No. 13-478

IN THE

Supreme Court of the United States

DARREL ADAMS,

Petitioner,

v.

EARL EUGENE CANNEDY, JR.,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent asks leave to file the attached brief and to proceed *in forma pauperis.*

Respondent has previously been granted leave to proceed *in forma pauperis* in the following court: the United States District Court for the Central District of California, which appointed undersigned counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, on December 3, 2008, which appointment continued through all proceedings before the United States Court of Appeals for the Ninth Circuit.

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Dated: December 16, 2013

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DARREL ADAMS,

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v.

EARL EUGENE CANNEDY, JR.,

Respondent.

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

BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED

Should this Court grant certiorari on a question regarding the application of *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), where: (a) the scenario has never arisen in the 22 years since *Ylst* was decided; (b) the dissenting opinion on which petitioner relies was predicated on *Ylst* no longer being good law; (c) the author of that dissent apparently abandoned that conclusion after this Court endorsed *Ylst*'s look-through doctrine in *Johnson v. Williams*, 133 S. Ct. 1088 (2013); and (d) not even the petition for certiorari contends that the question is, in itself, important.

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BRIEF IN OPPOSITION

Respondent Earl Eugene Cannedy, Jr. submits this brief in opposition to the State's petition for certiorari.

STATEMENT

Based on an accusation by his 13-year-old stepdaughter, A.G., Cannedy was charged with four counts of lewd acts on a child, and one count of attempting to dissuade a witness from reporting a crime. At trial, A.G. testified that Cannedy molested her three times. Cannedy testified as the sole defense witness, and denied ever molesting A.G. The defense theory was that A.G. fabricated the allegations to get away from her strict stepfather, and to go live with her biological father. The jury convicted Cannedy on three counts of lewd and lascivious conduct, and one count of attempting to dissuade a witness. The trial court sentenced him to 128 months' imprisonment.

Cannedy retained a new lawyer and moved for a new trial on the ground of ineffective assistance of counsel. Cannedy alleged that his trial lawyer, Mark Sullivan, "failed to present witnesses who could have corroborated [A.G.]'s motives for accusing [Petitioner] of molestation," and presented a handwritten statement by one of A.G.'s friends that read:

> The second week of February, I logged on the internet to talk to my friends. That day, I was talking to [A.G.], and I decided to look at her profile. To my surprize the profile said, "To everyone whos reading this, the rumers that you've heard are wrong. I just wanted to move to my dads because everyone hates me, and I don't want to put up with it

> anymore. Everything you've heard isnt true. I just made it up, so I could get away from it all. I'm living at my dads where I have friends, and I am very happy....

Pet. App. 49 (errors in original.) The trial court denied Mr. Cannedy's motion for a new trial.

Cannedy appealed his convictions to the California Court of Appeal and simultaneously petitioned that court for a writ of habeas corpus. In that petition, he raised the same ineffective assistance of counsel claim, and he submitted the handwritten statement that he had provided to the trial court together with a sworn declaration by J.C. which said:

> I used to be one of [A.G.]'s best friends. I knew her for three and a half years, and knew her very well in those years.
>
> Regarding the profile I alluded to in my statement that [Cannedy's lawyer] attached in support of [Cannedy's] motion for a new trial ... , it was a buddy profile for AIM ([America Online] instant messenger). I found it while I was on the Internet instant messaging my friends. I think it was on the Internet to tell all of her friends/aquaintences [sic] why she had moved, and why she wasn't coming back.
>
> In the profile, she stated that she made up the claims of molestation against [Cannedy] because she wanted to move to her natural father's home in Northern California where she was more happy and had more friends.
>
> I would have testified at [Petitioner's] trial but his trial attorney did not subpoena me to testify. He never even talked to me.

In a single opinion addressing both the appeal and the petition, the California Court of Appeal affirmed the convictions and denied the writ. The court found Cannedy's ineffective assistance of counsel claim "too vague to warrant

habeas relief" because "there is no allegation that trial counsel knew of the existence of [J.C.], the information on the Internet, or the time frame given for the alleged Internet information, and there is no documentary evidence."

