No. 11-1397

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN CHAPPELL, ACTING WARDEN OF CALIFORNIA
STATE PRISON AT SAN QUENTIN,

PETITIONER,

v.

JESSE EDWARD GONZALES,
RESPONDENT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

MARK E. OVERLAND
100 Wilshire Blvd., Ste. 950
Santa Monica, CA 90401
Telephone: (310) 459-2830
Facsimile: (310) 459-4621
Email: mark@ overlaw.net
Attorney for Respondent
Jesse Edward Gonzales

CAPITAL CASE QUESTION PRESENTED

Petitioner misstates the question presented by this case. The question is not, as framed by Petitioner:

> If a state court's rejection of a claim on the merits was reasonable under 28 U.S.C. § 2254(d)(1), does *Cullen v. Pinholster* require that the claim be denied, or may a federal court stay the proceedings in order to permit the petitioner to present to the state court additional allegations of fact in support of the claim?

Rather, the question presented is:

> When the state prosecutor and the state courts have, in spite of a habeas petitioner's diligence, precluded the development of facts relevant to a potentially meritorious Brady claim, does *Cullen v. Pinholster* prohibit a federal court, which allowed discovery of those facts, from staying the proceedings and permitting the state court to have the first opportunity to consider the precluded facts in determining the Brady claim?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Statement of Additional Facts 2

Mischaracherization Of Opinion Of Court Of Appeals 5

REASONS FOR DENYING THE PETITION 6

1. This Case Does Not Present A "Compelling Reason" For Review According To Rule 10 Of the Rules Of this Court 6

A. There is No Circuit Conflict That Requires Resolution 7

B. The Decision Of the Court of Appeals Correctly Applied *Cullen v. Pinholster* 7

C. The California Supreme Court Has Ordered Additional State Proceedings 11

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 516 U.S. 304 (2002).....11

Brady v. Maryland, 373 U.S. 83 (1963) .....passim

Carcieri v. Salazar, 555 U.S. 379 (2009) 9

Cullen v. Pinholster, 131 S. Ct. 1388 (2011).....passim

Fusari v. Stein berg, 419 U.S. 379 (1974).....11

In re Chapman, 166 U.S. 661 (1897).....9

Rhines v. Weber, 544 U.S. 269 (2005).....10

Rodriguez v. United States, 480 U.S. 522 (1987).....10

Strickland v. Washington, 466 U.S. 668 (1964) 5

Williams v. Taylor, 529 U.S. 420 (2000) 9

Maxwell v. Rowe, 628 F.3d 486 (9th Cir. 2010).....2

FEDERAL STATUTES

28 U.S.C. § 2254(d) 6, 8. 9, 10

28 U.S.C. § 2254(d)(1) 5, 7, 9

28 U.S.C. § 2254(d)(2) 7

28 U.S.C. § 2254(e)(2) 10

28 U.S.C. § 2254(e)(2)(A)(ii) 9

STATE CASES

People v. Gonzalez, 51 Cal.3d 1179 (1990).....1

In re Hawthorne, 35 Cal. 4th 40 (2005).....11

STATEMENT OF THE CASE

Jesse Edward Gonzales ("respondent") was convicted in a California state court of first degree murder with a single special circumstance allegation of killing a peace officer in the lawful performance of his duties. A separate penalty jury became deadlocked and the trial court declared a mistrial. A second penalty jury was empanelled and returned a death verdict. See Appendix F, at 340.

The California Supreme Court affirmed respondent's conviction and denied habeas relief. *People v. Gonzalez*, 51 Cal.3d 1179 (1990); Appendix F, at 338-491.[1] The district court denied respondent's petition under 28 U.S.C. § 2254. See Appendix A, at 1, 5.

The facts underlying the charged offense and special circumstance allegation consisted of plainclothes men bursting through the front door of the residence occupied by respondent who shot and killed one of the men as he entered. Respondent contended at trial he believed the man he shot to be a member of a rival gang. The prosecution's key evidence to the contrary was respondent's alleged confession to William Acker that respondent knew in advance the men were police officers and were entering the residence to execute a search warrant. This evidence was critical to the special circumstance finding of the murder having been committed on a victim whom respondent knew to be a peace officer engaged in the lawful performance of his duties. See Appendix F, at 341-344.

Without the peace officer special circumstance finding, respondent would not have been eligible for the death penalty.

---

[1] Respondent's name was misspelled throughout the state and district court proceedings. See Appendix A, at 2, n. 1.

