No. 19-239

IN THE
Supreme Court of the United States

LARRY BENZON, WARDEN, UTAH STATE PRISON,
Petitioner,
v.

TROY MICHAEL KELL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF INDIANA, ALABAMA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether a district court's order staying and abeying a capital prisoner's habeas corpus petition under *Rhines v. Weber*, 544 U.S. 269 (2005), is immediately appealable under the collateral-order doctrine.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* STATES 1

REASONS FOR GRANTING THE PETITION 2

I. As the Court Predicted in in *Rhines*, Capital Petitioners Regularly Abuse the Stay-and-Abeyance Procedure 4

II. Immediate Appeals Would Mitigate the Harm from Abusive *Rhines* Stays and Prevent Further Abuse 9

III. The Court Can Authorize Immediate Appeals of Capital *Rhines* Stays and Should Do So 12

CONCLUSION 14

APPENDIX 1a

Table Listing Published *Rhines* Stays in Capital Cases from March 30, 2005 to March 30, 2010 ..... 1a

TABLE OF AUTHORITIES

CASES

California v. Rooney,
483 U.S. 307 (1987).....10

Crump v. Filson,
No. 2:07-cv-0492-APG-CWH (D. Nev. Mar. 23, 2017), ECF No. 86.....7

Crump v. Filson,
No. 2:07-cv-0492-APG-CWH (D. Nev. Mar. 23, 2017), ECF No. 90.....7

Crump v. McDaniel,
No. 2:07-cv-0492-PMP-PAL, 2008 WL 4660137 (D. Nev. Oct. 17, 2008).....6

Crump v. State,
716 P.2d 1387 (Nev. 1986).....5, 6

Crump v. State,
No. 63346, 2016 WL 1204502 (Nev. Mar. 25, 2016).....6, 7

Crump v. State,
No. 76051, 2018 WL 5291454 (Oct. 18, 2018).....7

Horn v. Quarterman,
508 F.3d 306 (5th Cir. 2007).....8, 9

CASES [CONT'D]

Kell v. Crowther,
No. 2:07-cv-00359-CW, 2017 WL
5514173 (D. Utah Nov. 16, 2017) 11, 12

Lafferty v. Crowther,
No. 2:07-CV-322, 2015 WL 6875393 (D.
Utah Oct. 30, 2015).....12

Neville v. Dretke,
423 F.3d 474 (5th Cir. 2005).....11

Steele v. Woodford,
No. 2:03-cv-00143-GEB-CKD (E.D. Cal.
June 30, 2015), ECF No. 253.....8

People v. Steele,
47 P.3d 225 (Cal. 2002).....8

Picard v. Connor,
404 U.S. 270 (1971).....10

Rhines v. Weber,
346 F.3d 799 (8th Cir. 2003).....12

Rhines v. Weber,
544 U.S. 269 (2005).....*passim*

Riner v. Crawford,
415 F. Supp. 2d 1207 (D. Nev. 2006).....11

Roper v. Simmons,
543 U.S. 551 (2005).....9

CASES [CONT'D]

Steele v. Dep't of Corr. & Rehab.,
No. S147651 (Cal. Jan. 24, 2007) 8

Steele v. Ornoski,
No. 2:03-cv-0143-GEB-KJM, 2006 WL
2844123 (E.D. Cal. 2006).....8

Thompson v. Frank,
599 F.3d 1088 (9th Cir. 2010).....7

Williams v. Taylor,
529 U.S. 420 (2000).....2

STATUTES

28 U.S.C. § 2254 2

INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Georgia, Idaho, Kansas, Louisiana, Montana, Nebraska, Ohio, South Carolina, and South Dakota respectfully submit this brief as *amici curiae* in support of the petitioner.

In *Rhines v. Weber*, 544 U.S. 269 (2005), this Court held that federal district courts may stay "mixed" habeas petitions—that is, petitions with exhausted and unexhausted claims—to allow habeas petitioners to present their unexhausted claims in state court before returning to federal court. The Court held, however, that such stays are appropriate only in in "limited circumstances," cautioning in particular that capital petitioners "might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Id.* at 277–78. The *Amici* States have a strong interest in preventing and correcting abusive *Rhines* stays, which they can do only through immediate appeals. In its decision below, however, the Tenth Circuit held that States cannot immediately appeal *Rhines* stays—even in capital cases, where the risk and cost of abusive stays are greatest. The *Amici* States submit this brief to explain why the Court should grant Utah's petition and hold that *Rhines* stays in capital cases are immediately appealable.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least 10 days prior to the due date of this brief.