Consistent with California procedure, Cannedy then filed a petition for review and a petition for a writ of habeas corpus in the original jurisdiction of the California Supreme Court. Cannedy submitted his own declaration, stating:

> Prior to my trial, I gave my trial lawyer, Mark Sullivan, names, addresses and phone numbers of all potential witnesses who could give favorable testimony in my behalf.
>
> Prior to my trial, I specifically told Mr. Sullivan about [J.C.] who was a friend of [A.G.]. I indicated that she could give favorable testimony in my behalf as to a motive for [A.G.] to falsely accuse me of the crimes for which I was charged. Contrary to Mr. Sullivan's assertion to my appellate attorney, I never agreed that there were no available witnesses who could give favorable testimony in my behalf. I was disappointed Mr. Sullivan did not call any of my witnesses to testify. I trust[ed that] he knew what he was doing.

The California Supreme Court summarily denied the writ and declined to review the court of appeal's decision.

Cannedy then petitioned the district court for a writ of habeas corpus. The district court held an evidentiary hearing on the ineffective assistance of counsel claim. Six witnesses testified.

First, J.C. and her mother both testified that they saw the away message described in J.C.'s handwritten statement during the second week of February 2003. Thinking that it could be useful evidence, they wrote down the statement and gave it to A.G.'s mother. Second, A.G.'s mother testified that, before the trial, she

gave Sullivan a copy of that statement in a box of other documents. She also testified that, during a meeting with Petitioner and Sullivan shortly before trial, she handed Sullivan a copy of the statement and Sullivan agreed to subpoena J.C. to testify. The Cannedys' former neighbor, present at that same meeting, corroborated that testimony, saying that the statement was discussed "intensely."

Next, A.G. testified that she did not write the away message. But she could not say who else could have written it because she could not recall giving anyone else the password to her America Online account, nor had she stored her password in any computer to which anyone could have had access during the second week of February 2003.

Last, Sullivan testified that, three or four weeks before the trial, Cannedy mentioned a favorable posting that A.G. had made on the Internet. But he testified that Cannedy never could identify who saw it, and the issue eventually "seemed to fizzle." Pet. App. 112.

The district court disbelieved Sullivan, crediting the other witnesses instead. It held that J.C.'s testimony concerning the away message was admissible under state law through California's hearsay exception for prior inconsistent statements. Pet. App. 123. It also held that Sullivan's conduct was constitutionally deficient because "[e]vidence that A.G. recanted her molestation allegations to her friends was so significant and potentially exculpatory that any reasonable attorney would have sought to admit the evidence." Pet. App. 126. The district court concluded that

Sullivan's deficient performance prejudiced Petitioner, because J.C.'s testimony "would have permitted jurors reasonably to conclude, or at least reasonably to suspect, that: (1) [A.G.] fabricated her allegations of molestation; and (2) [A.G.] had a motive to fabricate those allegations because she wanted to move away." Pet. App. 130. "There exists a reasonable probability that such conclusion[s] or suspicion[s] would have raised in the mind of at least one juror a reasonable doubt as to [Cannedy's] guilt." Pet. App. 130–31. The district court granted the petition and the State appealed.

After oral argument before the Ninth Circuit panel, this Court issued its opinion in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). The Ninth Circuit ordered three rounds of supplemental briefing from the parties. Among them was a March 6, 2012 order that the parties brief the effect, if any, of *Gonzalez v. Wong*, 667 F.3d 965 (9th Cir. 2011), on the issues in the case. Among Cannedy's arguments in his March 26, 2012 supplemental brief was that, should the Ninth Circuit find itself unable to affirm the district court judgment based on the record before the state court under *Pinholster*, it should, under *Gonzalez*, remand the action to the district court with an order that the habeas proceeding be stayed and held in abeyance pending Cannedy's presentation to the state court of the evidence disclosed at the district court evidentiary hearing.

A three-judge panel of the Ninth Circuit affirmed the district court, in a published opinion authored by Judge Graber and joined by Tenth Circuit Judge

Lucero, sitting by designation. *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013). The majority found that the California Supreme Court's summary adjudication rejecting Cannedy's claim had been based on an objectively unreasonable determination of the facts. The panel did not reach Cannedy's alternative request that the habeas proceeding be stayed and held in abeyance under *Gonzalez*, 667 F.3d at 980.