William Acker was a jailhouse informant.[2] Despite respondent's diligence in attempting to discover and present evidence relating to Acker's credibility, the prosecution withheld relevant records revealing Acker's lack of credibility, which were in its possession at the time of trial and should have been disclosed to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).[3] Rulings by the California Supreme Court precluded respondent from discovering and presenting this impeaching material of Acker at the state habeas proceedings. These precluded facts did not become known to respondent until the federal district court granted discovery during the course of the 28 U.S.C. § 2254 proceedings. See Appendix A, at 2, 64-65.

Statement of Additional Facts.

The following relevant and material facts have been omitted from Petitioner's Petition For Certiorari:

Acker provided the most significant evidence against respondent in both the guilt and penalty phases of the trial, an alleged confession by respondent to the sole special circumstance charged against him, the intentional killing of a peace officer in the lawful performance of his duties. See Appendix A, at 32-33, 67-69.

In June, 1989, during the state habeas proceedings, the state trial court held a hearing on respondent's motion to discover Acker's California Department of Corrections records. Appendix A, at 85, 89. The state habeas court ordered post-conviction discovery, directing "the Los Angeles County Counsel, the District Attorney, the Sheriff, and the Attorney General, to produce all their files on Acker, limited to

---

[2] This case is an unfortunate reminder of the Los Angeles County Jail informant scandal that was the subject of a Grand Jury investigation that uncovered the fabrication of confessions by jailhouse informants used by Los Angeles County prosecutors from 1979 through 1990. See Appendix A, at 11-12, 72-83; see also *Maxwell v. Rowe*, 628 F.3d 486, 505 (9th Cir. 2010), cert. denied sub nom. *Cash v. Maxwell*, 132 S.Ct. 611 (2012).

[3] It is uncontested that the undisclosed impeachment evidence was in the possession of the prosecution prior to respondent's trial. See Appendix A, at 24.

discovery matters within the period commencing January 1, 1978 and ending upon the date of the completion of ... Acker's testimony in [defendant's] second penalty trial ... (on or about April 29, 1981)." Appendix F, at 434.

The prosecution did not comply with the discovery order and successfully obtained a writ of mandate from the California Supreme Court, which held the trial court had no jurisdiction to issue the discovery order. The California Supreme Court also denied the requested discovery on the ground that "the pending habeas corpus petitions, most recently supplemented in 1986, do not state a prima facie case that Acker gave perjured testimony, or that the prosecution has material undisclosed evidence bearing on Acker's veracity or his status as a government agent…" Appendix F, at 438[4]. The Supreme Court further justified denial of discovery relating to the *Brady* claim by stating "We expect and assume that if the People's lawyers have such information in this or any other case, they will disclose it promptly and fully." Appendix A, at 13; F, at 440. That assumption was unfounded.

The prosecution had provided defense trial counsel with only two documents relating to Acker, his incomplete and inaccurate "rap sheet" and a transcript of Acker's initial statement to investigators, which provided no impeachment material. See Appendix A, at 69.

Attempted defense impeachment of Acker at trial was limited. Acker admitted he pled guilty to murder and provided evidence against his own wife about this murder. He denied being a police informant or giving information in other cases. Acker testified he hoped giving information against respondent would help to get Acker transferred to an out of state prison because he feared gangs in California prisons. Acker claimed he was testifying against respondent because "it was a step in the right direction" and would help him get "moral balance" in his life. Acker admitted he could lie if he wanted, but insisted

[4] Under California law, a "prima facie case" for relief in a habeas petition "must set forth specific facts, which, if true, would require issuance of the writ. Any petition that does not meet these standards must be summarily denied and it creates no cause or proceeding which would confer discovery jurisdiction." See Appendix F, at 438.

he was not lying about respondent's statement to him. See Appendix A, at 9, 70-71. None of the attempted impeachment established that Acker had lied in the past or had been manipulative and deceptive and none of the impeachment related to Acker's competency to tell the truth nor to Acker's purported motive for testifying against respondent, to "turn his life around" and obtain "moral balance." Appendix A, at 27, 30-31, 71, 91.

By vacating the habeas court's discovery order and itself denying discovery to respondent, the California Supreme Court precluded respondent from obtaining relevant and material impeaching evidence against Acker in support of respondent's *Brady* claim. The evidence consisted of six reports prepared by prison psychologists and psychiatrists while Acker had been incarcerated in California prisons between 1972 and 1979. See Appendix A, at 88-92. These reports described Acker as intelligent, predatory and violent, with a history of lying and manipulative behavior and indicated that Acker had a severe personality disorder, was mentally unstable, possibly schizophrenic. Acker's manipulative behavior included faking three attempted suicides to obtain transfers to other prison facilities. Appendix A, at 89.