REASONS FOR GRANTING THE PETITION

This Court has long "been careful to limit the scope of federal intrusion into state criminal adjudications" in light of "the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). And in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress advanced these principles by circumscribing when federal courts may grant habeas relief from state criminal judgments. *Id.* Specifically, Congress sought to reserve to state courts the opportunity to adjudicate constitutional claims in the first instance and sought "to 'reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.'" *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). To these ends, AEDPA requires habeas petitioners to exhaust claims in state court before raising them in federal court and imposes a one-year statute of limitations on petitions. *See* 28 U.S.C. § 2254(b), (d); *Rhines*, 544 U.S. at 274–75. As a result, when habeas petitioners file "mixed" petitions combining exhausted and unexhausted claims they "run the risk of forever losing their opportunity for any federal review of their unexhausted claims." *Id.* at 275.

In *Rhines*, the Court considered whether district courts can relieve petitioners of this risk by staying and abeying the federal habeas proceeding to allow the petitioner to present the unexhausted claims in state court before returning to federal court. The Court noted that the stay-and-abeyance procedure facilitates federal review of constitutional claims, but,

"if employed too frequently, has the potential to undermine the[] twin purposes" of AEDPA: It "frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings . . . [and] undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims . . . ." *Id.* at 277. Balancing these considerations, the Court held that stay-and-abeyance is appropriate only in "limited circumstances": where "the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 277–78. The Court emphasized that capital cases require special care because "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Id.*

The Court's prediction that capital petitioners would abuse *Rhines* stays to delay their executions has proven correct. District courts have delayed numerous executions by issuing stays based on plainly meritless claims. Making things worse, many circuit courts—including the Tenth Circuit below—have held that *Rhines* stays are not immediately appealable, even in capital cases like *Rhines*.

These decisions are directly contrary to *Rhines*, which assumed that appellate courts *would* have jurisdiction to review stay-and-abeyance orders; *Rhines* itself was an interlocutory appeal from a stay, and the Court remanded to the Court of Appeals to apply the new test. *Id.* at 279. And these decisions are not only

wrong; they also seriously and uniquely harm States, because *Rhines* stays, which are often based on meritless claims, irreparably delay executions; if States cannot appeal such stays, circuit courts cannot correct district courts' misinterpretations of *Rhines*. The Court should grant Utah's petition for a writ of certiorari to vindicate AEDPA's purposes and restore the careful balance the Court struck in *Rhines*.

I. As the Court Predicted in *Rhines*, Capital Petitioners Regularly Abuse the Stay-and-Abeyance Procedure

In *Rhines* the Court recognized that "not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). The Court's prediction was accurate. Capital petitioners routinely abuse the stay-and-abeyance procedure, delaying and sometimes entirely foreclosing States from executing lawful sentences.

For example, in the first five years following *Rhines*, federal district courts granted stays in at least twenty-six capital cases.[2] Even though *Rhines*

[2] This total includes the orders available on Westlaw; district courts may have granted more stays in unpublished orders. To capture how state courts evaluated the claims underlying the *Rhines* stays, this analysis focuses on orders issued within the first five years after *Rhines*, which ensures that most of the post-stay state-court proceedings have been completed.

requires federal district courts to deny stays if the unexhausted claims are "plainly meritless," *id.* at 277, state courts denied relief in more than *two-thirds* of these cases: eighteen out of twenty-six. These claims were rejected by state courts in eight states that span five federal circuits. (Out of the remaining eight cases, State courts granted relief in six, and two are still pending in state court). *See* Appended Table. That such a high percentage of these stays were premised on claims that state courts later rejected suggests that federal district courts are misapplying *Rhines*. It also underscores the widespread, unnecessary harms that unappealable stays impose on States: *Rhines* stays prevented the execution of final judgments in some of these States' most heinous criminal cases without furthering any purpose but delay, and this outcome could easily have been avoided if the States had been able to immediately appeal the stays.

