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.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
A. SCOTT HAYWARD
Deputy Attorney General
JAMES WILLIAM BILDERBACK II*
Supervising Deputy Attorney General
**Counsel of Record*
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2049
Fax: (213) 897-6496
E-mail: Bill.Bilderback@doj.ca.gov
Counsel for Petitioner

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REPLY TO BRIEF IN OPPOSITION

Gonzales's Brief in Opposition (Opp.) makes no genuine attempt to defend either the new rule or the new remedy announced by the Ninth Circuit below. The Ninth Circuit held that, even after it has been demonstrated that a claim in a federal petition fails (because the state court reasonably rejected it, because it fails on its merits de novo, or, as here, both), a federal petitioner is nevertheless entitled to a stay of federal proceedings, based upon nothing more than a "colorable" claim that new evidence that was not previously presented to the state court has been discovered. Gonzales's failure to defend this unprecedented rule is understandable, however, because he never advocated it.

Instead, Gonzales simply laments that if the limitations on federal collateral review in 28 U.S.C. § 2254 are applied to him, he will not be able to receive relief from his conviction and judgment. As the State demonstrated in the petition, however, no injustice will ensue if the rules Congress laid down are applied in the way this Court has previously instructed. This Court held in *Premo* v. *Moore*, 131 S. Ct. 733, 745 (2011), and *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011), that, if a claim fails to pass through the § 2254(d) threshold because the state court rejection of the claim was reasonable in light of the facts presented to the state court, then that is the end of federal review. The new rule the Ninth Circuit has announced runs roughshod over *Premo* and *Pinholster*.

I.

In the thirty-one years since Gonzales was convicted and sentenced to death for murdering a peace officer, his trial has been analyzed and re-analyzed for error. Of the dozens of claims for relief that Gonzales has asserted and that have been adjudicated by the state and federal courts, every single one has failed. Included in this litany of failed claims is Gonzales's allegation that the prosecution violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to provide to the defense material exculpatory evidence about prosecution witness William Acker.[1] The California Supreme Court rejected that claim on its merits. PA 431-33, 438-42; *People* v. *Gonzalez*, 800 P.2d 1159, 1202, 1205-07 (Cal. 1990). The federal district court—reviewing the claim de novo, and contemplating the California Department of Corrections (CDC) reports Gonzales discovered during the course of the federal proceedings[2] —likewise found that the *Brady* claim

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[1] Although Gonzales raised a related claim of ineffective assistance of counsel for failing to discover and present the same evidence, the reasons Gonzales offers for opposing certiorari apply solely to the alleged *Brady* violation.

[2] Gonzales's assertion, that "[i]t is uncontested that the undisclosed impeachment evidence was in the possession of the prosecution prior to respondent's trial," is untrue. Opp. at 2 n.3. The State vigorously disputed the Ninth Circuit's conclusion in that regard in its petition for rehearing in the Ninth Circuit. Indeed, Gonzales has never even suggested that five of the six CDC reports were ever in the possession of the prosecution at any time prior to or during his trial. As to the sixth, although Gonzales at least alleged that the prosecution was in possession of that report, the State has consistently contested that

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was without merit. PA 328-36. And the Ninth Circuit expressly agreed that the California Supreme Court decision rejecting the *Brady* claim on its merits was reasonable. PA 34-35 n.12; *Gonzalez* v. *Wong*, 667 F.3d 965, 986 n.12 (9th Cir. 2011).

The Ninth Circuit nonetheless set aside the state court's reasonable rejection of the claim, and ignored the district court's conclusion that the claim failed on its merits even with the new material.[3] Instead, the Court of Appeals remanded the matter to the district court, with directions to enter a stay so that Gonzales could return to state court, based upon its conclusion that a state court "could" grant relief on the claim in light of the new evidence. PA 22; *Gonzalez*, 667 F.3d at 982.