A withheld 1979 official report noted Acker was "intelligent, manipulative, unscrupulous" and "capable of any measure of brutality in the service of achieving what he wants to do." Appendix A, at 89-90.

Contrary to his trial testimony, the withheld evidence established that Acker had lied previously about reforming his life in order to obtain benefits. See Appendix A, at 13, 25-28. A 1972 report showed Acker told a prison psychologist he had turned his life around and was on the right path because he had "undergone a religious experience," (Appendix A, at 90), just as he claimed at respondent's trial that he was testifying in order to turn his life around and achieve "moral balance." However, after his 1972 statement to the prison psychiatrist, Acker was released from prison and committed a first degree murder and numerous robberies. *Id.*, at 27, 91.

Acker's deposition testimony during the federal habeas proceedings provided an illustration of how the undisclosed evidence could have been used effectively to impeach his trial testimony. When confronted with the evidence, Acker alternatively denied

making the statements ascribed to him by the prison officials, denied knowing the psychiatrist to whom he had made the statement, or admitted he had made the statements, but claimed the statements were lies. See Appendix A, at 91-92.

The Court of Appeals reversed and remanded with directions to stay and abey the federal petition to permit respondent to present the previously withheld impeaching evidence of Acker to the state courts.[5] See Appendix A, at 4, 19-20, 34, 61.

Mischaracterization Of Opinion Of Court Of Appeals.

Petitioner mischaracterizes the Question Presented by this case as one in which the "state court's rejection of a claim on the merits was reasonable under 28 U.S.C. § 2254(d)(1)." Petition, at i. In fact the Court of Appeals concluded only that "the determination of the California Supreme Court that there was no prejudice, *based on the material known to it at the time of its decision, was not unreasonable.*" (emphasis added). See Appendix A, at 35, n. 12. This finding by the appellate court does not resolve the question of whether a federal court, which allowed respondent to discover facts relevant and material to his *Brady* claim that were withheld by the state through no fault of respondent, from staying the proceedings and permitting the state court to have the first opportunity to consider the precluded facts in determining the *Brady* claim.

Petitioner also mischaracterizes the opinion of the Court of Appeals by claiming the decision was a "three-opinion decision in which each of the judges would have come to a different determination of the case." Petition, at 9. In fact Judges Clifton and Fletcher agreed in the reversal of the judgment as well as the remand to the district court to stay and abey the habeas petition to allow respondent to present his claim to the California Supreme Court supported by the previously withheld evidence. Judge Fletcher merely opined that he believed the Court of Appeals had the authority to decide this claim

[5] The Court of Appeals analyzed both the *Brady* and the overlapping ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1964) according to the same standards and decided the *Strickland* claim as included in its *Brady* resolution. See Appendix A, at 15, n. 7.

without first seeking a ruling by the California state court, but joined Judge Clifton in the remedy of abey and remand to the California Supreme Court. See Appendix A, at 62.

The Ninth Circuit found that respondent presented sufficient evidence he was precluded, without fault, from developing all the facts for his *Brady* claim by the state's suppression of evidence. See Appendix A, at 24. The Court of Appeals also found the undisclosed *Brady* records were likely to be material because they constituted a new and powerful ground of impeachment against a key witness for the prosecution. The Court of Appeals found it reasonable that a trier of fact would have found "the information about Acker contained in these reports disturbing, and that it would have been difficult for anyone, let alone a reasonable factfinder, to trust the witness described in these reports." See Appendix A, at 25-26.

Additionally, the Ninth Circuit found that none of the impeachment material available to respondent at the time of trial enabled him to cast doubt on Acker's desire to turn his life around or show that the state itself had expressed doubts about Acker's veracity and competency. See Appendix A, at 31. The Ninth Circuit noted that the state prosecutor acknowledged that his ability to retry the penalty phase, after the first penalty phase hung jury, depended on the availability of Acker. See Appendix A, at 33.

REASONS FOR DENYING THE PETITION

1. <u>This Case Does Not Present A "Compelling Reason" For Review According to Rule 10 Of the Rules Of This Court.</u>

Rule 10 of the Rules of this Court provide the guidelines that establish a "compelling reason" for granting a Petition for Writ of Certiorari. None of the enumerated guidelines, nor any other "compelling reason" support a grant of the Petition in this case.