Take, for example, the case of Thomas Crump. When Crump was serving a life sentence in New Mexico for murdering his wife, he confessed to murdering and robbing an escort in Las Vegas in 1980. *See Crump v. State* ("*Crump I*"), 716 P.2d 1387, 1388 (Nev. 1986). The police had found the victim's naked body in a motel bathtub, her arms and legs bound with pantyhose and a ligature made from knotted strips of pillowcase around her neck. *Id.* In Crump's confession, he said, "No crime of murder, of violence is justifiable, but in my estimation it was. . . . She deserved what she got, and I don't feel no remorse over it. . . . I could have obtained my money without killing her. I just wanted to kill her. . . . It[']s an eye for an eye. . . . I premeditated. I knew I was going to kill her

and I did." *Id.* He later confessed to committing "(1) seven murders, (2) seven attempted murders, and (3) innumerable robberies, assaults, and kidnappings. Crump additionally confessed that he had participated in a prison uprising in which a prison guard was taken hostage and killed. He had also escaped from a New Mexico jail." *Id.* He admitted that he would escape again if he could, that prison time did not affect him, and that he would hurt someone else. *Id.* He said, "I would like the death penalty because I deserve it. . . . I don't want to hurt nobody else." *Id.* Crump was sentenced to death in 1984, and his judgment became final in 1986. *Crump v. McDaniel* ("*Crump II*"), No. 2:07-cv-0492-PMP-PAL, 2008 WL 4660137, at *1 (D. Nev. Oct. 17, 2008). From 1987 to 2007, he pursued state post-conviction relief. *Id.*

After Crump exhausted his state-court remedies, he filed a petition for a writ of habeas corpus in federal district court in April 2007. *Id.* One year later, he moved for a *Rhines* stay to raise three additional unexhausted claims: that he was mentally incompetent to be executed, that one of the aggravating circumstances for the death penalty was improper, and that a jury instruction given at his trial was erroneous. *Id.* at *3–4. The district court granted his motion over Nevada's objection. *Id.* at *4.

Back in state court, Crump pursued a second round of post-conviction proceedings from 2008 until 2016. *Crump v. State* ("*Crump III*"), No. 63346, 2016 WL 1204502, at *1 (Nev. Mar. 25, 2016), *cert. denied*, 137 S. Ct. 596. When the case finally arrived in the Supreme Court of Nevada, the court concluded that

"Crump's postconviction petition for a writ of habeas corpus is subject to several procedural bars." *Id.* It "was untimely." *Id.* (citing Nev. Rev. Stat. § 34.726(1)). It was "successive." *Id.* (citing Nev. Rev. Stat. § 34.810(2)). It "constituted an abuse of the writ." *Id.* (citing Nev. Rev. Stat. § 34.810(1)(b)). And "the State pleaded laches." *Id.* Because Crump could not demonstrate cause and prejudice to excuse his procedural default, the court affirmed the denial of his petition. *Id.* at *2–5. Under any interpretation of *Rhines*, that should have been Crump's last trip to state court.

On March 23, 2017, however, the district court *continued* Crump's *Rhines* stay, again over Nevada's objection, so that he could exhaust yet another claim in state court. Order Granting Mot. to Lift Stay, *Crump v. Filson*, No. 2:07-cv-0492-APG-CWH (D. Nev. Mar. 23, 2017), ECF No. 86. Nevada could not appeal because the Ninth Circuit has held that the collateral-order doctrine does not apply to *Rhines* stays. *See Thompson v. Frank*, 599 F.3d 1088, 1090 (9th Cir. 2010).

Crump's state-court proceedings were still pending on June 15, 2018, more than three decades after his judgment became final, when he died of natural causes at the age of seventy-eight. *See* Order Dismissing Case, *Crump v. Filson*, No. 2:07-cv-0492-APG-CWH (D. Nev. July 18, 2018), ECF No. 90; *Crump v. State*, No. 76051, 2018 WL 5291454 (Oct. 18, 2018). A *Rhines* stay had prevented Nevada from executing a sentence that no court had ever found to be unlawful.

