[4] Further, the decision did not address what failsafe is in place to protect a petitioner from incompetent habeas counsel. After summarizing *Ryan* and its procedural history, this

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1. Ryan v. Gonzales, 133 S. Ct. 696, 700 (2013).
2. *Id.*
3. *Id.* at 709.
4. *Id.*

Comment considers the policy ramifications of *Ryan* as it relates to ineffective assistance of counsel at both the state and federal court levels.

Ryan considered two circuit court decisions, the Sixth Circuit's decision in *Carter v. Bradshaw*[5] and the Ninth Circuit's decision in *In re Gonzales*.[6] Both cases and their procedural histories will be considered separately. In *Carter*, respondent Sean Carter was charged with aggravated murder, aggravated robbery, and rape in an Ohio state court, and, after considering the evidence presented during trial, a jury convicted Carter on all counts and sentenced him to death.[7] After exhausting his appeal rights under state law, Carter filed a writ of habeas corpus.[8] While his proceeding was pending, and after he filed his third amended petition, Carter filed a motion for a competency hearing.[9] The district court granted Carter's motion for a competency hearing, and, after an exhaustive hearing, the district judge deemed Carter incompetent to assist counsel; dismissed Carter's case without prejudice; and prospectively tolled the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA).[10]

The State of Ohio appealed the district court's decision.[11] After considering the record, the Sixth Circuit ordered Carter's habeas petition to be stayed until he was competent to assist counsel.[12] The court relied on *Rees v. Peyton*,[13] a Supreme Court decision, which it interpreted to stand for the proposition that habeas petitioners have a statutory right to competency in certain situations through 18 U.S.C. § 4241.[14] In *Rees*, the Court considered whether a petitioner who had been declared incompetent by a psychiatrist could withdraw his habeas petition for certiorari.[15] Through application of § 4241 to habeas proceedings, the *Rees* Court determined that in order to proceed, a defendant must be competent enough

5. Carter v. Bradshaw, 644 F.3d 329 (2011).
6. *In re* Gonzales, 623 F.3d 1242 (2010).
7. *Ryan*, 133 S. Ct. at 701.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 702.
13. Rees v. Peyton, 384 U.S. 312, 313–14 (1966).
14. Carter v. Bradshaw, 644 F.3d 329, 332 (2011) (quoting *Rees*, 384 U.S. at 313–14) ("[I]n order to 'aid . . . the proper exercise of th[e] Court's certiorari jurisdiction' . . . the Court directed the district court to apply 18 U.S.C. §§ 4244–4245, which has been recodified as 18 U.S.C. § 4241."). Section 4241 allows a defendant to file a motion for a competency determination. If, after the hearing, the court determines that a defendant is suffering from a mental disease rendering him incompetent "to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense" the defendant is to be committed to the custody of the Attorney General. 18 U.S.C. § 4241 (a)–(d) (2006).
15. *Rees*, 384 U.S. at 313.

to understand the action against him and to properly assist in his defense.[16] The Court concluded that the petition should be stayed until the petitioner regained competence.[17] In rendering its decision to grant the stay, the Sixth Circuit relied on the provision of § 4241 which states that a competency hearing may be held "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is *unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense*."[18]

In *In re Gonzales*, respondent Ernest Valencia Gonzales was convicted in Arizona for felony murder, armed robbery, aggravated assault, first-degree burglary, and theft, and sentenced to death.[19] Following the exhaustion of his state appeals, Gonzales filed a petition for habeas relief in federal court.[20] While his habeas petition was pending, Gonzales's appointed counsel moved the district court to stay his habeas proceeding on the basis that Gonzales was not competent to proceed.[21] The district court denied the stay in light of *Rohan ex rel. Gates v. Woodford*,[22] a Ninth Circuit decision that interpreted the right to counsel in the federal post-conviction relief guarantee of 18 U.S.C. § 3599(a)(2) to imply a right to competence.[23] The district court reasoned that because claims in a habeas proceeding are based on the record, Gonzales's counsel would not benefit from his input in the case; therefore, there was no reason to stay the proceedings until he was found competent to assist counsel.[24] The court did not rule on respondent's competency but did find that he had a "limited capacity for rational communication."[25]

Gonzales filed a writ of mandamus in the Ninth Circuit Court of Appeals.[26] While the petition was pending, the Ninth Circuit ruled in *Nash*

16. *Ryan*, 133 S. Ct. at 702 (quoting *Carter*, 644 F.3d at 333).
17. *Id.* at 702.
18. *Carter*, 644 F.3d at 333.
19. *Ryan*, 133 S. Ct. at 700.
20. *Id.*
21. *Id.*
22. Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (2003).
23. *Ryan*, 133 S. Ct. at 701. 18 U.S.C. § 3599(a)(2) reads in relevant part:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys.

