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Mental Illness on Appeal and the Right to Assist Counsel

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MENTAL ILLNESS ON APPEAL AND THE RIGHT TO ASSIST COUNSEL

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In the United States, the criminal appeals process is the last chance for prisoners to contest a conviction, and in some cases, to prevent execution. However, prisoners struggling with mental illness have no right to participate in the process.

The case of Ron Lafferty highlights this problem. In 1984, Lafferty was sentenced to death for the murder of his sister-in-law and her young daughter.[1] According to Lafferty, God commanded him to do it.[2] He chose execution by firing squad.[3]

In 1991, Lafferty's conviction was overturned because the trial court used the wrong standard to find him mentally competent to stand trial.[4] In 1994, he underwent another competency evaluation. He was then granted a new trial in 1996 and again was found guilty and sentenced to death.[5] In 2007, the Utah Supreme Court denied Lafferty's request for a new trial.[6] He filed a writ of habeas corpus in federal court in an effort to stop his execution.[7]

In December of 2010, Lafferty's attorneys argued for a stay of the proceedings, claiming he could provide insight and information pertinent to

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1. Emiley Morgan, *Ron Lafferty Case Will Proceed While the Man's Competency is Evaluated*, DESERET NEWS, Feb. 1, 2011, http://www.deseretnews.com/article/705365658/Ron-Lafferty-case-will-proceed-while-the-mans-competency-is-evaluated.html?pg=2.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

his appeal but was unable to do so because he was mentally ill.[8] Tom Brunker, an assistant Utah Attorney General, observed, "The right to competence [on appeal] is an ongoing issue nationally."[9] Judge Dee Benson decided Lafferty's proceedings were taking too long and denied the stay, stating, "This could go on forever. If you can find and come up with different theories of his mental state ... nothing will ever get done ... there has to be an end to this."[10] The stay was denied. Lafferty's appeal will go on without him for the sake of judicial efficiency.

A right to assist counsel on appeal for Lafferty is not widely supported because it has long been assumed that lawyers alone are responsible for marshaling arguments on appeal.[11] Courts recognizing a right to assist

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8. *Id.* Lafferty's attorney, Ken Murray, said, "This is a serious, make or break decision in this case, because if we have to go forward ... we could miss some very critical issues." *Id.*

9. Dennis Romboy, *Death-Row Inmate Ron Lafferty Seeks Right to Competency in Federal Appeals Process*, DESERET NEWS, July 11, 2010, http://www.deseretnews.com/article/700047006/Death-row-inmate-Ron-Lafferty-seeks-right-to-competency-in-federal-appeals-process.html?pg=all.

10. *See* Morgan, *supra* note 1 ("Benson said the competence issue, which has already stalled the case for more than a year, has already been addressed at the state level and will only further delay court proceedings").

11. *See* ABA Criminal Justice Mental Health Standards §7–5.4 (1984). This section provides:

> (b) Mental incompetence of the defendant at time of appeal from conviction in a criminal case should not prohibit the continuation of such appeal as to matters deemed by counsel or by the court to be appropriate.
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> (i) If, following the conviction of the defendant in a criminal case, there should arise a good faith doubt about the mental competence of the defendant during the time of appeal, counsel for the state or the defendant should make such doubt known to the court and include it in the record.
>
> (ii) Counsel for the defendant should proceed to prosecute the appeal on behalf of the defendant despite the defendant's incompetence and should raise on such appeal all issues deemed by counsel to be appropriate.
>
> (c) Mental incompetence of the defendant during the time of appeal shall be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for post-conviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.

counsel on appeal order competency determinations and stay the proceedings upon a finding of incompetency, but not for an indefinite period of time.[12] Unfortunately, the notion that these procedures delay the criminal appeals process prevents broad endorsement of a right to assist counsel.[13] This Comment argues that a right to assist counsel on appeal protects the integrity of the criminal justice system and should not be sacrificed for the sake of speedy appellate review.

Mental illness pervades the criminal justice system. More than half "of state correctional systems responding to a survey on inmate mental health reported that 15 percent or more of their inmate population had a diagnosed mental illness."[14] In the capital punishment context, mental illness affects

12. The Ninth and Sixth Circuits embraced a right to assist counsel on appeal until the U.S. Supreme Court overruled them. *See* Carter v. Bradshaw, 644 F.3d 329 (6th Cir. 2011) (holding that habeas proceedings challenging a capital sentence should be stayed until the petitioner is competent to proceed), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013); Rohan ex rel. v. Woodford, 334 F.3d 803, 806 (9th Cir. 2003) (creating a statutory right to competency in federal post conviction proceedings). Wisconsin, Florida, and Illinois have endorsed a right to assist counsel on appeal. *See* State v. Debra A.E., 523 N.W.2d 727, 738 (1994) (recognizing a statutory right to competency in state post conviction claims in the noncapital context); Carter v. State, 706 So. 2d 873, 875 (Fla. 1998); People v. Owens, 564 N.E.2d 1184, 1189-90 (Ill. 1990). California, Arizona, Missouri, Texas, and Michigan have rejected a right to assist counsel on appeal. *See* People v. Kelly, 822 P.2d 385, 413 (Cal. 1992); State v. White, 815 P.2d 869, 878 (Ariz. 1991); Brock v. State, 242 S.W.3d 430, 432-33 (Mo. Ct. App. 2007); Ex parte Mines, 26 S.W.3d 910, 912-13 (Tex. Crim. App. 2000); People v. Newton, 394 N.W.2d 463, 466 (Mich. Ct. App. 1986); *see also* Hannah Robertson Miller, *A "Meaningless Ritual": How the Lack of a Post-conviction Competency Standard Deprives the Mentally Ill Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 276 (2008).

13. Amicus Brief Utah et al. at 3, Ryan v. Gonzales, 133 S. Ct. 696 (2013) (No. 10-930).

14. Jeffrey Metzner, M.D. & Jamie Fellner, Esq, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. OF AM. ACAD. OF PSYCHIATRY AND THE LAW 104, 105 (2010), *available at* http://www.hrw.org/sites/default/files/related_material/Solitary%20Confinement%20and%20Mental%20Illness%20in%20US%20Prisons.pdf.

between 10% and 70% of inmates.[15] Prison conditions alone can exacerbate mental illness, although many of these individuals arrive on death row with a history of psychological problems.[16] On death row, where prisoners are held in solitary confinement, the suicide rate, according to data from 1995, is about five times the rate of suicide in the United States as a whole.[17]

The prevalence of mental illness in prisons indicates that a great number of inmates are unable to participate in appellate proceedings. Schizophrenia, depression, and substance abuse are the more common psychiatric problems among inmates.[18] Symptoms of schizophrenia include delusions and hallucinations, a lack of content in speech, and deficits in cognition and memory.[19] These impairments can drastically alter a prisoner's understanding of the proceedings. For example, the schizophrenic prisoner facing execution in *Carter v. Bradshaw* believed he could not be put to death unless he volunteered for it— "an irreversibly dangerous false belief," according to the court.[20] Depression, although not a psychotic disorder like schizophrenia, can equally distort an inmate's perception of the situation. Inmates suffering from depression experience feelings of hopelessness and

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15. Dominic Rupprecht, *Compelling Choice: Forcibly Medicating Death Row Inmates to Determine Whether They Wish to Pursue Collateral Relief*, 114 PENN ST. L. REV. 333, 334 (2009).

16. *See* David Wallace-Wells, *What Is Death Row Syndrome?*, SLATE, Feb. 1, 2005, http://www.slate.com/articles/news_and_politics/explainer/2005/02/what_is_death_row_syndrome.html.

