No. 10-930

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

ERNEST VALENCIA GONZALES,

Respondent.

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

REPLY BRIEF

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Contrary to Gonzales' position, the issue before the Court is a straight-forward narrow issue not governed by this Court's precedent or the Common Law. Without a legal basis, the Ninth Circuit has read into 18 U.S.C. § 3599(a)(2) rights for the capital habeas petitioner that frustrate the very purpose of habeas relief, needlessly obstruct the execution of lawful state-courts judgments, and further hinder timely federal review of state-court decisions.

Moreover, after Arizona filed its petition, this Court decided *Cullen v. Pinholster*, 563 U.S.___, 131 S. Ct. 1388 (decided April 4, 2011). The holding of *Pinholster* significantly undercuts the Ninth Circuit's rationale for injecting into § 3599(a)(2) a right of competency. In *Pinholster*, this Court expressly held that "review under [28 U.S.C. § 2254(d)(1)] is *limited to the record that was before the state court* that adjudicated the claim on the merits." *Id.* Slip. Op. p. 9 (emphasis added). Because "[s]ection 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief," it is "contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." *Id.* pp. 9-10. Given that the federal habeas court's focus under § 2254(d)(1) is on "what a state court knew and did," the Ninth Circuit's decision that the habeas petitioner must be competent to assist counsel is meritless in light of *Pinholster*. *See id.* p.10.

Furthermore, Gonzales does not dispute that the Ninth Circuit decisions in *Rohan ex rel. Gates*, 334

F.3d 803 (9th Cir. 2002), *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009)[1], and the instant case relied on 18 U.S.C. § 3599(a)(2) as the statutory authority for these rights. (Br. Opp.[2] p. 31.) Further, Gonzales agrees, "the statute *fails to address [competency] altogether.*" (*Id.* pp. 25-26.) (emphasis added). He argues, nevertheless, that the Ninth Circuit was justified in reading this right of competency into the statute in the same manner that this Court found "a right to trial competency in the Sixth Amendment[.]" (*Id.* p. 26.) However, such an argument ignores the jurisprudential difference between this Court interpreting a trial right under the Constitution and a lower court applying a statute enacted by Congress.

Having acknowledged that the plain text of the statute does not provide for a capital habeas petitioner to be competent and to have his case stayed until he becomes competent, Gonzales argues that the case-law of this Court and the Common Law is consistent with Gonzales' right to be competent to assist his habeas attorneys. (Br. Opp. p.7, 11-13, 21-23.) He is mistaken. The cases he cites from this Court concern a different issue—the necessity of being competent in order *to end collateral review*, not any requirement that a habeas petitioner be competent *to proceed* in his quest for collateral relief. *See, e.g., Rees v. Peyton*, 384 U.S. 312 (1966) (Memo), *Anderson v. Kentucky*, 371 U.S. 886 (1962). Once a competent petitioner waives

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[1] *Rohan*, 334 F.3d at 813 (implying from the predecessor to § 3599(a)(2) [21 U.S.C. § 848(q)(4)(B)] a right to competence); *Nash*, 581 F.3d at 1051-52 (same); *Gonzales*, Pet. Cert. App. p. A-5 (same).

[2] Br. Opp. refers to "Brief in Opposition."

further review, the federal court lacks jurisdiction to consider other issues no matter their merit. *See Gilmore v. Utah*, 429 U.S. 1012, 1016-17 (1976) (Burger, C.J., concurring); *cf. Lonchar v. Thomas*, 517 U.S 314, 317-18 (1996) (demonstrating the competency requirement to waive further collateral review). Here, Gonzales is not attempting to withdraw his habeas petition; rather he wants the opposite, to obtain relief. He is not attempting to waive any right. This Court's waiver cases do not establish that habeas petitioner must be competent to proceed with his case for relief.

Gonzales is also mistaken about the Common Law. The Common Law prior to the enactment of the Constitution did not provide any rights pursuant to a writ of habeas corpus in collateral review of state-court convictions. "It was not until 1867 that Congress made the writ generally available in 'all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.' [citation omitted] And it was not until well into [the 20th] century that this Court interpreted that provision to allow *a final judgment* of conviction in a state court to be collaterally attacked on habeas." *Felker v. Turpin*, 518 U.S. 651, 663 (1996) (emphasis added). "The writ of habeas corpus known to the Framers was quite different from that which exists today." *Id.* While the *Rohan* case has an extensive discussion of the Common Law, it identified no evidence that Congress intended to require habeas petitioners to be competent in order to pursue relief in federal court.

