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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Michael Ray White,

) No. CV 08-8139-PCT-GMS

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Petitioner,

) DEATH PENALTY CASE

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v.

) **ORDER DENYING MOTION TO  
LIFT STAY AND VACATE ORDER  
FOR COMPETENCY RESTORATION**

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Charles L. Ryan, et al.,

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Respondents.

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Before the Court is Respondents’ Motion to Lift Stay and Vacate Order for Competency Restoration in Light of *Cullen v. Pinholster*. (Doc. 215.) Petitioner filed an opposition, and Respondents filed a reply. (Docs. 224, 225.)

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**BACKGROUND**

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Shortly after initiation of this habeas proceeding, Petitioner, through his counsel, filed a habeas petition raising 53 claims for relief. At the time it was filed, counsel were operating under an imminent statute of limitations deadline. *See* 28 U.S.C. § 2244(d). Consequently, the Court granted leave for Petitioner to file an amended petition, subject to any defenses Respondents might raise in their answer to the amended petition.

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Just prior to the amended petition filing deadline, Petitioner’s counsel sought a stay to determine Petitioner’s competency to communicate and assist counsel. In the motion, counsel identified the following claims as ones that would benefit from Petitioner’s assistance:

- 1 Claim 1 – Ineffective Assistance of Resentencing Counsel
- 2 Claim 15 – Ineffective Assistance of Trial Counsel
- 3 Claim 16 – Ineffective Assistance of Appellate Counsel
- 4 Claim 41 – Trial Counsel Conflict of Interest
- 5 Claim 42 – Shackling during Trial
- 6 Claim 43 – Judicial Bias

7 The motion further asserted that one of Petitioner’s previous attorneys lost trial  
8 counsel’s file, trial counsel has little or no memory of the proceedings or his decision-making  
9 process, and “many pretrial and trial proceedings in this case were not recorded.” (Doc. 66  
10 at 10.)

11 After examination by experts, the Court accepted the parties’ stipulation that  
12 Petitioner is not presently competent, pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d  
13 803 (9th Cir. 2003), and directed that the case be stayed pending Petitioner’s restoration.  
14 Subsequently, the Supreme Court issued an opinion in *Cullen v. Pinholster*, 131 S. Ct. 1388  
15 (2011), and Respondents filed the instant motion, arguing that the *Pinholster* decision  
16 abrogates the necessity for a *Rohan* stay in this case.

17 **DISCUSSION**

18 For claims adjudicated on the merits by a state court, habeas relief may be granted  
19 only if the state court’s adjudication was contrary to or involved an unreasonable application  
20 of clearly established federal law, 28 U.S.C. § 2254(d)(1), or was based on an objectively  
21 unreasonable determination of facts in light of the evidence presented in state court, 28  
22 U.S.C. § 2254(d)(2). In *Pinholster* the Court held that habeas review under § 2254(d)(1) is  
23 limited to the record that was before the state court that adjudicated the claim on the merits.  
24 Consequently, new evidence introduced for the first time in federal court may not be  
25 considered in determining whether a state court’s adjudication of a claim was objectively  
26 unreasonable.

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1 Respondents argue that *Rohan* and its progeny rest on the presumed need for rational  
2 communication between an attorney and a prisoner to develop new evidence in support of  
3 habeas claims. In their view “the concerns underlying *Rohan* are no longer valid” given  
4 *Pinholster*’s prohibition on the consideration of new evidence in federal court, and counsel  
5 must rely on the state court record to present a prisoner’s claims. (Doc. 215 at 6.)

6 Respondents also argue that this Court must conduct a claim-specific inquiry to justify  
7 a continued *Rohan* stay. To this end, Respondents assert that Petitioner received evidentiary  
8 hearings in state court on many of the allegations underlying his claims of trial, appellate, and  
9 resentencing counsel ineffectiveness, and that these claims were adjudicated on the merits  
10 by the state court. Therefore, according to Respondents, this Court may consider only the  
11 evidence presented in state court to resolve the claims, and any additional information  
12 Petitioner may possess is irrelevant.