17. David Lester & Christine Tartaro, *Suicide on Death Row*, 47 J. OF FORENSIC SCI. 5 (2002).

18. Mark Weisenmiller, *Texas Death Row Suicide Underscores Stress*, INTER PRESS SERVICE NEWS AGENCY, Nov. 6, 2011, http://ipsnews.net/print.asp?idnews=35385 ("Some of the more common psychiatric problems affecting death row inmates, according to Metzner, are schizophrenia, depression, substance abuse, and 'probably some history with head trauma.'").

19. *The Diagnosis, Symptoms, and Causes of Schizophrenia*, NAT'L ALLIANCE ON MENTAL HEALTH, http://www.nami.org/Template.cfm?Section=Schizophrenia9&Template=/ContentManagement/ContentDisplay.cfm&ContentID=117958 (last visited Mar. 2, 2013).

20. Carter v. Bradshaw, 644 F.3d 329, 334 (6th Cir. 2011).

suicidal thoughts and are at risk of withdrawing from the appeals process and accepting execution.[21]

Most damaging of all, the symptoms of schizophrenia and depression can include forgetfulness and difficulty making decisions, planning for the future, and organizing thoughts, which can disrupt the ability to rationally communicate with counsel, thereby preventing the prisoner from alerting counsel to exculpatory facts known only to the prisoner.[22] Even when rational communication with counsel is possible, schizophrenia and depression often impair memory, rendering the prisoner incapable of recalling important facts that could prove error at trial or even actual innocence. The result is that prisoners struggling with mental illness cannot adequately defend themselves at a juncture when that is exactly what they should be doing.[23]

Acknowledging the effects of mental illness on the criminal justice system, the U.S. Supreme Court has addressed the issue at opposite ends of the process, requiring criminal defendants to be competent at trial and upon execution. However, a right to competency at the appeals stage has been

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21. *See* Lucile Malandain, *For U.S. Death Row Inmates, a Long Wait for Execution*, AFP (Apr. 17, 2010), http://www.google.com/hostednews/afp/article/ALeqM5hOcn1bXU7W_NbP0JN80LCNIVFa7A ("Haney, an expert on prisoners held in isolation, said death row inmates held for years are prone to depression and mental illness and can become extremely distrustful and completely apathetic. Some 'become so dismayed and despondent that they actually give up,' he told AFP. 'I've seen some clients who've been on death row for over 20 years. They simply become wound down by the deprivation, wound down by the degradation and wound down by the isolation. As a result, in some instances they simply give up the way they live and decide that they can't endure this any longer, even if there is a possibility that enduring it a little longer would result in their sentence being overturned.'").

22. *See* Daniel Pendick, *Depression and Memory*, MEMORY LOSS & THE BRAIN, (2001), http://www.memorylossonline.com/summer2001/depression.html ("Memory is but one of a suite of higher or 'executive' brain functions hobbled by depression."); *Schizophrenia Memory Differences*, BBC NEWS, Mar. 12, 2008, http://news.bbc.co.uk/2/hi/health/7289245.stm (noting that schizophrenia "is often linked with enduring memory problems.").

23. As Blackstone stated, "and if, after judgment, he becomes of nonsane memory, execution shall be stayed, for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 William Blackstone, *Commentaries* 24-25 (1769).

recognized only on a piecemeal basis.[24] The U.S. Supreme Court has said that a prisoner must be competent to waive the right to post-conviction counsel or the right to appeal generally.[25] A right to assist counsel on appeal—for someone in Lafferty's position—has not been upheld.[26] A trend toward recognizing a right to assist counsel on appeal had been occurring at the federal level,[27] and many states believed that such a right delays the criminal appeals process. However, the recent Supreme Court decision *Ryan v. Gonzales* held that 18 U.S.C. § 3599, which provides the right to counsel in federal habeas proceedings, does not also provide the right to suspend the proceedings when the prisoner is adjudged incompetent.[28] According to the Court, an indefinite stay for a prisoner unlikely to regain

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24. *See* Ford v. Wainwright, 477 U.S. 399, 409-410 (1986) (holding that the Eighth Amendment prohibits the execution of an incompetent individual); Pate v. Robinson, 383 U.S. 375, 378 (1966) ("[t]he conviction of an accused person while he is legally incompetent violates due process").

25. Rees v. Peyton, 384 U.S. 312, 313-314 (1966) (holding that a defendant's decision to forgo further proceedings requires an evaluation of the defendant's capacity); *see also* Hannah Robertson Miller, *A "Meaningless Ritual": How the Lack of a Post-conviction Competency Standard Deprives the Mentally Ill Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 276 (2008) ("All criminal defendants must be competent to plead guilty, to waive counsel, and to stand trial. In the capital context, defendants must be competent to waive direct appeals, to waive state and federal post-conviction counsel, to withdraw final appeals, and to be executed").

26. California, Arizona, Missouri, Texas, and Michigan have all rejected a right to assist counsel on appeal. *See* People v. Kelly, 822 P.2d 385, 413 (Cal. 1992); State v. White, 815 P.2d 869, 878 (Ariz. 1991); Brock v. State, 242 S.W.3d 430, 432-33 (Mo. Ct. App. 2007); Ex parte Mines, 26 S.W.3d 910, 912-13 (Tex. Crim. App. 2000); People v. Newton, 394 N.W.2d 463 (Mich. Ct. App. 1986).

27. *See* In re Gonzales, 623 F.3d 1242 (9th Cir. 2010), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013); Nash v. Ryan, 581 F.3d 1048 (9th Cir. 2009) (applying the Rohan rule to appeals); Rohan ex rel. v. Woodford, 334 F.3d 803, 806 (9th Cir. 2003) (creating a statutory right to competency in federal post conviction proceedings), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

28. Ryan v. Gonzales, 133 S. Ct. 696, 702-06 (2013).

competence causes undue delays.[29] However, the Court noted that district courts have discretion to issue stays for incompetent prisoners.[30]

Proceeding in four parts, this Comment argues that a right to assist counsel on appeal protects the integrity of the criminal justice system and should not be sacrificed for the sake of speedy appellate review. Part I provides a background on competency rights throughout the system with an emphasis on the lack of a right to assist counsel on appeal. It considers the prevailing notion that prisoners have no role to play on appeal and explains why this view is flawed. Part II examines case law treatment of a right to assist counsel on appeal and analyzes its impact on the efficiency of the criminal appeals process. Part III disputes the argument that a right to assist counsel on appeal contravenes the Antiterrorism and Effective Death Penalty Act of 1966 (AEDPA), a federal law designed to streamline federal habeas review. Part IV offers a proposal for reducing delays if this right were more uniformly recognized.

I. COMPETENCY RIGHTS AT THE TRIAL, APPEAL, AND EXECUTION STAGES

In *Pate v. Robinson*, the U.S. Supreme Court held that a right to competence at trial is essential to due process of law.[31] An accused is incompetent to stand trial if he does not understand the proceedings and is unable to rationally communicate with counsel. This right recognizes the need for the defendant to assist counsel with developing the facts and formulating a case theory, as well as the need to make important decisions, such as whether to testify or whether to waive a jury trial.[32] At the last stage

29. *Id.*

30. *Id.*

31. Pate v. Robinson, 383 U.S. 375 (1960) ("The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975)). The right to competence at trial also is rooted in the Sixth Amendment. *See* Brief in Opposition at 26, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930) ("The Framers did not include a right to trial competency in the Sixth Amendment, but this Court [the U.S. Supreme Court] found such a right vital to protect the right to counsel.") (quoting Rohan ex rel. v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003)).