The Ninth Circuit applied the "look through" doctrine of *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), by examining the reasoning of last reasoned opinion. The last reasoned option was the state court of appeal's opinion rejecting the ineffective-assistance of counsel claim on the grounds that there was no allegation that Sullivan knew of J.C.'s potential testimony, and that testimony that A.G. wanted to move to her father's come could contradict a portion of Cannedy's defense. The majority held that Cannedy's declarations submitted to the California Supreme Court cured any evidentiary deficiency, and thus the California Supreme Court's denial of relief to Mr. Cannedy was the result of an unreasonable determination of the facts given the evidence before it. Judge Kleinfeld dissented.

The State petitioned for rehearing and hearing en banc. The Ninth Circuit denied rehearing. Six judges dissented. This petition followed.

REASONS FOR DENYING THE PETITION

The Question Presented is a case-specific application of *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), that has never before arisen in the 22 years since *Ylst* was

decided. The State does not present any cognizable grounds for certiorari under Rule 10. Nowhere does the State contend that its Question Presented is itself important. Instead, the State reasons that any Ninth Circuit grant of habeas relief is automatically suspect, and that reversal is important to send a message to the Ninth Circuit. Pet. 13. These are not grounds for certiorari.

The Ninth Circuit was legally and factually correct. The State's theory of error rests on the reasoning of the panel dissent, not of the dissent from the denial of en banc rehearing. Judge Kleinfeld's panel dissent expressed doubt regarding the continuing validity of *Ylst*'s look-through doctrine. But, after this Court applied that doctrine in an intervening decision, Judge Kleinfeld did not even join the en banc dissent. This Court should deny the petition.

1. The State fails to identify any plausible ground for certiorari. The State does not assert that a division of authority exists regarding its Question Presented. Nor does it contend that an exercise of the Court's supervisory power is appropriate. Rather, the State's sole supposed Rule 10 ground for certiorari is that the Ninth Circuit purportedly "decided an important question of federal law in a way that conflicts with relevant decisions of this Court." Pet. 7.

Yet, *Harrington v. Richter*, 131 S. Ct. 770 (2011), the only decision that the State cites as allegedly inconsistent with the ruling below, does not address the Question Presented. The State simply reargues its unreasonably broad reading of

Richter, a reading that this Court rejected in *Johnson v. Williams*, 133 S. Ct. 1088 (2013) (ALITO, J.).

The Question Presented is not important. The scenario here appears never to have arisen, in any case, at any time, in any circuit, during the 22 years since this Court decided *Ylst.* Judge Kleinfeld's panel dissent criticized the majority for failing to cite a case where a federal court "reject[s] the intermediate appellate court's reasoning based upon evidence presented not to it, but subsequently to the state supreme court." Pet. App. 36. But neither Judge Kleinfeld nor the State were able to cite any case where any court ever addressed this situation.[1] There is no reason to believe that the scenario here ever will arise again.

The State's two-sentence argument for the supposed importance of its Question Presented is that this Court has reversed the Ninth Circuit granting habeas relief in the past. The State's theory of Rule 10 importance would presume certiorari every time the Ninth Circuit grants habeas relief.

In short, the State seeks to use this Court as a "Court of General Errors" for the Ninth Circuit. That this Court has, in the past, reversed grants of habeas relief by the Ninth Circuit does not mean that review is warranted in this case. To the contrary, the majority opinion addressed a unique scenario in a principled manner, and it reached the correct conclusion.

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[1] Were it not for the State's footnote on page 13 of its Petition, the State's Table of Authorities would be seven cases long, even including the citations to the opinions below. No decision, other than the opinions below, addresses the State's Question Presented.

2. The Ninth Circuit did not err. The majority's straightforward analysis, Pet. App. 3–35, speaks for itself. The State offers no explanation for how, under any standard of deference, constitutionally sufficient counsel would have failed to call J.C. to testify about A.G.'s highly exculpatory AOL away message. The State's argument against the resulting prejudice actually reinforces the conclusion that J.C.'s testimony would have been extremely powerful for the defense.

The State asserts error based on the rationale of Judge Kleinfeld's panel dissent. Pet. 8–12 (citing Pet. App. 35–44). That dissent began by expressing doubt whether *Ylst* remains good law, and then proceeded to read *Richter* as holding that California Supreme Court denials of review are merits decisions to be reviewed independently from reasoned decisions below. Pet. App. 36–37.

Thirteen days after the panel decision, however, this Court issued a decision contrary to the dissent's reasoning. *Johnson v. Williams* held that "[c]onsistent with our decision in *Ylst* ... the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of [the] petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision to address [the claim]," 133 S. Ct. at 1094 n.1, and rejected the State's argument that *Richter* required deference each time a state court did not expressly state it was declining to reach a factual or legal issue. *Id.* at 1096; Tr. of Oral Arg., *Johnson v. Williams*, No. 11-465, (U.S. Oct. 3, 2012), at 6–7, 10–11, 17.