18 U.S.C. § 3599(a)(2) (2006).
24. *Ryan*, 133 S. Ct. at 701.
25. *Id.* (quoting Gonzales v. Schriro, 617 F. Supp. 2d 849, 863 (2008)).
26. *Id.* at 701.

v. Ryan[27] that 18 U.S.C. § 3599(a)(2) provides a right to competency during an appeal.[28] In granting Gonzales's writ of mandamus and finding a right to competency for a habeas petitioner, the Ninth Circuit applied 18 U.S.C. § 3599(a)(2) since appeals, like habeas proceedings, are entirely based on the record.[29]

Ohio and Arizona both appealed to the United States Supreme Court, which granted certiorari to determine if either § 3599 or § 4241 provided a defendant with a statutory right to competency in a federal habeas proceeding.[30] In a unanimous decision, the Supreme Court held that neither statute requires a petitioner to be competent during a habeas proceeding.[31] Accordingly, the Court reversed the Ninth Circuit's writ of mandamus and vacated the Sixth Circuit's opinion.[32]

As the Ninth and Sixth Circuits relied upon different statutes as authority to support a defendant's right to competency during a habeas proceeding, each opinion will be considered separately. Turning first to the Sixth Circuit's opinion in *Carter v. Bradshaw*, the Sixth Circuit found that § 4241 provides habeas petitioners with a right to competency during their habeas proceeding.[33] In vacating the Sixth Circuit's judgment, the Supreme Court concluded that § 4241 does provide a statutory right to competency, but not for a petitioner in a habeas proceeding.[34] The Court pointed out that § 4241 applies only to trial and pre-sentencing proceedings and is thus not applicable to habeas proceedings that occur after sentencing.[35] The Court also recognized that Title 18 only applies to federal defendants who are prosecuted by the United States.[36] Both Gonzales and Carter were state prisoners who challenged their convictions with a federal civil action.[37] The Court then explored the language of § 4241, which authorizes a competency hearing before a defendant must face a proceeding against him.[38] The Court stated that a habeas proceeding is not a proceeding against the petitioner, rather it is a civil action brought by the petitioner.[39]

27. Nash v. Ryan, 581 F.3d 1048 (2009).
28. *Ryan*, 133 S. Ct. at 701.
29. *Id.*
30. *Id.* at 701–02.
31. *Id.* at 700.
32. *Id.* at 709–10.
33. Carter v. Bradshaw, 644 F.3d 329, 337 (2011).
34. *Ryan*, 133 S. Ct. at 706–07.
35. *Id.* (explaining that § 4241 by its own language only applies to presentence proceedings, and is therefore inapplicable to federal habeas petitions). *See* 18 U.S.C. § 4241(a) (2006) ("At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence.").
36. *Ryan*, 133 S. Ct. at 707.
37. *Id.*
38. *Id.*
39. *Id.*

Therefore, it concluded that the statutory right to competence found in § 4241 does not apply to habeas proceedings.[40]

In reversing the Ninth Circuit in *Gonzales*, the Court looked to the language of § 3599, which the Ninth Circuit previously relied upon as a basis for finding a statutory right for a petitioner's competency during a habeas proceeding.[41] The Court determined that § 3599 does not apply to competency in a habeas hearing.[42] The Court reasoned that the language in the statute only provides that indigent defendants are given adequate representation with experience in death penalty litigation.[43] It noted that the statute does not provide a directive that district courts must stay proceedings where a petitioner is incompetent to assist counsel.[44] Further, the right to assistance of counsel comes from the Sixth Amendment.[45] The Court concluded that if the right to counsel implied a right to competency, the right to competency during trial would stem from the Sixth Amendment instead of the Due Process clause of the Fourteenth Amendment.[46]

Since the Ninth Circuit relied on *Rohan* and *Rees* for its conclusion in *Gonzales*, the Supreme Court addressed both decisions in *Ryan*. While considering *Rohan*, the Court concluded that the Ninth Circuit mistakenly attributed a substantial constitutional concern to the petitioner's due process claim.[47] The Court found this attribution "puzzling" in light of the fact that the Ninth Circuit recognized that there was no constitutional right to counsel in a habeas proceeding.[48] In considering *Rees*, the Court refuted the Ninth Circuit's belief that *Rees* stood for the proposition that incompetence is grounds for staying a habeas proceeding.[49] It explained that the issue in *Rees* centered on whether an incompetent petitioner could revoke his petition for habeas relief, not whether the proceeding could be stayed until a petitioner gains competence.[50] As such, the Court found that *Rees* provides no support for the Ninth Circuit's decisions in *Rohan*, *Nash,* or *Gonzales*.[51]