32. *See* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 265 (2009) ("At trial a defendant will need to make reasoned decisions in light of possible consequences, such as whether to testify, waive a jury, or raise certain defenses.").

of the system, as determined by the Supreme Court's landmark decision in *Ford v. Wainwright,* the Eighth Amendment prohibits the execution of an incompetent individual.[33] Unlike the standard for measuring competency at trial, Justice Powell's concurrence in *Ford*, commonly accepted as articulating the competency standard at execution, does not conceive of the inmate's ability to assist counsel as a requirement.[34] Instead, Justice Powell wrote that the Eighth Amendment bars the execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it."[35]

Between the trial and execution stages, the criminal appeals process involves a number of different venues that take place over a long period of time. Generally, upon a conviction and a death sentence, a direct appeal is initiated in the state's highest court. If the judgment is affirmed, the prisoner has the right to seek state post-conviction review, sometimes called a collateral attack, for the purpose of considering errors at the trial level.[36] Unlike a direct appeal, post-conviction review is not limited to the trial record.[37] Typical claims at this stage include prosecutorial misconduct and ineffective assistance of counsel.[38] The state post-conviction review of the court's decision can be appealed. At that point, the prisoner has exhausted

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33. Ford v. Wainwright, 477 U.S. 399, 401 (1986).

34. The ability to assist counsel was offered by the Justices in *Ford* as a standard for determining competency at the execution stage, but this definition of competency did not gain traction. *See generally* Christopher Seeds, *The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L.J. 309 (2009).

35. *Ford*, 477 U.S. 399 at 422.

36. *See The Criminal Appeals Process*, AZ. ATTORNEY GEN. OFFICE http://www.azag.gov/victims_rights/Brochures/CriminalAppealsProcess.pdf (last visited Mar. 2, 2013).

37. *Id.*

38. *See* Hannah Robertson Miller, *A "Meaningless Ritual": How the Lack of a Post-conviction Competency Standard Deprives the Mentally Ill Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 280 (2008) ("It is habeas counsel that is responsible for reinvestigating the case based on such claims as prosecutorial misconduct, ineffective assistance of counsel, actual innocence, or other facts previously unknown that might warrant a sentence less than death.").

state remedies and can file a writ of habeas corpus in federal court.[39] Federal habeas claims must allege violations of federal constitutional law and are subject to extensive procedural rules under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[40]

Unlike competency rights at trial and execution, competency rights on appeal are limited. In *Rees v. Peyton*, the U.S. Supreme Court dealt with a prisoner who wished to withdraw his petition for certiorari and accept execution.[41] The Court held that those who "volunteer for death" must be competent.[42] Thus, capital defendants must be competent to waive direct appeals, to waive state and federal post-conviction counsel, and to withdraw final appeals.[43] Despite these holdings, a right to assist counsel on appeal does not exist because of the assumption that the strictly legal nature of appeals obviates the need for any communication between prisoner and counsel.[44] Proponents of this view argue that the prisoner has no role to play since it is the attorney's job alone to decide which issues to pursue on appeal.[45] However, while it is true that appellate work product relies less on

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39. *See The Criminal Appeals Process*, AZ. ATTORNEY GEN. OFFICE, http://www.azag.gov/victims_rights/Brochures/CriminalAppealsProcess.pdf (last visited Mar. 2, 2013).

40. *Id.*; *see* Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

41. Rees v. Peyton, 384 U.S. 312, 312 (1966).

42. *Id.*

43. *See* Miller, *supra* note 38, at 276-77. ("All criminal defendants must be competent to plead guilty, to waive counsel, and to stand trial. In the capital context, defendants must also be competent to waive direct appeals, to waive state and federal postconviction counsel, to withdraw final appeals, and to be executed.").

44. *See* People v. Kelly, 822 P.2d 385, 414 (Cal. 1992); Fisher v. State, 736 P.2d 1003, 1015 (Okla. Crim. App. 1987). In rejecting a right to assist counsel on appeal, both cases cited the ABA Criminal Justice Mental Health Standards. *See* ABA Criminal Justice Mental Health Standards, *supra* note 11.

45. *See* Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.")

the defendant than does trial preparation, prisoners may still assist in developing claims that have been identified by counsel from the trial record.

In any event, the underlying presumption itself is flawed because unlike direct appeal, post-conviction review is not limited to the trial record.[46] Most disputes on post-conviction review include claims of ineffective assistance of counsel or prosecutorial or judicial misconduct, all of which require the disclosure of facts beyond the record that are, in most cases, known only to the prisoner.[47] As the Seventh Circuit has stated, "The petitioner was at his trial; his current lawyers were not. He may—if mentally competent—be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide."[48] For example, the incompetent petitioner in *Nash v. Ryan*, a recent Ninth Circuit case, was granted a stay on appeal because his ineffective assistance of counsel claim required his first-hand insight into what happened at trial.[49] Several attorneys assisted Nash in prior appeals and his appellate counsel's attempts to contact those attorneys

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46. *See The Criminal Appeals Process*, AZ. ATTORNEY GEN. OFFICE, http://www.azag.gov/victims_rights/Brochures/CriminalAppealsProcess.pdf (last visited Mar. 2, 2013).

47. *See* Miller, *supra* note 38, at 280 ("It is habeas counsel that is responsible for reinvestigating the case based on such claims as prosecutorial misconduct, ineffective assistance of counsel, actual innocence, or other facts previously unknown that might warrant a sentence less than death.") In regard to ineffective assistance of counsel claims, the U.S. Supreme Court in *Strickland v. Washington*, stated: "A convicted defendant making a claim of ineffective assistance must *identify acts or omissions of counsel* that are alleged not to have been the result of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984) (emphasis added). Additionally, "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary . . . *Inquiry into counsel's conversations with the defendant may be critical* to proper assessment of counsel's investigation decisions, just as it may be critical *to a proper assessment of counsel's other litigation decisions.*" *Id.* at 691 (emphasis added). Thus, the Strickland standards for ineffective assistance of counsel claims actually demand facts outside of the record, specifically implicating the appellant's ability to recall conversations with the trial lawyer and the appellant's ability to precisely identify the trial lawyer's questionable behavior.

48. Holmes v. Buss, 506 F.3d 576, 580 (7th Cir. 2007) (holding that the test for post conviction competency should be identical to the competency-to-stand-trial standard).

49. Nash v. Ryan, 581 F.3d 1048, 1055-56 (9th Cir. 2009) (applying the Rohan rule to appeals), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

were unsuccessful.[50] In the absence of a right to assist counsel on appeal, important facts regarding Nash's claim would have never come to light, rendering his lawyer unable to successfully represent him.[51]

The lack of a right to assist counsel on appeal is also inconsistent with competency rights at trial. The right to competency at trial alone does not sufficiently protect the mentally ill from the criminal justice system. Trial usually lasts a matter of weeks,[52] while the average amount of time spent on federal habeas review is 17 years.[53] It is improper to rely solely on trial procedures to identify competency issues because the trial period presents a mere snapshot of the defendant's mental state.

Mental illness is not static, and even those individuals with severe mental health issues have moments of lucidity.[54] Symptoms of mental illness gone unnoticed at trial may only become apparent once the prisoner is forced to face the stress of coming to terms with a death sentence. As Judge Posner in *U.S. v. Graves* observed, "Determining past as distinct from present competence has been ruled to be infeasible when more than a few years have

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50. *Id.*

51. *See* Brock v. State, 242 S.W.3d 430 (Mo. App. 2007). In Brock, the appellate court upheld the state post-conviction court's denial of the appellant's request for a competency determination, stating "Because Rule 29.15 focuses on the validity of what occurred at the trial proceeding, the '[m]ovant's present mental condition is irrelevant." *Id.* at 433. The appellate court then denied the ineffective assistance of counsel claim by crediting trial counsel's uncontested testimony that he was not ineffective. The prisoner did not testify because he was mentally ill. *Id.*

52. *See* Philip Cook, Donna Slawson, & Lori Gries, Terry Sanford Institute of Public Policy Duke University, *The Costs of Processing Murder Cases in North Carolina* 50 (May 1993), http://www.deathpenaltyinfo.org/northcarolina.pdf (Table 6.2).