13 Finally, Respondents assert that the remaining claims identified by Petitioner’s  
14 counsel in their initial motion for competency determination, including Claims 41, 42, and  
15 44, were never presented in state court and Petitioner has no available remedy to exhaust  
16 them in state court now. Thus, the claims are procedurally defaulted, and any information  
17 possessed by Petitioner with respect to these claims is irrelevant. Respondents further  
18 contend that counsel can develop Claims 41, 42, and 44 through sources other than  
19 Petitioner.

20 Petitioner’s counsel argue that Respondents’ motion is premature, misstates the  
21 holdings of *Rohan* and its progeny, and exaggerates the extent of *Pinholster*. Counsel  
22 contend that Petitioner is not limited to the claims presented in the initial petition because the  
23 Court authorized the filing of an amended petition and that filing has yet to take place due  
24 to the *Rohan* litigation. In counsel’s view, moving forward solely on the claims presented  
25 in the initial petition would prevent Petitioner from presenting support for those claims and  
26 inhibit his raising other claims not yet developed due to Petitioner’s incompetence. Counsel  
27 also argue that Respondents’ assertions of procedural default are premature because  
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1 Respondents have not filed an answer, which will occur only after the filing of the amended  
2 petition. Moreover, according to Petitioner’s counsel, even if the Court were to conduct a  
3 procedural default analysis, Petitioner’s competency is necessary to assist counsel with  
4 cause/prejudice and miscarriage of justice arguments relevant to overcoming any default.

5 Petitioner’s counsel also argue that the Ninth Circuit in *Rohan*, and subsequently in  
6 *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), and *In re Gonzales*, 623 F.3d 1242 (9th Cir.  
7 2010), discusses the need for rational communication between counsel and a capital  
8 petitioner in contexts other than the development of new evidence. In *Nash*, for example, the  
9 court recognized the necessity for rational communication during a record-based appeal from  
10 denial of federal habeas relief, observing that counsel may need to communicate with a client  
11 to obtain “factual context” not evident from review of state and district court records.  
12 Counsel argues that in this case, given the lost trial file and trial counsel’s professed lack of  
13 memory, rational communication with Petitioner is necessary to make fully informed  
14 decisions about how to effectively prosecute his claims.

15 Finally, counsel argue that Respondents’ reading of *Pinholster* is overly broad because  
16 it “ignores the other uses for which newly developed evidence might be properly used” such  
17 as developing support to overcome affirmative defenses (e.g., procedural default) and  
18 developing new claims for which avenues of state court review are not precluded.

19 Relevant Caselaw

20 *Rohan* dictates that an incompetent capital petitioner’s habeas proceeding must be  
21 stayed if he has raised claims “that could potentially benefit from his ability to communicate  
22 rationally” with counsel. *Rohan*, 334 F.3d at 819. In *Rohan* the Ninth Circuit found that at  
23 least some of the petitioner’s claims could potentially benefit from his assistance. In  
24 particular, the court noted that ineffective assistance of counsel claims depend in large  
25 measure on facts outside the record and therefore a petitioner’s private knowledge could be  
26 relevant. *Id.* at 818. The court further observed:



1 In *Gonzales* the Ninth Circuit declined to find that competency is categorically  
2 irrelevant when the only remaining claims are record-based or purely legal questions.  
3 Rather, the court undertook a “claim specific” inquiry and concluded that communication  
4 between Gonzales and his counsel was necessary to meaningfully prosecute claims alleging  
5 counsel ineffectiveness and judicial bias. *Gonzales*, 623 F.3d at 1245. Specifically, the court  
6 found that, like the petitioner in *Nash*, Gonzales had been assisted by numerous attorneys  
7 over the course of his trial and sentencing and that his judicial bias claim “centers on events  
8 regarding which ‘counsel may . . . need to communicate with [Gonzales] to understand fully  
9 the significance and context’ of key facts so that counsel can pursue the most persuasive  
10 arguments.” *Id.*, quoting *Nash*, 581 F.3d at 1048 (alteration in original).

11 The Ninth Circuit’s most recent application of *Rohan* occurred in *Blair v. Martel*, 645  
12 F.3d 1151 (9th Cir. 2011), in which the court held: “When the law forecloses a petitioner’s  
13 habeas claim no matter what arguments he might make, we see no benefit that could come  
14 from the petitioner’s communications with his lawyer, rational or otherwise.” *Id.* at 1156.  
15 Consequently, “whether a habeas petitioner has the competence to assist his lawyer or not,  
16 a habeas petition raising only claims for relief that fail as a matter of law must be denied.”  
17 *Id.* In *Blair* the only claim before the court was whether the petitioner had a due process  
18 right to a speedy appeal; the court found that no Supreme Court case clearly established such  
19 a right and therefore the claim failed.