A. There Is No Circuit Conflict That Requires Resolution.

The Ninth Circuit opinion is not in conflict with any decision of another United States Court of Appeals, nor does Petitioner cite any such conflict.

This Court decided *Pinholster* on April 4, 2011, during the pendency of the appeal in this case, which was decided on December 7, 2011 by the Ninth Circuit. Petitioner cannot cite a single opinion since *Pinholster* where the unusual facts of this case have recurred. Therefore review by this Court is unwarranted.

Additionally, no Circuit opinion supports petitioner's claim that this Court's decision in *Pinholster* precludes the consideration of relevant and material evidence by a federal habeas court and prohibits remand thereafter to permit the state court to consider such evidence in the first instance, when the state prosecutor and courts have prevented the habeas petitioner from discovering and presenting that evidence at the original state habeas proceeding. *Pinholster* does not stand for such a remarkable proposition. *See Pinholster*, 131 S. Ct. at 1401, n. 10 ("Justice SOTOMAYOR's hypothetical involving new evidence of withheld exculpatory witness statements, see post, at 1417–1418, may well present a new claim."). As Justice Breyer explained, "AEDPA is not designed to take necessary remedies from a habeas petitioner but to give the State a first opportunity to consider most matters and to insist that federal courts properly respect state-court determinations." *Pinholster*, 131 S. Ct. at 1413, (Breyer, J. concurring in part and dissenting in part). Here the State, by withholding relevant impeachment evidence of the prosecution's key witness, declined that "first opportunity."

B. The Decision Of the Court of Appeals Correctly Applied *Cullen v. Pinholster*.

In *Pinholster*, this Court held 28 U.S.C. § 2254(d)(1) federal habeas review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id*., at 1398. This Court noted: "We cannot comprehend how exactly a state court would have any control over its application of law to matters beyond its knowledge." *Id*., at 1399, n. 3.

But *Pinholster* does not bar the presentation of additional facts in support of respondent's *Brady* claim in state court, within the state's knowledge, when that court and the prosecution control and limit the facts on which the court bases its habeas ruling. As this Court noted in *Pinholster*, "[p]rovisions like §§ 2254(d)(1) and (e)(2) ensure that federal courts sitting in habeas are not an alternative forum for trying facts and issues *which a prisoner made insufficient effort to pursue in state proceedings*." *Pinholster*, 131 S. Ct. at 1401 (internal quotations and citations omitted; emphasis added). Respondent did not violate this fundamental principle. Here the state precluded respondent from presenting the facts in support of his claim, facts that the prosecution possessed and respondent had diligently attempted to discover and present to the state court. Therefore, as the Court of Appeals correctly determined, it was appropriate to give respondent another chance to present the withheld evidence to the state court.

Alternatively, respondent's *Brady* claim, supported by the newly discovered evidence previously withheld by the state, may present a "new claim" not subject to the limitations of § 2254(d). This Court's *Pinholster* majority's opinion does not preclude this result. See *Pinholste*r, 131 S.Ct. at 1401 ("[S]tate prisoners may sometimes submit new evidence in federal court). Specifically, "Justice Sotomayor's hypothetical involving new evidence of withheld [*Brady* material] may well present a new claim." *Id*., at n. 10. Nothing in this Court's *Pinholster* majority's reasoning suggests that it intended to limit a diligent petitioner's ability to present to the federal habeas court evidence consisting of potentially exculpatory material that the state failed to disclose contrary to its *Brady* obligations, especially where the state precluded a petitioner from discovering and presenting that evidence to the state courts.

Additionally, *Pinholster* partly relied on the AEDPA's "goal of promoting comity finality, and federalism by giving state courts the first opportunity to review a claim, and to correct any constitutional violation in the first instance." *Id*., at 1401 (citation omitted). In this case state courts did not have the opportunity to evaluate the *Brady* claim on all the available facts. Respondent made diligent efforts in state court to discover and present the facts supporting his *Brady* claim in order for the state to correct the constitutional

violations "in the first instance." *Id*. Had the prosecution disclosed those facts, as the state court "expect[ed] and assume[d]" it would, Appendix A, at 13 or as the federal court ultimately did, respondent would have been able to present to the state habeas courts all the factual bases for his claims. If the state court then denied relief, consistent with *Pinholster*, the federal court could consider all the facts in assessing the reasonableness of the state court's determination. Through no fault of respondent, the state court chose to ignore those facts and adjudicated the claim on an incomplete record of its own creation. The Ninth Circuit opinion remanding the matter to the state court in order to consider the previously undisclosed facts to determine the *Brady* claim, therefore fulfils the AEDPA "goal of promoting comity." *Pinholster*, at 1401.