53. Emiley Morgan, *Ron Lafferty Case Will Proceed While the Man's Competency is Evaluated*, DESERET NEWS, Feb. 1, 2011, http://www.deseretnews.com/article/705365658/Ron-Lafferty-case-will-proceed-while-the-mans-competency-is-evaluated.html?pg=2.

54. *See* Holmes v. Buss, 506 F.3d 576, 583 (7th Cir. 2007) (describing how a schizophrenic petitioner was "lucid, even articulate," at times, and had deteriorated between hearings).

elapsed since the plea."[55] Accordingly, competency rights at trial do not eliminate the need for competency rights on appeal.

Despite these arguments, the possibility that a right to assist counsel on appeal will delay the criminal appeals process threatens recognition of the right.[56] The next part of this Comment examines how a right to assist counsel on appeal is treated in case law and its implications for the criminal justice system.

II. CASE-LAW PERSPECTIVES

A. Prior Law

State appellate courts faced with incompetency claims follow the ABA Criminal Justice Standards on Mental Health, which instruct counsel to proceed with the appeal or post-conviction proceeding notwithstanding the prisoner's mental illness.[57] A defendant's incompetency is to be noted on the record so that counsel can, in a later proceeding, show cause and present claims not previously asserted because of the incompetency. As Professor Quinn explains, "The Standard and its commentary . . . state conclusorily that 'spread[ing] on the record' questions of capacity will allow the defendant in a later proceeding—such as a federal habeas corpus petition—to raise issues that may not have been raised because of incompetency." *Fisher v. State*[58] and *People v. Kelly*[59] illustrate how this approach invites later proceedings and delays the criminal appeals process.

In *Fisher v. State*, the court dealt with the incompetency of a prisoner convicted of first-degree murder and sentenced to death.[60] On appeal from a denial of post-conviction review, counsel asserted that Fisher's emotional

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55. United States v. Graves, 98 F.3d 258, 262 (7th Cir. 1996) (holding that a defendant who pled guilty to three counts of armed robbery was entitled to a competency hearing before he entered such a plea).

56. *See* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

57. *See* ABA Criminal Justice Mental Health Standards, *supra* note 11; *see also* Brock v. State, 242 S.W.3d 430 (Mo. App. 2007).

58. *See* Fisher v. State, 845 P.2d 1272 (Okla. Crim. App. 1987).

59. *See* People v. Kelly, 822 P.2d 385 (Cal. 1992).

60. *Fisher*, 845 P.2d at 1278-79 (finding that a death-sentenced inmate did not need to be competent during the direct appeals process).

disorder rendered him unable to assist in the claims.[61] The court ignored the competency issue by relying on the ABA Criminal Justice Standards on Mental Health, stating:

> Because convicted defendants, like parties to appellate litigation in general, do not participate in appeal proceedings, mental incompetence rarely affects the fairness or accuracy of appellate decisions...the standard envisions that appellate or post-conviction review procedures will be carried to completion despite an appellant's mental incompetence, provided [that if] it later appears that matters important to review could not be presented because of mental incompetence, they should be considered in post-conviction review proceedings.[62]

A footnote reveals the author of the opinion disagreed with the holding and was concerned that ignoring the competency issue would result in further proceedings.[63] According to the author, a competency determination would have promoted "finality of judgment at the state level. . . thereby minimizing collateral attacks."[64]

People v. Kelly demonstrates the problems associated with ignoring the author's advice from *Fisher*.[65] On direct appeal from a conviction of first-

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61. *Id.* at 1275.

62. *Id.*

63. *See id.* at 1277 n.4. ("A post-conviction proceeding before this Court represents the final appeal an appellant can pursue before he has exhausted his state remedies. I therefore find it an appropriate vehicle through which the issue of appellate competency may be raised. Such procedure would ensure that a post-conviction appellant is given the opportunity, upon a proper showing, to raise any pertinent matter not previously raised because of his incompetence, and will promote finality of judgment at the state level, thereby minimizing collateral attacks...It is my opinion that this case should be remanded for an evidentiary hearing to determine whether any relevant issue has not been raised during the appellate process because of incompetence. However, the text of this opinion represents the view of a majority of this Court.").

64. *Id.* A year after the appellate court's opinion, Fisher filed a petition for federal habeas review. The federal district court found that Fisher received ineffective assistance of counsel at the sentencing phase of his trial and granted relief as to the sentence of death. The court upheld the conviction itself because Fisher failed to demonstrate prejudice as a result of counsel's mishandling of the mental illness claims. Fisher appealed and the Tenth Circuit remanded for a new trial. Fisher v. Gibson, 282 F.3d 1283, 1289-90 (10th Cir. 2002).

65. People v. Kelly, 822 P.2d 385, 412 (Cal. 1992).

degree murder, rape, and robbery, and a death sentence, Kelly claimed the appeal should be stayed until he regained competence.[66] The court denied Kelly's claims and affirmed the lower court's judgment by relying on the ABA Criminal Justice Standards on Mental Health noted in *Fisher*, stating:

> For these reasons, current counsel can and should seek to challenge the judgment even if defendant is currently incompetent. If, in a petition for a writ of habeas corpus, counsel make [sic] a specific showing why specified contentions require defendant's ability to cooperate, and why the necessary information cannot be obtained from other sources, we will consider the question at that time.[67]

A year after his conviction was affirmed at the state level, a federal district court stayed Kelly's execution in order for counsel to be appointed and for a competency determination to be made.[68] But the statute of limitations on filing the federal habeas claim expired before the court made its competency determination. The State argued the stay of execution should be lifted and the Ninth Circuit (*Kelly III*) agreed. A dissenting judge argued that tolling the statute of limitations was appropriate because the competency determination had not been made, noting, "It is true, as the majority emphasizes, that these proceedings have been pending for several years. However, it is evident from the record that most of the delay has been caused by the district court's attempts to grapple with Kelly's mental problems."[69] On en banc review (*Kelly V*), the court agreed with the dissent and stayed the execution.[70]

As *Fisher* warned, the *Kelly* court's reliance on the ABA Criminal Justice Standards on Mental Health resulted in further proceedings regarding the prisoner's mental health.[71] Ignoring the competency issue at the early stages

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66. *Id.* at 412-14.

67. *Id.* at 414.

68. Calderon v. U.S. Dist. Court for Cent. Dist. of Cal. (Kelly III), 127 F.3d 782, 783 (9th Cir. 1997).

69. *Id.* at 788.

70. *Calderon,* 163 F.3d at 543.

71. *See* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 280 (2009) ("The Standard and its commentary instead state conclusorily that "spread[ing] on the record" questions of capacity will allow the defendant in a later

prevented identification and treatment of the mental illness, which resulted in serious delays on federal habeas review.

In a break from the *Fisher* and *Kelly* tradition, the court in *State v. Debra A.E.* ordered competency evaluations and proposed that if the claims required the prisoner's input, the time limit for filing them could be continued.[72] Ordering competency determinations is important for reducing delays because, as the U.S. Supreme Court has noted, it is difficult to retrospectively establish incompetency.[73] The *Debra* court concluded, "The process we prescribe . . . satisfies the interests of alleged incompetent defendants and the public in expediting post-conviction relief and reaching a final determination on the merits."[74] State courts adopting the *Debra* approach to incompetency can prevent later proceedings on the issue and thereby streamline the criminal appeals process.[75]

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proceeding—*such as a federal habeas corpus petition*—to raise issues that may not have been raised because of incompetency." (emphasis added)).

72. *Id.* at 734.