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40. *Id.*
41. *Id.* at 701, 705–06.
42. *Id.* at 702.
43. *Id.*
44. *Id.*
45. *Id.* at 703.
46. *Id.*
47. *Id.* at 704.
48. *Id.*
49. *Id.* at 705.
50. *Id.*
51. *Id.*

Recognizing the backwards-looking nature of the habeas proceeding, the Court disagreed with the Ninth Circuit that mental incompetency would "eviscerate" a petitioner's right to counsel.[52] As a habeas proceeding does not require evidence outside of the record, the Court asserted that an attorney generally can provide effective counsel regardless of the competency level of the petitioner.[53] Attorneys do not rely on the client's assistance to review the record, assemble arguments, or identify legal errors in the case.[54] After finding that the Ninth Circuit's statutory interpretation failed, and that there was no precedent to be relied upon to reach its conclusion, the Court reversed the decision.[55]

The Court also considered the effects of indefinite stays and concluded that stays "frustrate[]" the finality of the sentencing by allowing a petitioner to suspend the resolution of the proceeding.[56] Petitioners facing a death sentence are not incentivized to obtain federal relief as quickly as possible and may use tactics like these to extend incarceration and temporarily avoid execution.[57] These tactics are unfair to the State who must, at some point, "be allowed to defend its judgment of conviction."[58] The Court is clear that this decision does not lift the proscription of "carrying out a sentence of death upon a prisoner who is insane."[59]

Finally, the Court addressed the district courts' discretion in staying proceedings for competency.[60] The Court refused to "manage the[] dockets" of the district courts by defining precise contours of the issuance of stays, instead choosing to defer matters of competency stays to the discretion of the courts.[61] The Court noted that district courts have the inherent authority to stay their proceedings, however it urged courts to disallow stays in cases where petitioners do not have a "reasonable" hope of competency in the future.[62] In order to warrant review, the petitioner must show an abuse of discretion.[63]

In *Gonzales*, the district court denied the motion for a stay after finding that Gonzales's competence was not at issue since all of Gonzales' claims were record based.[64] Any evidence Gonzales could have presented in this

52. *Id.* at 704.
53. *Id.*
54. *Id.* at 705.
55. *Id.* at 706.
56. *Id.* at 709.
57. *Id.*
58. *Id.*
59. *Ryan*, 133 S. Ct. at 709 n.18 (citing Panetti v. Quarterman, 551 U.S. 930, 934, (2007) (quoting Ford v. Wainwright, 477 U.S. 399, 410–11 (1986))).
60. *Id.* at 708–09.
61. *Id.* at 708.
62. *Id.* at 709.
63. *Id.* at 707 n.13.
64. *Id.* at 708.

proceeding would have been inadmissible, as a habeas petition is a guard against miscarriages of justice and not for the correction of ordinary errors.[65] Similarly, three of Carter's four claims did not warrant a competency stay either, since those claims were also record-based and any additional evidence presented would have been inadmissible.[66] The Court concluded that a district court, in granting a stay for incompetency, should consider the likelihood of a petitioner regaining competence if a petitioner's claim would "substantially" benefit from the assistance of a competent petitioner.[67] However, it found that a stay is not appropriate and would only serve to disrupt the state's ability to defend its judgment if there is no "reasonable" hope of competence in the future.[68]

This Comment does not argue that the Court's decision in *Ryan* was incorrect. Rather, it suggests that there are situations that the Court did not address in its opinion that may lead to issues in the future. The Court's decision only considers whether a statutory right to competency stays is found in § 4241 or § 3599. The Court's thorough review of the statutes cited by both the Ninth and Sixth Circuit clearly shows that these statutes do not provide a habeas petitioner a statutory right to competency. Complications may arise from the Court's directive that district courts have discretion to issue stays by considering the duration of time for a petitioner to regain competency as long as the petitioner's assistance would "substantially benefit" his counsel.[69] The Court considers competency stays inappropriate for petitioners who stand little chance of ever regaining competency.[70] This standard raises several questions about a petitioner's ability to protect himself from ineffective or incompetent representation both before and during a habeas proceeding.