In contrast to *Pinholster* where the materials presented at the federal habeas proceedings could have been presented in the state habeas proceedings, respondent was unable to discover and present the facts supporting his *Brady* claim to the state court because the California Supreme Court denied him access to these facts, which were possessed and withheld by the prosecution.

In interpreting the related provision of the AEDPA, 28 U.S.C. § 2254(e)(2), which concerns the prohibition of holding a federal evidentiary hearing following a state habeas hearing, this Court held that a federal evidentiary hearing is not prohibited where the petitioner fails to develop the factual basis for a claim without fault. See *Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."). *Williams* relied on 28 U.S.C. § 2254(e)(2)(A)(ii), which provides an exception to the no-hearing rule where the petitioner shows "a factual predicate [for the claim] that could not have been previously discovered through the exercise of due diligence."

Petitioner in effect claims that, notwithstanding § 2254(e)(2)(A)(ii), *Pinholster*'s interpretation of §2254(d)(1) with precludes a federal court from ever considering facts not previously presented to the state court, even if the failure to develop facts in support of a claim at the state habeas hearing is the fault of the state. *Pinholster* does not require

such a result. See *In re Chapman*, 166 U.S. 661, 667 (1897) ("statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion"). Petitioner's position would nullify § 2254(e)(2)(A)(ii), contrary to the established principle that "an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (internal citations and quotations omitted); see also *Rodriguez v. United States*, 480 U.S., 522, 524 (1987) (repeals by implication are disfavored and will not be found unless an intent to repeal is clear and manifest).

Indeed, § 2254(e)(2) and § 2254(d) are easily reconciled with respect to the facts of this case. This Court in *Williams v. Taylor*, interpreted § 2254(e)(2) to ensure avoiding "needless tension with § 2254(d)." 529 U.S. at 434 ("If the opening clause of § 2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim even if he could satisfy § 2254(d)."); see also *Pinholster*, 131 S. Ct. at 1400-01 (explaining how the Court's interpretation of § 2254(d) preserves a role for § 2254(e)(2)). Petitioner's position would abolish such role.

The implications of the State's position are stark and troubling. Petitioner claims respondent is barred from ever presenting the facts in support of his claim, facts that were undeveloped in state court because the prosecution concealed those facts from him in violation of its *Brady* obligations and the state courts precluded respondent from discovering those facts. The decision of the Court of Appeals correctly recognized that *Pinholster* does not stand for this proposition, which would effectively reward unscrupulous prosecutors for prolonged and successful concealment of *Brady* evidence. On the contrary, the Court of Appeals correctly adhered to the principles of comity emphasized by this Court in *Pinholster*, by giving the state court the first opportunity to determine all the relevant facts in support of respondent's *Brady* claim.

Even petitioner, in his supplemental briefing to the Court of Appeals, acknowledged the propriety of remand to state court to give it the first opportunity to rule on the significance of the evidence withheld by the prosecution. See Appendix A, at 61, Appendix L, at 545-548.

The decision of the Court of Appeals also adheres to this Court's teaching in *Rhines v. Weber*, 544 U.S. 269, 278 (2005), that, "if 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 ... the district court should stay, rather than dismiss" the petition. As shown above, respondent had good cause for not presenting the new evidence to the state court, cannot be faulted for not presenting the facts to the state court and has a potentially meritorious claim. *Pinholster* does not require the Court of Appeals to have ruled otherwise and reward the prosecution for its failure to fulfill its *Brady* obligations.

C. The California Supreme Court Has Ordered Additional State Proceedings.

Consistent with provisions of Rule 15.8 of the Rules of this Court, respondent brings to the Court's attention a recent state court development that could affect the Court's decision concerning respondent's Petition for Certiorari. See *Fusari v. Stein berg*, 419 U.S. 379, 391 (1974) (Burger, J., concurring). Attached hereto as Exhibit "A" is a copy of the July 18, 2012 Order of the California Supreme Court to the California Department of Corrections, directing it to show cause why a hearing under *Atkins v. Virginia*, 516 U.S. 304 (2002) and *In re Hawthorne*, 35 Cal. 4th 40 (2005), should not be granted.

CONCLUSION

For all of the foregoing, Petitioner requests this Court deny the Petition.

Dated: July 18, 2012

Respectfully submitted,

LAW OFFICES OF MARK E. OVERLAND

By: _____

Mark E. Overland
Attorney for Respondent
JESSE EDWARD GONZALES