Nevada is not the only State that was stymied from executing a lawful capital sentence by a *Rhines* stay. In California, Raymond Steele was sentenced to death for his second murder: in 1971 he stabbed to death a fifteen-year-old babysitter, and in 1988 he stabbed and strangled to death a developmentally disabled woman, who "had the skills of . . . maybe a 10 year old," after paying her for sex. *People v. Steele*, 47 P.3d 225, 230–31 (Cal. 2002) (internal quotation marks omitted), *cert. denied*, 537 U.S. 1115 (2003). He received a stay on September 29, 2006 to exhaust thirty-seven claims in state court. *Steele v. Ornoski*, No. 2:03-cv-0143-GEB-KJM, 2006 WL 2844123, at *12 (E.D. Cal. 2006). On January 24, 2007, the Supreme Court of California concluded that all of the claims were meritless and that most of them were procedurally defaulted. Pet. for Writ of Habeas Corpus Denied, *Steele v. Dep't of Corr. & Rehab.*, No. S147651 (Cal. Jan. 24, 2007).[3] On April 22, 2015, while Steele's federal proceedings were still pending, he died in prison. Order, *Steele v. Woodford*, No. 2:03-cv-00143-GEB-CKD (E.D. Cal. June 30, 2015), ECF No. 253.

To be sure, not all *Rhines* stays are abusive. Patrick Horn's case is a good example. He was sentenced to death for a murder that he committed when he was seventeen years old. *Horn v. Quarterman*, 508 F.3d 306, 307–08 (5th Cir. 2007). He filed his petition for a writ of habeas corpus before this Court ruled that a

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[3] *Available at* https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1879329&doc_no=S147651&request_token=NiIwLSIkTkw2WyBFSCI9UEtIQEQ0UDxfJyMuXz9TICAgCg%3D%3D.

death sentence for a juvenile offender is unconstitutional in *Roper v. Simmons*, 543 U.S. 551 (2005). *Horn*, 508 F.3d at 307, 311. After *Roper*, he sought a *Rhines* stay, which the district court appropriately granted so that Horn could raise his *Roper* claim in state court—which ultimately commuted his sentence to life. *Id.* at 307–08, 311. But *Horn* is an exceptional case; as the Table appended to this brief shows, *Rhines* stays are much more often based on claims that state courts go on to reject.

Abusive *Rhines* stays can prevent States from carrying out lawful sentences—sometimes for years and sometimes forever. This is precisely contrary to this Court's reasoning in *Rhines*, where the Court was careful to ensure that the stay-and-abeyance procedure does not undercut one of the principal purposes of AEDPA: "to 'reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.'" *Rhines*, 544 U.S. at 276 (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). To reaffirm that *Rhines* stays should not be used to delay lawful executions, and to restore the balance between petitioners' interests and States' interests, the Court should grant certiorari and hold that stay-and-abeyance orders are immediately appealable.

II. Immediate Appeals Would Mitigate the Harm from Abusive *Rhines* Stays and Prevent Further Abuse

An immediate appeal is a State's only opportunity to redress abusive *Rhines* stays. If the *Rhines* stay is not immediately appealable, the State will be unable

to challenge the propriety of the stay regardless of the ultimate disposition of the habeas petition: If the district court ultimately denies habeas relief, the State cannot appeal at all, *see, e.g.*, *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curium), and if the district court grants relief, the decision to grant a stay will be moot because once a petitioner has exhausted his state-court remedies, they remain exhausted, even if the *Rhines* stay was improper*, see Picard v. Connor*, 404 U.S. 270, 275 (1971) (citations omitted) ("[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied."). And in any event, a delayed appeal cannot cure the harms imposed by the stay. The only way to secure the State's ability to correct and remedy improper *Rhines* stays is immediate appeal, which protects the State's interest in finality and helps prevent future abuses of the stay-and-abeyance procedure.

Immediate appeals are essential to vindicating the States' interest in finality. Of course, the appeal of a *Rhines* stay will take some time, but it will invariably take longer for a petitioner to exhaust new claims through the entire state-court system than it will take a State to convince a federal circuit court that the district court abused its discretion in ordering a stay. *See Rhines v. Weber*, 544 U.S. 269, 279 (2005) (remanding to determine "whether the District Court's grant of a stay . . . constituted an abuse of discretion"). At the very least, States should be given the opportunity to weigh their prospects on interlocutory appeal against the potential delay in state court in each case.