Neither AEDPA nor the Court's decision in the instant case deprives a district court of the ability to stay a proceeding.[71] A key concern of the Court was allowing the state to achieve finality in its judgment.[72] However, the Court recognized the discretion of district courts to grant stays for incompetence and deferred to a district court's judgment to determine when a petitioner's participation will "substantially benefit" counsel.[73] However, "substantially" is a vague standard. Without defining this term, the door is left open for a variety of litigation over what constitutes "substantially benefit." The need for interpretation of this ambiguous term may well lead the state further away from its judgment finality and down a

65. *Id.*
66. *Id.* at 709.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 708.
72. *Id.* at 709.
73. *Id.*

long path of litigious clarification.

Further complications may arise in light of the fact that the instant case deters district courts from issuing competency stays to petitioners who have little hope of regaining competency.[74] A petitioner's competency may play a role in his ability to undertake the necessary steps for an ineffective assistance of counsel claim.[75] Courts favor a strong presumption for the effectiveness of counsel,[76] thus a petitioner's proof of incompetence must be compelling and complete. Indeed, this is a difficult threshold even for a fully competent defendant.[77]

The opinion repeatedly explains the evidentiary inadmissibility of any additional facts that a competent petitioner may add to his or her case.[78] Since any additional information an attorney receives from the client would not be admissible during the habeas proceeding, the Court concludes that "counsel can read the record," and there is therefore no need for the client to be competent to assist the attorney.[79] Again, the Court does not consider other reasons why a client's participation in the case may be imperative.[80] In some cases, it is difficult for petitioner's counsel to carry out their duties to the client without competent participation from the client.[81]

For example, counsel's failure to present mitigating evidence at sentencing is one common claim of ineffective assistance of counsel where the petitioner's assistance may be important. Defense counsel's presentation of mitigating evidence at sentencing, particularly in a capital case, is significant not only for sentencing but also for developing a

74. *Id.*

75. In order to be successful with an ineffective assistance of counsel claim, a petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). This has been expressed as a two-prong test. *See* Gregory J. O'Meara, *"You Can't Get There From Here?": Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545, 569 (2009). The first prong requires a defendant to prove his counsel was deficient. *Id.* The second prong requires showing that the defense was prejudiced due to the deficiency. *Id.*

76. *Strickland*, 466 U.S. at 689.

77. *See* Brief for ACLU et al. as Amici Curiae Supporting Respondents at *23–24, Ryan v. Gonzales, 133 S. Ct. 696 (2013) (Nos. 10-930, 11-218), 2012 WL 3109425 [hereinafter ACLU Brief] (describing the difficultly petitioners face in preparing a post-conviction petition).

78. *Ryan*, 133 S. Ct. at 708–09.

79. *Id.* at 708.

80. A petitioner's participation may be relevant in encouraging counsel to timely file a habeas petition, prompting counsel to raise all viable claims, moving for a substation of counsel if the current counsel is not adequate, developing facts for evidentiary hearings, "and participating in litigation of a variety of facts concerning the state-court proceedings that may well be significant, if not outcome determinative, in the litigation of the federal writ." ACLU Brief, *supra* note 77, at *5.

81. *Id.* at *5–6 ("These [duties] include fact investigation, evaluation of the accuracy of the state court rulings and fact-findings, and determination and consideration of what may have transpired in the proceedings but may not have been captured in the record.").

reliable appellate and post-conviction record.[82] Indeed, it is of such significance that the Supreme Court has recognized a constitutionally protected right to present such evidence.[83] At the habeas stage, a petitioner's counsel must present evidence that the sentencing was prejudiced by the fact that the mitigating evidence was not shown.[84] Where the record has not been fully developed, the petitioner's assistance could be crucial.[85] If an incompetent petitioner is unable to effectively communicate his mitigating factors with his habeas counsel, counsel will find great difficulty in fleshing out the factors for mitigation.

In addition to incompetent counsel at the pre-conviction stage, the Court's decision in the instant case does not address potential issues with attorney incompetence at the habeas stage. Instead, *Ryan* repeated the notion that attorneys are capable of handling the proceeding without the aid of a competent petitioner.[86] The Court does not address situations where capable attorneys simply fail to adequately manage the petitioner's case whether through negligence or inadvertence.[87] Since a petitioner cannot seek habeas relief from ineffective or incompetent assistance of counsel from collateral federal post conviction proceeding, it is vital that the petitioner is competent to monitor and assist his counsel during his habeas proceeding.[88]

Title 28 U.S.C. § 2261 does not foreclose the appointment of different counsel at the request of the petitioner during "any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings."[89] This raises a difficult question. How is a petitioner who is incompetent to assist counsel expected to recognize that his habeas counsel is ineffective, and then make a sufficient request to the court for new counsel? The ACLU's amicus brief for the respondent in *Ryan* identifies several instances where an attorney failed to take the proper action in a petitioner's case, and but for the petitioner's intervention, the petitioner's opportunity for a habeas

82. Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After* Schriro v. Landrigan, 62 FLA. L. REV. 721, 726, 742 (2010).