In so doing, the Ninth Circuit announced a new rule of general application, granting to a state prisoner whose habeas corpus petition contains only unmeritorious claims a stay of federal proceedings based merely on the assertion that new evidence nowhere alleged or discussed in the federal petition perhaps might persuade the state court to grant relief. This new rule directly conflicts with this Court's rulings in *Premo* and *Pinholster* that, if a

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(…continued)
allegation. *See* PA 870-72.

[3] Given that the only court that has examined the *Brady* claim in light of the CDC reports—the federal district court—concluded that the claim fails on its merits, and insofar as the Ninth Circuit did not gainsay that determination, Gonzales's assertion that "the prosecution concealed those facts from him in violation of its *Brady* obligations . . . ," Opp. at 10, is unsupportable.

claim fails to pass through the § 2254(d)(1) threshold because the state court's rejection of the claim on its merits was reasonable, then federal habeas review must end. Instead of respecting these precedents, the Ninth Circuit has created a system that will lead to abusive delays that are contrary to the interests of justice. *Martel* v. *Clair*, 132 S. Ct. 1276, 1277-78 (2012).

1. Contrary to Gonzales's assertion, Opp. at 7, there is a clear split among the circuits regarding the impact of *Pinholster* on new evidence presented for the first time in federal court. While the Ninth Circuit below found that new evidence may trigger a right to a stay of federal proceedings, other circuits have held, consistent with the State's position, that new evidence presented for the first time in federal court must be entirely excluded from the federal court's analysis, and that if the claim fails to pass through the § 2254(d) threshold, the claim must be rejected and federal review is at an end. *Clark* v. *Thaler*, 673 F.3d 410, 417 (5th Cir. 2012); *Brown* v. *Wenerowicz*, 663 F.3d 619, 628-29 (3d Cir. 2011). Certiorari should be granted to resolve this conflict.

2. The Ninth Circuit expressly held that the *Brady* claim it was considering was the same claim that the California Supreme Court had rejected on its merits. PA 59, *Gonzalez*, 667 F.3d at 998. Gonzales is uncertain about his own position on that question, suggesting at one point that the claim is the same claim "supported by the newly discovered evidence," but then arguing that he "may" be presenting "a 'new claim' . . . ." Opp. at 8. Regardless of Gonzales's lack of clarity, however, the new stay rule the Ninth Circuit has announced applies, by its own terms, to a claim presented to a federal court that is the same as

the claim that was presented in state court.

The Ninth Circuit also expressly held that the state court determination of the *Brady* claim was reasonable. PA 34-35 n.12; *Gonzalez* v. *Wong*, 667 F.3d at 986 n.12. Gonzales does not dispute this conclusion. Instead, he complains that the Ninth Circuit "only" held that the claim fails in light of the state-court record. Opp. at 5. But this is precisely the test under § 2254(d)(1), properly limited pursuant to this Court's holding in *Pinholster*, 131 S. Ct. at 1398. When a claim fails to pass through the § 2254(d)(1) threshold, federal review "is at an end." *Pinholster*, 131 S. Ct. at 1411 n.20; *accord Premo* v. *Moore*, 131 S. Ct. at 745. Gonzales has no legally cognizable complaint just because the laws Congress enacted as interpreted by this Court make federal collateral relief unavailable to him.

3. Gonzales argues that simply denying him relief under § 2254(d) would work an injustice, insofar as that would "bar the presentation of additional facts in support of [his] *Brady* claim in state court . . . ." Opp. at 8. His argument is demonstrably false. *Pinholster* in no way controls what a state prisoner elects to present to the state court. Rather, *Pinholster* discusses what a state prisoner may—or more specifically, what a state prisoner may not—ask a *federal* court to consider when seeking *federal* collateral relief. It says nothing whatsoever about what a state prisoner may present to a state court when seeking relief there.

Gonzales could have presented the CDC reports to the state court, if he had acted with reasonable diligence upon discovering the added evidence back in 2003. *In re Robbins*, 959 P.2d 311, 329-30 (Cal. 1998) (a habeas petitioner who acts

diligently may return to state court with new material discovered during federal proceedings). Instead, over the State's repeated objections, Gonzales chose to pursue his case only in federal court: in the district court for five years after he claimed he first received the CDC reports, and for an additional four years on appeal. Indeed, although Gonzales has now had the CDC reports for nine years, and the Ninth Circuit has directed him to, as of this writing he still has not returned to state court, or justified his delay in doing so.