#### 20 Analysis

21 Pursuant to *Rohan*, this Court must determine whether the claims raised in Petitioner’s  
22 petition are ones that could potentially benefit from his ability to rationally communicate  
23 with counsel. It is evident from the pertinent caselaw that the Circuit intends district courts  
24 to broadly construe the “potentially benefit” standard when conducting the necessary claim-  
25 specific inquiry. In addition, in *Rohan*, *Nash*, and *Gonzales*, the court found that claims  
26 alleging ineffective assistance of counsel at trial and sentencing were ones that could  
27 potentially benefit from rational communication with the petitioner.

1 Here, Petitioner has raised numerous ineffectiveness claims, including an alleged  
2 conflict of interest, as well as claims of judicial bias and improper shackling. Given the  
3 similarity between his claims and those at issue in *Rohan, Nash, and Gonzales*, it appears that  
4 Petitioner has raised at least one claim that could potentially benefit from his competency.  
5 *Cf. Mulder v. Baker*, No. 3:09-CV-610-PMP-WGC, 2011 WL 4479771, at \*20 (D. Nev.  
6 Sept. 26, 2011) (unpublished) (finding penalty-phase ineffectiveness claim—alleging failure  
7 to investigate and present available mitigation evidence—would benefit from petitioner’s  
8 competency).

9 Respondents make a plausible argument that under *Pinholster* this Court may be  
10 precluded from considering any new evidence in support of the merits of Petitioner’s claims  
11 and thus Petitioner’s competency would be irrelevant to resolution of his claims. However,  
12 this case has yet to be fully briefed—the Court granted leave for Petitioner to file an amended  
13 petition, which has not occurred due to Petitioner’s present incompetency. Until Petitioner  
14 is restored to competency, his counsel are unable to obtain his assistance in preparing the  
15 amended petition, which will presumably include more factual detail than the initial petition  
16 and may include claims not previously raised. And until the amended petition is filed and  
17 responsive briefing received, the Court is in no position to determine whether the state court  
18 ruled on the merits of Petitioner’s claims and whether such ruling was objectively reasonable  
19 under 28 U.S.C. § 2254(d). In addition, Respondents have indicated they intend to raise  
20 procedural defenses to some of Petitioner’s claims. If so, claims for which Respondents  
21 assert procedural bars may potentially benefit from Petitioner’s ability to assist counsel in  
22 responding to such defenses. *See Nash*, 581 F.3d at 1053-54 (“[C]ounsel’s decision to  
23 emphasize certain arguments, and to focus on different facts and theories, may likewise  
24 depend on the information relayed by the petitioner—information that the record may supply  
25 in part, but not in whole.”).

26 Although this Court’s review of Petitioner’s claims ultimately may be limited to the  
27 record available to the state court, at this stage of the proceedings it is premature for the  
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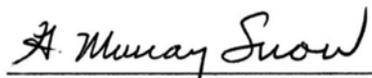
1 Court to assess the impact of *Pinholster* on Petitioner's claims. Moreover, Petitioner has  
2 raised at least one claim that could potentially benefit from his competence. Accordingly,  
3 and in light of the State's concession that Petitioner is presently incompetent, *Rohan* requires  
4 that these proceedings remain stayed.

5 Based on the foregoing,

6 **IT IS ORDERED** that Respondents' Motion to Lift Stay and Vacate Order for  
7 Competency Restoration in Light of *Cullen v. Pinholster* (Doc. 215) is **DENIED**  
8 **WITHOUT PREJUDICE**.

9 **IT IS FURTHER ORDERED** amending the Court's order of June 7, 2011 (Doc.  
10 226), and directing Respondents to file a status report every six months beginning **June 1,**  
11 **2012**, updating the Court on when, or if, a competency restoration treatment plan will be  
12 proposed.

13 DATED this 31st day of January, 2012.

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17 G. Murray Snow  
18 United States District Judge  
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