73. *See* In re Gonzales, 623 F.3d 1242, 1247 (9th Cir. 2010). "The Supreme Court has emphasized that such retrospective competency determinations are inherently difficult even 'under the most favorable circumstances.'" *Id. See also* Drope v. Missouri, 420 U.S. 162, 183 (1975) (viewing these retrospective competency determinations with disfavor); Moran v. Godinez, 57 F.3d 690, 696 (9th Cir. 1994) (recognizing that when a court erroneously fails to hold a contemporaneous competency hearing "it often may be impossible to repair the damage retrospectively") (superseded on other grounds by statute as described in McMurtrey v. Ryan, 539 F.3d 1112, 1119 (9th Cir. 2008)).

74. State v. Debra, A.E., 523 N.W.2d 727, 736 (1994).

75. *Id.* at 734-36. The court's rules can be summarized as follows: (1) If in doubt, a post-conviction court should rule on an appellant's competency so that counsel can appoint a temporary guardian to make decisions that are committed by law to the defendant personally, not counsel, such as whether or not to pursue post-conviction relief. A ruling on competency also insures that counsel is able to create a record reflecting the incompetency should the appellant seek to raise issues later that were precluded by the incompetency. (2) Post-conviction review should proceed without the appellant's input if the claims are on the record, the claims do not require the appellant's input, and going forward with the proceedings would not put the appellant at risk. (3) If the claims require the incompetent appellant's input, the time limit for filing a motion for post-conviction review may be continued.

B. The Federal Trend Toward Recognizing A Right To Assist Counsel On Appeal

Recent decisions from the Ninth Circuit recognized a right to assist counsel on appeal, culminating in a reversal at the U.S. Supreme Court. In *Rohan v. ex. rel Woodford,* the landmark case on this point, the defendant, Gates, was convicted of first-degree murder and sentenced to death.[76] After exhausting state remedies, Gates initiated federal habeas review, claiming his trial counsel was ineffective for failing to seek a competency hearing and for presenting inadequate mitigating evidence of his upbringing.[77]

At the time of filing, Gates believed he was a beneficiary of the Howard Hughes[78] trust fund and that state officials were conspiring to assassinate him in order to deny him his inheritance.[79] A psychiatrist wrote, "His unwillingness stems from his paranoid lack of trust and certainty he is being persecuted. His attorneys have attested to his inability to cooperate."[80] The state questioned whether he was malingering, a medical term used to describe the act of exaggerating or fabricating symptoms, but determined he was not.[81] Upon concluding that Gates's input could potentially bolster his claims, the court stayed the proceedings until he could competently proceed by inferring a right to assist counsel from 13 U.S.C. § 3599, which provides a right to counsel in federal habeas proceedings.[82] The court reasoned that a right to counsel is not meaningful if the appellant is unable to assist counsel.[83]

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76. Rohan ex rel. v. Woodford, 334 F.3d 803, 806 (9th Cir. 2003), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

77. *Id.* at 805.

78. Howard Hughes was a famous businessman, filmmaker, and aviator. One of the wealthiest men in the world, his death in 1976 provoked numerous fake versions of his will.

79. Rohan ex rel. v. Woodford, 334 F.3d 803, 805 (9th Cir. 2003), *abrogated by* Ryan v. Gonzales, 133 S.Ct. 696 (2013).

80. *Id.* at 806.

81. *Id.*

82. 18 U.S.C. § 3599 (a)(2) (2006).

83. Rohan ex rel. v. Woodford, 334 F.3d 803, 807-10 (9th Cir. 2003), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013); *see also* Blair v. Cullen, No. CV 99-6859, 2010

In short, the *Rohan* rule mandated a competency determination if there is a threshold showing of incompetency. A stay would be issued if the petitioner was found incompetent and had raised claims that could "potentially benefit from his ability to communicate rationally, whether or not counsel can identify with precision the information sought." *Rohan* marked a dramatic shift in thinking about the various roles counsel and prisoner play on post-conviction review. But in accordance with current attitudes toward appeals,[84] *Rohan* was thought to be limited to fact-based claims such as Gates's ineffective assistance of counsel claim.[85] *Rohan* did not occur in the context of an appeal, but rather concerned district court proceedings.

Nash v. Ryan, another Ninth Circuit case, was the first to apply the *Rohan* rule to an appeal.[86] In 1983, Nash was convicted of first-degree murder, armed robbery, aggravated assault, and theft, and was sentenced to death.[87] Counsel appealed a denial of his petition for federal habeas review and certified for appeal two claims of ineffective assistance of counsel, including a failure to "investigate and present at the penalty phase available mitigation evidence, including evidence concerning Nash's mental illness, character, background, and family history."[88] Shortly after appealing, Nash began to

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WL 5563896 at *20 (C.D. Cal. Mar. 21, 2010) ("Because federal statute secures the right to counsel in capital habeas proceedings, 21 U.S.C. § 848(q)(4)(B), and because 'federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty,' McFarland v. Scott, 512 U.S. 849, 859 (1994), the Ninth Circuit has found that meaningful assistance of counsel is essential in securing the right of competence. The Congressional mandate that habeas petitioners be afforded counsel can only be fully enforced if the federal courts ensure that the condemned has the capacity for rational communication and is competent to provide meaningful assistance to his counsel.").

84. *See* ABA Criminal Justice Mental Health Standards, *supra* note 11.

85. *See* In re Gonzales, 623 F.3d 1242, 1245 (9th Cir. 2010) ("The district court denied Gonzales's motion for a competency determination under *Rohan* because '[Gonzales's] properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel,' and therefore 'cannot benefit from [his] personal input'").

86. Nash v. Ryan, 581 F.3d 1048, 1054 (9th Cir. 2009), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

87. *Id.* at 1050.

88. *Id.* at 1055.

suffer from a delusional disorder that caused him to experience auditory hallucinations, as well as grandiose and paranoid delusions.[89] Nash's symptoms made it impossible for him to rationally communicate with counsel.[90] The Ninth Circuit held the insight Nash could provide regarding the earlier proceedings might be helpful in ways that counsel could not identify because of his alleged incompetence, noting that several attorneys had assisted Nash over the course of post-conviction litigation.[91] Applying the *Rohan* rule to appeals, the court stated, "[w]hile an appeal is record-based, that does not mean that a habeas petitioner in a capital case is relegated to a nonexistent role."[92] Accordingly, a stay under *Nash* requires only that a petitioner identify claims that "could potentially benefit from such communication with counsel," even if the proceeding is entirely based on the record.[93] *Nash* left little room for doubt that prisoners have a right to assist counsel on appeal.

Rohan and *Nash* were endorsed by *In re Gonzales,* the Ninth Circuit's recent emergency mandamus decision to reverse a district court's refusal to issue a *Rohan* stay for defendant Gonzales, a man suffering from a psychotic disorder that interferes with his ability to rationally communicate with counsel.[94] In contrast to *Fisher* and *Kelly*, the appellate court justified its adoption of the *Rohan* rule by reference to *promoting* efficiency on appeal:

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89. *Id.* at 1057.

90. *Id.* at 1057-58.

91. *Id.* at 1056 (quoting Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 818 (9th Cir. 2003)), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013) ("Perhaps there are cases where an incompetent petitioner's counsel knows exactly what he needs to know and can't find out. Surely, however, those are the exception rather than the rule.").

92. *Id.* at 1050.

93. *Id.* at 1055.