Gonzales contends that this case is not ripe

because he has not been found incompetent (Br. Opp. pp. 5-7). That contention misses the point. The issue is not whether Gonzales is competent; rather the issue is whether there is a requirement he be competent to proceed. Already the issue of Gonzales' competency has been in litigation for half a decade. *See* App A, at 1a (Gonzales' motion for competency determination dated February 23, 2006.) Apparently it matters not that Congress has never said that a capital habeas petitioner must be competent, nor has this Court. Gonzales would burden the States with the significant expense of litigation and further delay when, other than the Ninth Circuit's opinions, there is no basis in law to support such a requirement. Gonzales is simply wrong about this case not being ripe. These ersatz rights to competency and a stay are an impediment to the states' right to proceed with their judgments. The costs to the States are real as the case dockets demonstrate for this unnecessary litigation. (*See, e.g.*, Br. Opp. p. 27; *Amici Curiae* in support of the Pet. pp. 4-5 for cases litigating a right never authorized by Congress.)

Gonzales asserts there are no compelling reasons for review because this is simply an error-correction case that does not require intervention by this Court. However, judge-made law that contravenes the acknowledged intent of Congress and that harms the states, is a fundamental problem requiring this Court's intervention. One of Congress' chief purposes for enacting the AEDPA was to reduce the delays in capital cases on habeas review. *Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). The error in the pre-AEDPA case of

Rohan is particularly egregious in the context of post-AEDPA review. The 1996 amendments to 28 U.S.C. § 2254 restricted the scope of federal habeas review in the interest of finality by substantially "constraining a federal court's power to disturb state-court convictions." *Miller-el v. Cockrell*, 537 U.S. (2003). The amendments "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685 (2002). The new highly deferential standard of review demands that state-court decisions "be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

In contrast to the narrowing of habeas review mandated by AEDPA, Ninth Circuit panels have extended the reach of *Rohan*. In *Nash*, Judges Richard Paez, Stephen Reinhardt and Sidney Thomas extended these rights to *an appeal* from the denial of a § 2254 petition, finding the inmate's ability to communicate rationally with counsel essential in a record-based appeal and stayed the appeal pending Nash's determination of competency. In *Gonzales*, Judges Stephen Reinhardt, Marsha Berzon and Milan Smith, stayed this case in an interlocutory appeal even though the district court found all the remaining claims were record-based or legal in nature. Pet. Cert. App. pp. A-1–A-6.

Gonzales contends that because the *Rohan* decision is narrow in scope and "coupled with the high burden of proof" the decision is beneficial. (Br. Opp.

p.29.) However, *Nash* and *Gonzales* decisions belie this contention. Moreover, the Ninth Circuit decisions are not benign. The cases Gonzales cites provide a snap-shot of how contagious these decisions can be. (*See* Br. Opp. pp. 19-20, 27, 29 n.9.)

In an effort to avoid review, Gonzales contends that his claims are not legal in nature or record-based—that the only issue is a mere factual dispute between the district and circuit courts. (Br. Opp. pp. 8-10.) The point is, however, 18 U.S.C. § 3599(a)(2), *does not require*—as Gonzales' acknowledges—the capital habeas petitioner be competent, hence the pre-*Pinholster* factual dispute concerning the need for petitioner's input is not material to the issue before this Court. Because Congress *has not* provided for a right to be competent in pursuing federal habeas relief, it matters not whether the claims are recorded based or not.

Gonzales claims Arizona "waived" the question "whether a stay based on incompetency is appropriate where the habeas petitioner's claims include *non-record-based claims*." (Br. Opp. p. 10, emphasis original.) Again Gonzales is mistaken. Given the Question Presented in the petition, it makes no difference whether the claims are record based—§ 3599(a)(2) does not provide a capital habeas petitioner a right to be competent in order to rationally communicate with counsel. Pet. Cert. at i.

Finally, the Seventh Circuit *Holmes* cases illustrate the logical fallacy in the course the Ninth Circuit charted. *See Holmes v. Levenhagen (Holmes*

II), 600 F.3d 756 (7th Cir. 2010); *Holmes v. Buss (Holmes I)*, 506 F.3d 576 (7th Cir. 2007). Because it is unethical to bring an action simply for delay, presumably a death row inmate pursues federal habeas because he has at least one arguably meritorious claim. Thus, as Judge Posner stated in *Holmes I* : "[I]t is odd to think that someone who initiates a proceeding can then freeze it by claiming to be mentally incompetent." 506 F.3d at 578. When years later, Holmes returned to the Seventh Circuit after being found incompetent and consigned to "habeas corpus limbo indefinitely," Judge Posner mused "[I]magine a capital defendant who has a slam-dunk habeas corpus claim that would not merely get him a new trial, but an acquittal; but because he is incompetent, he cannot communicate effectively with his lawyers or they with him." 600 F.3d at 762-63. "The implication is profoundly unsatisfactory." *Id.* at 762. Neither this Court nor Congress has mandated such a result. This Court should accept review to correct the Ninth Circuit misperception of the law.

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CONCLUSION

For these reasons, the State respectfully requests that this Court accept Arizona's petition for a writ of certiorari.

Respectfully submitted

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