In addition, immediate appeals will prevent further *Rhines* abuse by permitting appellate courts to provide further explication of when such stays are appropriate; without immediate appeals the development of doctrine under *Rhines* is currently stunted in the majority of circuits. For example, district courts are split on the standard for "good cause." *Id.* at 277. Some courts have held that the standard is the same as the standard for procedural default; some courts have held that it is lower; and at least one court has held that it lands somewhere in between. *Riner v. Crawford*, 415 F. Supp. 2d 1207, 1209–10 (D. Nev. 2006) (collecting cases). Courts also disagree about whether ineffective assistance of post-conviction counsel is good cause. *Id.* at 1210–11 (collecting cases).

In addition to confusion about the "good cause" standard, federal courts inconsistently apply the "plainly meritless" standard. *Rhines*, 544 U.S. at 278. In *Rhines*, the Court held that "the district court would abuse its discretion if it were to grant [the petitioner] a stay when his unexhausted claims are plainly meritless." *Id.* at 277. The delay caused by *Rhines* stays is equally pointless when the claim underlying the stay is barred by state procedural rules—as they often are, as the cases of Thomas Crump and Raymond Steele illustrate. The Fifth Circuit recognized this in *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005), when it held that the petitioner's "unexhausted claims are 'plainly meritless' because he is now procedurally barred from raising those claims in state court." Yet the district court in this case would "not address possible state court time and procedural

bars" to determine whether the claims purportedly justifying the *Rhines* were plainly meritless. *Kell v. Crowther*, No. 2:07-cv-00359-CW, 2017 WL 5514173, at *3 (D. Utah Nov. 16, 2017); *see also Lafferty v. Crowther*, No. 2:07-CV-322, 2015 WL 6875393, at *5 (D. Utah Oct. 30, 2015) (refusing to consider state procedural bars as part of the "potentially meritorious" analysis). Litigants and lower courts are much more likely to find clarity on these important issues if States can immediately appeal.

III. The Court Can Authorize Immediate Appeals of Capital *Rhines* Stays and Should Do So

As Utah argues in its petition, the collateral-order doctrine applies to *Rhines* stays. The Court implicitly acknowledged this in *Rhines* when it decided the case after the Eighth Circuit exercised jurisdiction under the collateral-order doctrine. *See Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003) (per curiam) ("We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas petition in abeyance pending exhaustion of state court remedies." (citing *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998)). If the Eighth Circuit had been wrong about the collateral-order doctrine, then this Court would not have had jurisdiction to decide the case, and the Eighth Circuit would not have had jurisdiction to apply the new test on remand. *See Rhines v. Weber*, 544 U.S. 269, 279 (2005) (remanding to determine "whether the District Court's grant of a stay . . . constituted an abuse of discretion").

The availability of immediate appeals is also implicit in the Court's reasoning. First, the Court held that "the district court would abuse its discretion if it were to grant [the petitioner] a stay when his unexhausted claims are plainly meritless," *id.* at 277, and abuse of discretion is an appellate standard of review. Second, the Court explicitly recognized that the stay-and-abeyance procedure needed to balance two competing interests: Petitioners want the federal courts to review all of their claims without missing AEDPA's statute of limitations. *Id.* at 275. And States want finality in their judgments. *Id.* at 276. For a petitioner to protect his interests, he can request a *Rhines* stay. *Id.* at 277. For a State to protect its interests, it can appeal. To hold otherwise would upset the careful balance that the Court struck in *Rhines*.

The Tenth Circuit's holding would also lead to too many *Rhines* stays in capital cases, which this Court warned would "undermine the[] twin purposes" of AEDPA. *Id.* After all, if a capital petitioner has every reason to "deliberately engage in dilatory tactics," *id.* at 277, and the State has no defense, why would the petitioner exhaust all of his claims in state court before filing his habeas petition? Perversely, the petitioners with the least meritorious claims would have the most incentive to abuse *Rhines* stays. Even in the first five years after *Rhines*, before capital petitioners knew how lower courts would dismantle its reasoning, they employed this strategy. *See* Appended Table.