94. *See* In re Gonzales, 623 F.3d 1242, 1244-45 (9th Cir. 2010) *rev'd*, Ryan v. Gonzales, 133 S. Ct. 696 (2013). Gonzales was convicted of murder and sentenced to death. Upon filing a federal habeas claim alleging that his Sixth Amendment rights were violated when the trial judge was openly hostile to him and refused to recuse himself, the district court granted the government's motion to transfer Gonzales to a hospital for a mental health assessment. A psychologist's report concluded that Gonzales suffered from a "genuine psychotic disorder" and was "currently . . . unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding." However, the district court refused to stay the proceedings on the theory that Gonzales input was unnecessary because his claims were entirely based on the

> [T]he district court's erroneous refusal to stay proceedings in this capital case raises the prospect of months, if not years, of habeas proceedings that will almost certainly be vacated or reversal ... [A reversal] will help to 'assist the [district courts] in their efforts to ensure that the judicial system operates in an orderly and efficient manner.' It will do so by preventing district courts from wasting considerable resources on capital habeas proceedings in which a petitioner is incapable, as a result of incompetency, of availing himself of the assistance of counsel. Granting the writ in this case thus directly serves the fundamental purpose of supervisory mandamus— promoting the efficiency of the judicial system.[95]

In response, the state of Arizona petitioned the U.S. Supreme Court for review of *In re Gonzales*, urging that the *Rohan* rule did not promote efficiency on appeal, but instead, created delays in contravention of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[96] An amicus brief on behalf of fifteen states was filed in support of the petitioner, expressing similar concerns that a right to assist counsel on appeal causes delays.[97] On January 8, 2013, the U.S. Supreme Court decided the case *Ryan v. Gonzales*, holding that 18 U.S.C. § 3599, which provides a right to counsel in federal habeas proceedings, does not also provide a right to suspend the proceedings when the prisoner is adjudged incompetent.[98] The *Gonzales* decision overruled *Rohan* and *Nash*, as far as those cases relied on 18 U.S.C. § 3599 to create a right to assist counsel on appeal. The Court noted AEDPA does not deprive district courts of their equitable power to issue stays for incompetent prisoners,[99] but noted that an indefinite stay for a

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record. Gonzales filed an emergency petition for a writ of mandamus. The Ninth Circuit stayed the matter until it decided *Nash*, and then used its holding in *Nash* to find that Gonzales had a right to assist counsel on appeal, noting that, like Nash's ineffective assistance of counsel claim, Gonzales's judicial bias claim could potentially benefit from the "firsthand insight into the earlier proceedings" that a competent petitioner would be able to provide. *Id.*

95. *Id.* at 1247-48 (internal quotations and citation omitted).

96. Petition for Writ of Certiorari, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930).

97. *Amici* are Utah, Delaware, Florida, Georgia, Idaho, Indiana, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Washington. Amicus Brief of Utah et al., *Ryan*, 623 F.3d 1242 (No. 10-930).

98. Ryan v. Gonzales, 133 S. Ct. 696, 702-06 (2013).

prisoner unlikely to regain competence frustrates AEDPA's purpose.[100] Courts are now poised to accommodate incompetent prisoners without concern for delays.

III. THE RIGHT TO ASSIST COUNSEL ON APPEAL DOES NOT CAUSE DELAYS

A. Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)

District courts exercising discretion in this area should not be concerned about delays because the provisions of the Antiterrorism and Effective Death Penalty Act of 1966 ("AEDPA") actually support the early adjudication of competency claims. In 1996, Congress responded to concerns that the capital punishment system is delayed and amended the federal habeas corpus statute by passage of the AEDPA.[101] AEDPA limits the availability of federal habeas relief for all habeas petitioners.[102] Federal courts were able to review state court judgments de novo before the passage of AEDPA.[103] Now, district courts may interfere with state court decisions only if the decision is both erroneous and unreasonable,[104] but AEDPA does not foreclose a stay for incompetent prisoners. AEDPA's statute of limitations provision requires federal habeas claims to be made within a year of the conviction when finalized on direct appeal (the statute of limitations is tolled during state post-conviction review).[105] The U.S. Supreme Court has held that the statute of limitations may be equitably tolled under extraordinary

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99. *Id.*

100. *Id.*

101. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

102. Jonathan Kirshbaum, *Keeping Track of the Great Writ for New York State Prisoners, Habeas Corpus FAQ*, HABEAS CORPUS BLOG, http://habeascorpusblog.typepad.com/habeas_corpus_blog/habeas-corpus-faq.html (last visited Mar. 2, 2013).

103. Miller, *supra* note 38, at 285.

104. *Id.*

105. Jonathan Kirshbaum, *Keeping Track of the Great Writ for New York State Prisoners, Habeas Corpus FAQ*, HABEAS CORPUS BLOG, http://habeascorpusblog.typepad.com/habeas_corpus_blog/habeas-corpus-faq.html (last visited Mar. 2, 2013).

circumstances,[106] and the Ninth Circuit has confirmed that mental incapacity is an extraordinary circumstance justifying equitable tolling.[107] Therefore, competency claims on federal habeas review do not cause impermissible delays. They only toll the statute of limitations. Furthermore, federal habeas petitioners only have one opportunity to assert their claims because AEDPA bars successive petitions. A recent California district court noted the rule against successive petitions precludes prisoners from bringing new claims not previously asserted because of incompetency and therefore "actually support[s] the need to grant a stay of proceedings when a capital habeas petitioner is incompetent."[108] In sum, district courts exercising their discretion in this area can accommodate incompetent prisoners within the confines of AEDPA and without concern for delays.

B. Amicus Brief in In re Gonzales (2010)

State courts should also recognize a right to assist counsel on appeal without concern for delays. In their brief in support of the petitioner, *Amici* asserted that a right to assist counsel on appeal causes delays that frustrate *Amici's* interest in the finality of their judgments.[109] *Amici* cited several cases as examples of the allegedly significant delays caused by competency determinations and *Rohan* stays. However, *Amici* failed to appreciate that stays, on the whole, are rare.[110] Only a few stays have been granted in the

106. Holland v. Florida, 130 S. Ct. 2549, 2562 (2010).

107. *See Rohan*, 334 F.3d at 814-15 (citations omitted), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696, 706 (2013).

108. *See* Hill v. Ayers, No. 4-94-CV-641 2008 WL 683422, *1 (N.D. Cal. March 10, 2008) ("Respondent contends that these proceedings should not be stayed even if Petitioner is incompetent because of the limitations on habeas relief established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996). However, there is no support for the argument that AEDPA's limitations on the Court's power to grant relief somehow diminish a capital habeas petitioner's right to counsel while pursuing habeas relief. Indeed, *Rohan* makes clear that AEDPA's restrictions on successive petitions actually support the need to grant a stay of proceedings when a capital habeas petitioner is incompetent.") *Rohan*, 334 F.3d at 816-17.

109. *See* Brief in Opposition at 5, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930).

110. *See id.*

eight years since *Rohan*.[111] Of these, none were suspended indefinitely.[112] Underlying *Amici's* concerns is their failure to acknowledge that other factors more prominently contribute to delays in the criminal justice system.[113] According to Justice Stevens, "it may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State."[114] It is less clear to what extent a right to assist counsel on appeal contributes to delays. For instance, *Debra* and *In re Gonzales* explicitly suggest that endorsing a right to assist counsel on appeal may actually prevent later proceedings and further delays.[115]

AEDPA also provides state courts with an incentive to conduct competency determinations. AEDPA's procedural default provision provides that any claims not asserted at every level of state review are barred from federal habeas review.[116] The requirement can be overcome if the inmate can show "cause for the default and actual prejudice as a result of the alleged violation of federal law" or that failure to consider the claims will result in a "fundamental miscarriage of justice."[117] Thus, if counsel presents a claim on federal habeas review that was not asserted at the state level—a likely occurrence if the state followed the ABA Criminal Justice on Mental Health Standards and ignored the competency issue (which constitutes cause for default)—the federal court is likely to send the prisoner back to the state court so the claims can be exhausted.[118] Therefore, AEDPA provides state courts with an incentive for conducting competency determinations.

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111. *Id.*

112. *Id.* at 27.

113. *Id.* at 26.

114. *See* Lackey v. Texas, 514 U.S. 1045, 1047 (1997) (Stevens, J., respecting denial of certiorari); *see also* Miller, *supra* note 38, at 274.

115. State v. Debra A.E., 523 N.W.2d 727, 736 (1994).

116. 28 U.S.C. § 2254 (b)(1) (2008).

117. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

118. *See* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 280 (2009) ("The Standard and its commentary instead state conclusorily that "spread[ing] on the record" questions of capacity will allow the defendant in a later proceeding—*such as a federal habeas corpus petition*—to raise issues that may not have

Ironically, *Amici's* unwillingness to embrace the right to assist counsel on appeal at the state level actually results in more litigation at the federal level, as illustrated by *Fisher* and *Kelly*.[119] *Amici* therefore contributes to the very delays they seek to prevent by ignoring competency issues at the state level. While it is possible that some prisoners experience mental illness for the first time at the federal habeas stage, it is likely that incompetent federal habeas petitioners were incompetent during state proceedings. In fact, of the thirteen federal habeas cases cited by *Amici* in support of their delay argument, nine concerned prisoners with a prior history of mental health issues.[120] In four of the cases, state post-conviction courts had refused to grant competency determinations on the grounds that no right to assist counsel on appeal exists.[121]

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been raised because of incompetency.") (emphasis added); *see also* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 11; Miller, *supra* note 38, at 285.

119. People v. Kelly, 822 P.2d 385 (Cal. 1992); Fisher v. State, 736 P.2d 1003, 1011-12 (Okla. Crim. App. 1987).

120. Amicus Brief of Utah et al. at 4-5 n.2, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930); *see* Ferguson v. State, 789 So. 2d 306, 309 (Fla. 2001) (describing the state post-conviction court's denial of a right to assist counsel on appeal); Clayton v. Roper, 515 F.3d 784, 789 (8th Cir. 2008) (noting that the defendant was prescribed anti-psychotics while awaiting trial); Holmes v. Buss, 506 F.3d 576, 578-79 (7th Cir. 2007) (discussing appellant's mental condition at earlier hearing); Ex parte Mines, 26 S.W.3d 910, 915 (Tex. Crim. App. 2000) (denying a right to assist counsel on appeal); Nash v. Schriro, No. CV-97-1104 2006 WL 1889589 at *8 (D. Ariz. July 7, 2006) (noting that Nash had been committed to a mental hospital earlier in life); People v. Blair, 115 P.3d 1145, 1190-91 (Cal. 1995) (citing People v. Kelly to deny competency determination on appeal); Lewis v. Ayers, No. CIV S-02-0013 2010 WL 4630246 at *16 (E.D. Cal. Nov. 8, 2010) (describing physician's opinion that appellant was insane at the time of the offense); Rogers v. McDaniel, No. 3:02-cv-0342, 2008 WL 820088 at *7 (D. Nev. March 24, 2008) (denying the existence of a right to assist counsel at the state post-conviction stage); Emiley Morgan, *Ron Lafferty Case Will Proceed While the Man's Competency is Evaluated*, DESERET NEWS, Feb. 1, 2011, http://www.deseretnews.com/article/705365658/Ron-Lafferty-case-will-proceed-while-the-mans-competency-is-evaluated.html?pg=2 (noting that competency was at issue during state proceedings in Lafferty v. Turley).

121. Amicus Brief of Utah et al. at 4-5 n.2, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930); *see* Ferguson v. State, 789 So. 2d 306, 309 (Fla. 2001) ("Of particular relevance to the instant proceedings, this Court disposed of Ferguson's request for a stay of his post-conviction proceedings pending a determination of his competency"); Ex parte Mines, 26 S.W.3d 910, 915 (Tex. Crim. App. 2000) ("In light of

The assertion that a right to assist counsel on appeal causes delays is without merit. District courts exercising their discretion in this area can accommodate incompetent prisoners within the confines of AEDPA and without regard to delays. State courts should also recognize a right to assist counsel on appeal without concern or delays. The *Amici states* overstated the prevalence of *Rohan* claims and failed to realize the role the state courts play in contributing to competence-related delays. For these reasons, it is hard to comprehend the logic behind sacrificing a right to assist counsel on appeal for the sake of speedy federal habeas review.

IV. PREVENTING SPURIOUS CLAIMS AND PROMOTING FAIRNESS

The recognition of a right to assist counsel on appeal must be done as prudently as possible. This section recommends proposals that expedite the process and prevent frivolous claims of incompetency for courts embracing a right to assist counsel on appeal.

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the absence of legislative action, the statutory context, and the differences in the nature of the rights and procedures at trial and in post-conviction proceedings, we find no justification in inferring a statutory requirement that the applicant be mentally competent for habeas corpus proceedings in the way that a defendant must be mentally competent for trial."); People v. Blair, 115 P.3d 1145, 1190-91 (Cal. 2005) ("Defendant contends that during his incarceration on death row, his mental health has deteriorated to the point that he is unable to assist appellate or habeas corpus counsel and will be unfit to stand trial should a retrial be ordered. With respect to the appeal, however, which is the only proceeding that concerns us at this juncture, defendant has failed to connect his alleged mental deficiency to any inability of his appellate counsel to present his claims on appeal. Cf. People *v.* Kelly 822 P.2d 385 (Cal. 1992) [because the issues on appeal are limited to the appellate record, the appeal may proceed despite defendant's incompetence].) Accordingly, defendant has failed to demonstrate that any delay prejudiced his ability to obtain meaningful appellate review.") (citations omitted); Rogers v. McDaniel, 801 F. Supp. 2d 1049, 1061 (D. Nev. 2011) ("Rogers also argues that he was incompetent to proceed with his state post-conviction actions. Rogers, however, does not cite any precedent holding that it is a violation of the federal constitutional right to due process of law for a defendant's state post-conviction challenge to proceed while he is incompetent. Therefore, a fundamental shortcoming of this part of Ground 3 is that Rogers has not demonstrated that a federal right is at stake.").

A. Preventing Dilatory Tactics

In accord with *Debra* and the *Rohan* line of cases, a threshold showing of incompetence on appeal should warrant a competency determination.[122] Indeed, at the trial level, judges have a constitutional duty to initiate a competency determination if the defendant shows signs of incompetency.[123] Courts can then stay the proceedings for incompetent prisoners with procedures that prevent dilatory tactics.

The first task an incompetent prisoner may struggle with is deciding whether or not to pursue an appeal. Under *Rees,* a prisoner must be competent to waive his right to appeal.[124] This decision can be crucial because there are instances where pursuing an appeal may be risky to the prisoner, such as when a prisoner challenges a plea bargain and risks a higher sentence.[125] Courts accommodate allegedly incompetent prisoners with this task by equitably tolling the statute of limitations for filing a federal habeas claim while a competency determination is made. For example, in *Calderon v. U.S. District Court (Kelly V)*, the Ninth Circuit tolled the statute of limitations because a threshold showing on the record had the court concerned about the petitioner's ability to competently make the decision of whether to pursue an appeal.[126] Even the appointment of a

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122. *See* State v. Debra A.E., 523 N.W.2d 727, 734 at n.17 (1994) ("This 'reason to doubt standard' is the same as provided for proceedings to determine competency to proceed with trial.").

123. *See* Drope v. Missouri, 420 U.S. 162, 181 (1975) (stating that courts must be ever-vigilant for signs that a defendant is not competent to stand trial).

124. Rees v. Peyton, 384 U.S. 312, 314 (1966).

125. *See* Quinn, *supra* note 32, at 291 ("Such risk situations are often presented in plea cases—where a client pled guilty to a reduced charge for a reduced sentence. The guilty plea or sentence might be challenged by appeal, but this will deprive the defendant of the plea deal and expose him to the possibility of a higher sentence.").

126. Calderon v. U.S. Dist. Court for Cent. Dist. of Cal., 163 F.3d 530, 541 (9th Cir. 1998) (en banc) ("Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations, and we reject *Kelly III's* holding to the contrary. When a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination."), *abrogated by* Woodford v. Garceau, 538 U.S. 202 (2003).