83. *See* Wiggins v. Smith, 539 U.S. 510, 519 (2003) (holding that petitioner was entitled to habeas relief after his counsel failed to uncover or present evidence of mitigating circumstances at sentencing); Williams v. Taylor, 529 U.S. 362, 393 (2000) (sustaining a petitioner's ineffective assistance of counsel claim because of his counsel's failure to present mitigating factors at sentencing amounted to a failure of reasonable representation).

84. *See* Ho, *supra* note 82, at 726–27.

85. *Id.*

86. Ryan v. Gonzales, 133 S. Ct. 696, 704, 708 (2013).

87. Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1684 (2008) (providing examples of common errors made by post-conviction attorneys).

88. 28 U.S.C. § 2254(i) (2006) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

89. *Id.* § 2261(e).

proceeding would have expired.[90]

The Court's observation that petitioners who await the death penalty have no incentive to expedite the habeas relief proceedings[91] is confusing and not necessarily factual. This is particularly true in light of the limited amount of incompetency petitions.[92] While there are certainly petitioners who lack incentive to reach finality in the judgment, the Court's reasoning seems to dismiss the possibility that there are petitioners with a legitimate habeas claim. In circumstances where a petitioner was genuinely wronged by the judicial system and is awaiting an improper death sentence, that petitioner has every reason to expedite the habeas process.

In conclusion, *Ryan* overlooks the fact that a death row petitioner can offer a unique and necessary perspective to his habeas petition. This Comment does not advocate for granting indefinite stays in every instance of petitioner incompetence. However, in considering the small number of incompetence stays granted in habeas proceedings, it appears that providing a stay for every incompetent habeas petitioner in a capital case would not be an extreme burden on the court system. In 2012, approximately 3,100 inmates were on death row awaiting execution.[93] From June 2003 through September 2010, only 701 capital habeas claims were brought to federal court,[94] and petitioner incompetency was raised in only 34 of those cases.[95] Appellate attorneys readily recognize the rarity of the success of habeas petitions.[96] Only 1.5% of all capital habeas cases were stayed due to petitioner's incompetence.[97] The Court's ruling in *Ryan* may have negative consequences on incompetent habeas petitioners who can benefit through facilitation of counsel. Limited discretionary stays for

90. *See* ACLU Brief, *supra* note 77, at *7–13. Holland v. Florida, 130 S. Ct. 2549, at 2562–63 (2010) is one example cited by the ACLU Brief. In *Holland*, Florida death row inmate Albert Holland requested his counsel submit a state post conviction petition. ACLU Brief at *8. Holland continuously reminded his attorney about the importance of filing a timely federal petition. *Id.* Through his own research, Holland learned that the court denied his state petition. *Id.* at *9. Holland researched the AEDPA statute of limitations on his own and argued with his counsel whether his federal petition would be tolled under AEDPA. *Id.* Holland was able to submit a pro se federal habeas petition to attempt to preserve his claims for subsequent habeas review. *Id.* at *9. The Supreme Court recognized that Holland "was right about the law" and his lawyer was "wrong." *Id.*; *Holland*, 130 S. Ct. at 2557–58. After hearing the petition on its merits, the district court found that Holland was unconstitutionally denied a right to self-representation during his capital trial and granted him a new trial. ACLU Brief at 9–10.

91. *Ryan*, 133 S. Ct. at 709 (quoting Rhines v. Weber, 544 U.S. 269, 277–78 (2005)).

92. Brief for Respondents at *31, Ryan v. Gonzalez, 133 S. Ct. 696 (2013) (No. 10-930), 2012 WL 3027353 [hereinafter Respondent's Brief].

93. Size of Death Row by Year, Death Penalty Information Center, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.

94. Respondent's Brief, *supra* note 92, at *31.

95. *Id.*

96. *See* O'Meara, *supra* note 75, at 547.

97. Respondent's Brief, *supra* note 92, at *31.

incompetent petitioners who have little hope of regaining competency may provide the state the finality it seeks, but such a policy runs the risk of foreclosing a potential avenue for an aggrieved petitioner's redress through the courts—potentially resulting in an unjust death sentence.