4. Gonzales unapologetically acknowledges his unwillingness to present the new material to the state court, asserting that he is entitled to a federal evidentiary hearing on his *Brady* claim right now. Opp. at 9-10. In support of this argument, Gonzales repeats the canard there was something suspect about the prosecution's failure to abide by, and the California Supreme Court's decision overturning, the unlawful discovery order entered by the Los Angeles County Superior Court during the pendency of the state habeas matter. Opp. at 2-3. His position ignores the California Supreme Court's authoritative state-law determination that the superior court was without jurisdiction to enter the discovery order. The refusal of the prosecution to comply with this unlawful order was, accordingly, in no way improper. Further, the California Supreme Court held that the *Brady* claim, as pled, failed as a matter of law, which was the very reason that Gonzales's motion for discovery was properly denied. PA 438-42; *People* v. *Gonzalez*, 800 P.2d at 1205-07. The Ninth Circuit held that the California Supreme Court's determination that the claim failed as pled was reasonable. PA 34-25 n.12; *Gonzalez*, 667 F.3d at 986 n.12. Further, the federal district court came to the

same conclusion as the California Supreme Court: it, too, rejected Gonzales's *Brady* claim without granting him a hearing. PA 257-84, 307-14, 322-37. Gonzales is simply wrong to suggest that the California Supreme Court acted improperly in failing to grant him discovery in support of a claim that failed as pled.

Gonzales posits that limiting hearings to situations in which the claim passes through the § 2254(d)(1) threshold "would nullify § 2254(e)(2)(A)(ii)." Opp. at 10. Gonzales's position seeks to resurrect an already-discredited argument. "Section § 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief." *Pinholster*, 131 S. Ct. at 1401. That Gonzales and the concurrence below, PA 95-97; *Gonzalez*, 667 F.3d at 1015, believe that remains an unsettled question inveighs heavily in favor of granting certiorari.

Further underscoring the need for this Court to grant certiorari, federal district courts, both within and outside the Ninth Circuit, have cited the *Gonzalez* decision to authorize discovery and the development of facts never presented to the state court, regardless of whether the discovery and evidentiary development involve claims that were reasonably rejected by the state court. These courts have concluded that, pursuant to *Gonzalez*, it is somehow proper to allow discovery and evidentiary hearings to allow a federal petitioner to develop new evidence in the federal proceedings for the purpose of trying to improve the claim previously rejected on the merits by the state court. They thus treat *Gonzalez* as authority for turning the federal habeas process into an open-ended discovery mechanism to develop evidence for the express purpose of returning,

perhaps repeatedly, to state court—thereby thwarting any hope for finality. *See Hughes* v. *Chappell*, N.D. Cal. case no. 3-3-CV-2666-JSW (7/25/2012 order denying respondent's motion for reconsideration regarding procedural default and granting leave to move for discovery); *Smith* v. *McDonald*, E.D. Cal. case no. CV S-09-2967 MCE GGH P. [2012 WL 671885] (2/29/2012 orders & findings and recommendations); *Nicolas* v. *Morgan*, D. Md. case no. RDB-06-2637 [2012 WL 254848] (1/25/2012 memorandum opinion). Thus, Gonzales's prediction that the rule the Ninth Circuit has announced will have no effect outside "the unusual facts of this case," Opp. at 7, has already been proved wrong.

5. Gonzales likewise goes astray when he suggests that the State "acknowledged the propriety of remand to state court . . . ." Opp. at 11. The State has repeatedly argued that the federal courts should not consider this material because it was never presented to the California Supreme Court. And the State has argued that, if Gonzales wishes to make a claim for relief based on the new material, there is only one court in which he properly may seek that relief in the first instance: the California Supreme Court. But the State disputes that a "remand" to the state court—or, as the Ninth Circuit did here, a remand to the district court with directions to stay the proceedings while Gonzales decides whether to return to the state court—is proper. The petition Gonzales filed in federal court stated no claims upon which relief could be granted. Prior to the Ninth Circuit's decision in *Gonzalez*, the proper disposition of such a petition was clear and uncontroversial: deny the petition and dismiss it with prejudice. Because the federal proceedings, per *Premo* and

Pinholster, are supposed to be "at an end," there has only been one proper forum to present the new material Gonzales wishes to discuss: state court. But that reality does not inform the proper disposition of the meritless petition Gonzales filed in federal court.