"next friend," essentially a temporary guardian with the authority to make this decision on behalf of the prisoner, did not start Kelly's AEDPA clock running "until a reasonable period" after the district court made a competency determination.[127] The *Debra* court's procedures also provide for a next friend to make this decision, but only after a competency determination has been made.[128] As *Amici* pointed out, competency determinations can take a long time.[129] In the interest of expediting the process, if competency is at issue such that the prisoner is unable to decide whether or not to pursue an appeal, the court should start the clock and mandate the appointment of a next friend to make the decision for the prisoner instead of tolling the statute of limitations while the court makes an official competency determination. A next friend should be appointed to make the decision before the competency determination, not after.

Once the decision to pursue an appeal has been made, the next task an incompetent prisoner may struggle with is assisting counsel with the claims. Under *Rohan*, a stay of the proceedings was issued if the incompetent prisoner's input is necessary to a proper adjudication of *any* claim. Instead of issuing a blanket stay of the proceedings, courts should stay the proceedings for claims that require the prisoner's input and proceed with the adjudication of any claims that do not require the prisoner's input. Courts also should employ a heightened standard for deciding which claims require the prisoner's input. The *Rohan* court required only a showing of the general areas where the prisoner could potentially assist counsel, explaining that "[r]equiring counsel to identify with particularity what petitioner would tell them were he competent . . . sets an unrealistically high bar under the circumstances."[130] Such a lenient standard does a poor job of preventing frivolous claims. More than a mere threshold showing should be required to support a finding that a prisoner's input is necessary to the claims. Counsel should be required to argue that a prisoner's assistance is critical to the claims. For example, a Florida court employed a higher standard by requiring a showing of "specific factual matters at issue that require the

127. *Id.*

128. State v. Debra A.E., 523 N.W.2d 727, 736 (Wis. 1994).

129. Amicus Brief of Utah et al. at 5-6, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930).

130. Rohan ex rel. v. Woodford, 334 F.3d 803, 817, *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

defendant to competently consult with counsel."[131] Additionally, the *Nash* court's grant of a stay was based heavily on the showing of a specific factual matter, namely, that Nash had been assisted by several attorneys over a long period of post-conviction litigation.[132] This special circumstance required Nash's insight into his conversations with each attorney.[133] A higher standard ensures the prisoner's input is absolutely necessary to a proper adjudication of the claims and thereby prevents the assertion of frivolous claims.

B. Fairness on Appeal

It is important to note that implementation of the above proposals is not essential to the existence of the right to assist counsel on appeal. Arguments about delays threaten to overshadow what should be obvious: the right to assist counsel preserves the integrity of the criminal justice system and outweighs any concern for judicial efficiency. The right to assist counsel also facilitates the identification and treatment of mental illness. While states have a legitimate interest in the finality of their judgments, the gravity of criminal punishment, especially in capital cases, demands procedures that uphold the primary purpose of appellate review, which is to ensure the accuracy and reliability of the system. In 2005, the Task Force of the ABA Section of Individual Rights and Responsibilities (ABA-IRR Task Force) clarified its position on executing the mentally ill, and in the course of doing so, specifically called on courts to suspend the post-conviction proceedings of prisoners unable to assist counsel.[134] It made no mention of delays. These efforts should not be curtailed in an attempt to speed up an appeals

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131. Carter v. State, 706 So. 2d 873, 875 (Fla. 1998).

132. Nash v. Ryan, 581 F.3d 1048, 1055-56 (9th Cir. 2009), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

133. *Id.*; *see also* Brief in Opposition at 9, Ryan v. Gonzales 623 F.3d 1242 (9th Cir. 2010) (No. 10-930) ("Respondent, like Nash, had been represented by many attorneys over time, including 11 at trial and sentencing, he represented himself for a portion of that time, and he was needed to explain events so counsel would understand their 'significance and context.'").

134. *See* Individual Rights And Responsibilities Criminal Justice Section Commission On Mental And Physical Disability Law, ABA Death Penalty Moratorium Implementation Project ABA Death Penalty Representation Project Beverly Hills Bar Association, AM. BAR ASS'N, http://www.deathpenaltyinfo.org/documents/122AReport.pdf (last visited Mar. 2, 2013).

process that is delayed for other reasons. To deprive a prisoner of this final opportunity to assist in his or her defense on the grounds of judicial efficiency is to ignore basic notions of fairness.

V. CONCLUSION

Once the decision to pursue an appeal has been made, a prisoner's competency rights are nonexistent until the government decides to proceed with an execution. In most cases, several years go by without any input from the prisoner whatsoever.[135] The prisoner has no right to competently assert exculpatory facts that may reduce a sentence or even prove innocence during this period despite the fact that collateral attacks on post-conviction review require fact-based claims. The inability to defend oneself after conviction is entrenched in the ABA Mental Health Criminal Justice Standards, which instructs courts to proceed with the appeal while the prisoner is incompetent on the rationale that most claims on appeal are based on the record.[136]

Fortunately, courts today are recognizing that a right to assist counsel on appeal protects the integrity of the criminal justice system.[137] *Nash v. Ryan* was the latest and clearest rebuttal of the old assumption that prisoners have no role to play on appeal.[138] A stay under *Nash* required only that a petitioner identify claims that could potentially benefit from communication with counsel, even if the proceeding is entirely based on the record.[139]

The last barrier to a broader recognition of this trend is the notion that a right to assist counsel on appeal causes delays. This argument was expressed in *Ryan v. Gonzales*, but the assertions found in both the petitioner's brief and *Amici's* brief were fundamentally flawed.[140] The

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135. Morgan, *supra* note 1.

136. *See* ABA Criminal Justice Mental Health Standards, *supra* note 11.

137. Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

138. Nash v. Ryan, 581 F.3d 1048 (9th Cir. 2009), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).

139. *Id.* at 1055.

140. Petition for Writ of Certiorari, Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930); Amicus Brief of Utah et al., Ryan v. Gonzales, 623 F.3d 1242 (9th Cir. 2010) (No. 10-930).

petitioner's insistence that a right to assist counsel contravenes AEDPA is not based on any particular provision of the statute, but rather its general purpose to streamline federal habeas review. *Amici* cite cases to support their delay argument; however, the conclusions drawn from these arguments exaggerate the potential for systematic delays in the system. *Amici* also fail to realize their own policy of ignoring competency issues at the state level results in the very delays they seek to eliminate. The *Debra* and *Rohan* courts ordered competency determinations and stayed the proceedings for incompetent prisoners on the premise that a right to assist counsel on appeal actually reduces delays.[141] It is difficult to imagine why *Amici* argue against a right that brings integrity to the appeals process and solves their delay problem. In deciding the case, the U.S. Supreme Court noted that AEDPA does not deprive district courts of their equitable power to issue stays for incompetent prisoners, so long as they do not issue indefinite stays. There has never been a better time for federal and state courts to accommodate incompetent prisoners within the confines of AEDPA and without regard for delays.

Courts are poised to acknowledge a right to assist counsel on appeal while minimizing the impact of potentially spurious claims by mandating the appointment of a next friend to initiate the appeal and proceeding with the adjudication of any claims that do not require the prisoner's input. While these procedures can reduce the potential for delays, the right to assist counsel on appeal is necessary to combat the mental health crisis on appeal regardless of delays. To ignore competency rights for the purpose of reducing delays is both misguided and unjust.

141. State v. Debra A.E., 523 N.W.2d 727, 735 (Wis. 1994) (arguing that "[a]ssessing competency during postconviction relief proceedings . . . eliminat[es] the difficulty of attempting to measure that capacity months or years after the period in question."); Rohan ex rel. v. Woodford, 334 F.3d 803, 806 (9th Cir. 2003), *abrogated by* Ryan v. Gonzales, 133 S. Ct. 696 (2013).