Reaffirming that the collateral-order doctrine applies to *Rhines* stays will fully align *Rhines* with AEDPA. To prevent capital petitioners from abusing

the stay-and-abeyance procedure, States need authority to immediately appeal. The Court should grant Utah's petition to authorize States to immediately appeal *Rhines* stays.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix
Published *Rhines* Stays in Capital Cases from March 30, 2005 to March 30, 2010

Petitioner	Citation	State-court relief?
1. Patrick Horn	*Horn v. Dretke*, 2005 WL 3003504 (E.D. Tex. Nov. 8, 2005) (stay granted June 27, 2005)	Yes
2. Charles Rhines	*Rhines v. Weber*, 408 F. Supp. 2d 844 (D.S.D. 2005)	No
3. John King	*King v. Dretke*, 2006 WL 887488 (E.D. Tex. Mar. 29, 2006)	No
4. Joseph Prystash	*Prystash v. Quarterman*, 2006 WL 2479094 (S.D. Tex. Aug. 25, 2006)	No
5. Raymond Steele	*Steele v. Ornoski*, 2006 WL 2844123 (E.D. Cal. Sept. 29, 2006)	No
6. Manuel Alvarez	*Alvarez v. Ayers*, 2006 WL 3531750 (E.D. Cal. Dec. 7, 2006)	No
7. Richard Vieira	*Vieira v. Ayers*, 2007 WL 38028 (E.D. Cal. Jan. 4, 2007)	No

Petitioner	**Citation**	**State-court relief?**
8. Victor Taylor	*Taylor v. Simpson*, 2007 WL 141052 (E.D. Ky. Jan. 17, 2007)	No
9. Anibal Canales	*Canales v. Quarterman*, 2007 WL 922150 (E.D. Tex. Mar. 23, 2007)	No
10. Zane Floyd	*Floyd v. McDaniel*, 2007 WL 1231734 (D. Nev. Apr. 25, 2007)	No
11. Gerald Hand	*Hand v. Houk*, 2007 WL 2852360 (S.D. Oh. Oct. 1, 2007)	No
12. Karl Roberts	*Roberts v. Norris*, 526 F. Supp. 2d 926 (E.D. Ark. 2007)	Yes
13. Nathanial Jackson	*Jackson v. Houk*, 2008 WL 1805800 (N.D. Oh. Apr. 18, 2008)	Yes
14. William Speer	*Speer v. Dretke*, 2008 WL 2065798 (E.D. Tex. May 13, 2008)	No
15. Kelly Rhyne	*Rhyne v. McDaniel*, 2008 WL 2165955 (D. Nev. May 21, 2008)	Pending
16. Colin Dickey	*Dickey v. Ayers*, 2008 WL 2131564 (E.D. Cal. May 21, 2008)	No

Petitioner	**Citation**	**State-court relief?**
17. Seifullah Abdul-Salaam	*Abdul-Salaam v. Beard*, 2008 WL 2704605 (M.D. Penn. Jul. 7, 2008)	No
18. Zane Fields	*Fields v. Klauser*, 2008 WL 3992255 (D. Idaho Aug. 27, 2008)	No
19. Thomas Crump	*Crump v. McDaniel*, 2008 WL 4660137 (D. Nev. Oct. 17, 2008)	No
20. Edward Beets	*Beets v. McDaniel*, 2009 WL 212424 (D. Nev. Jan. 23, 2009)	Yes (agreed resolution)
21. Rickey Newman	*Newman v. Norris*, 597 F. Supp. 2d 890 (W.D. Ark. 2009)	Yes
22. Travers Greene	*Greene v. McDaniel*, 2009 WL 311168 (D. Nev. Feb. 6, 2009)	No
23. Steven Catlin	*Catlin v. Wong*, 2009 WL 1026057 (E.D. Cal. Apr. 15, 2009)	No
24. Roderick Rankin	*Rankin v. Norris*, 2009 WL 1973475 (E.D. Ark. Jul. 8, 2009)	Pending
25. Glen Cornwell, Jr.	*Cornwell v. Ayers*, 2009 WL 2171089 (E.D. Cal. Jul. 17, 2009)	No

Petitioner	**Citation**	**State-court relief?**
26. Paul Johnson	*Johnson v. Sec'y, Dep't of Corr.*, No. 8:09-cv-2065-T-27TGW, 2009 WL 3486024 (M.D. Fla. Oct. 28, 2009)	Yes