II.

Gonzales offers no meaningful defense of the Ninth Circuit's novel stay procedure, in which any state prisoner is entitled to a stay based on nothing more than his assertion that he has discovered new evidence that he argues might be helpful in some way, and that he asserts he could not have found earlier. As this case illustrates, even if the prisoner makes no showing of diligence, does not incorporate the new material into his federal petition, and does not attempt to return to state court for years and years (in this case, nine years and counting) after the new material is discovered, the new stay procedure concocted by the Ninth Circuit would still remain available.

The conclusion that Gonzales could not have discovered this material earlier in the exercise of reasonable diligence is, to say the least, in some tension with his claim that any reasonably diligent attorney would have discovered this material *at the time of his trial over thirty years ago.* PA 906-11; *see* PA 15 n.7, *Gonzalez*, 667 F.3d at 977 n.7. And although the State has consistently argued that Gonzales was not diligent in pursuing this material, and no evidentiary hearing was ever held testing Gonzales's claim of diligence, the Ninth Circuit resolved the factual question of diligence in Gonzales's favor based upon nothing more than his self-serving—and internally contradictory—claim

that he was diligent. Further, as Judge O'Scannlain noted, even after discovering the new material "Gonzales has engaged in intentionally dilatory litigation tactics." PA 109; *Gonzalez*, 667 F.3d at 1021 (O'Scannlain, J., dissenting). Nowhere does the Ninth Circuit majority explain why Gonzales could not have returned to the California Supreme Court years ago, promptly after he discovered the new material.

And it is apparently a matter of indifference to the Ninth Circuit's stay analysis that—as the federal district court concluded in this case—*even with the new evidence*, the claim fails. A stay is, per the Ninth Circuit's new rule, available to any state prisoner based on nothing more than his bare, unsupported assertion that he was diligent, so long as he meets the miniscule burden of alleging that a state court "could" conceivably find that the new evidence could inform the disposition of some claim. The Ninth Circuit's assertion of this sweeping but highly improbable new power should be scrutinized by this Court.

III.

Finally, Gonzales suggests, without explanation, that the pendency of an *Atkins* v. *Virginia*[4] petition in the California Supreme Court, in which he alleges that he is mentally retarded and thus cannot be executed, "could affect the Court's decision concerning respondent's Petition for Certiorari." Opp. at 11. Gonzales's suggestion is baseless. Gonzales argued that both the guilt and

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[4] *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002), forbids the execution of an inmate who is mentally retarded.

penalty verdicts are invalid because of the alleged *Brady* error. PA at 764-68. Because the *Atkins* petition only challenges the imposition of penalty, and not the constitutionality of the guilt or penalty determinations, no issue of mootness, ripeness, or justiciability is raised by the its pendency. Accordingly, it in no way militates against this request for review.

* * *

The Ninth Circuit has announced a rule that disregards this Court's decisions in *Premo* and *Pinholster* and that is already leading the lower federal courts to disregard those precedents. In those precedents, this Court explained that, once the federal court determines that the state court reasonably rejected a claim, federal review is at an end. In its place, the Ninth Circuit has created a stay process that will inevitably and unjustifiably delay finality. This is precisely the kind of proceeding that § 2254(d) and this Court's decision in *Pinholster* was designed to end. This Court needs to ensure that its rulings and the statute are followed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 2, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
A. SCOTT HAYWARD
Deputy Attorney General

JAMES WILLIAM BILDERBACK II*
Supervising Deputy Attorney General
**Counsel of Record*
Counsel for Petitioner

JWB:sf
LA2012603672
60826270