After *Johnson v. Williams*, Judge Kleinfeld voted to grant panel rehearing and rehearing en banc. Pet. App. 46. But in an unusual move[2] Judge Kleinfeld did not join Judge O'Scannlain's opinion dissenting from the denial of en banc rehearing, which argued that the majority opinion was inconsistent with *Johnson v. Williams*. Pet. App. 47, 56–57. Tellingly, the State does not, under its "Reasons for Granting Certiorari" (Pet. 7–13), mention Judge O'Scannlain's dissent or ask this Court to adopt his reasoning.[3] Indeed, the Petition does not even mention Justice Alito's opinion for the Court in *Johnson v. Williams*. By asking this Court to adopt the rationale of Judge Kleinfeld's panel dissent, without accounting for the intervening authority of *Johnson v. Williams*, the State presents no cognizable theory of error.

3. Further, by failing to account for this Court's decisions, the State eliminates any possibility that its case could present a good vehicle for its Question Presented. It is clear that the State wishes to reargue *Johnson v. Williams* (in which the State lost the threshold issue of formulation of the standard) without

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[2] Judge Kleinfeld dissented from a panel majority opinion and joined (or authored) a dissent from the denial of rehearing en banc in *Gaston v. Palmer*, 387 F.3d 1004 (9th Cir. 2004), *reh'g denied*, 417 F.3d 1050 (9th Cir. 2005), *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003), *reh'g denied*, 353 F.3d 1141, 1142 (9th Cir. 2004), and *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), *reh'g denied*, 210 F.3d 1098 (9th Cir. 2000). *See also al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *reh'g denied*, 98 F.3d 1129 (9th Cir. 2010) (Bea, J., dissenting from panel opinion and joining dissent from order denying rehearing en banc); *Moore v. Czerniak*, 574 F.3d 1092, 1093 (9th Cir. 2009) (Bybee, J., dissenting from panel opinion and joining dissent from order denying rehearing en banc).

[3] The petition mentions Judge O'Scannlain's dissent only under "Opinions and Judgments Below" (Pet. 1) and "Statement of the Case" (Pet. 6-7). The latter section quotes Judge O'Scannlain's statement that the majority "disregards explicit guidance from the Supreme Court" but does not mention that *Johnson v. Williams* was among the cases he cited. Pet. 6-7.

even acknowledging Justice Alito's opinion for the Court. The State implies that *Ylst* is no longer "viable after this Court's decision in *Richter*," Pet. 9, but it ignores *Johnson v. Williams*'s holding reaffirming *Ylst*'s look-through doctrine.[4] The State argues that Judge Kleinfeld's view is "consonant with the observation of the concurrence in *Johnson v. Williams*, 133 S. Ct. 1088 (2013) (SCALIA, J. concurring)," and that the "Ninth Circuit majority rejected this reading of *Richter*." Pet. 8–9. But Justice Scalia concurred only in the judgment. An eight-justice majority of this Court, in an opinion that the State does not cite, rejected that reading of *Richter*. *See Johnson v. Williams*, 133 S. Ct. at 1097.

If a petitioner does not expressly ask this Court to overrule one of its cases, this Court ordinarily decides the case within the confines of that precedent. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (SCALIA, J., concurring) (stressing that petition did not ask the Court to overrule *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003)). Even in AEDPA cases, federal courts do not rescue states from their inadequate framing of the issues. *Wood v. Milyard*, 132 S. Ct. 1826, 1833–34 (2012). With the State not even acknowledging the opinion of the

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[4] Indeed, the State has argued in favor of the application of the *Ylst* look-through doctrine many times since *Richter* (*See, e.g.* Appellee's Brief, *Fairbank v. R. K. Wong*, 2011 WL 2163965, No. 08-99018 at 74 n.14 (9th Cir. filed Jan. 15, 2011) ("under the 'look through' doctrine' this Court must look to the [state] courts' last reasoned decision which addressed the issue."); Appellee's Brief, *Parrish v. Yates*, 2011 WL 3672622, *10, No. 09-55893 (9th Cir. filed Aug. 8, 2011) ("In assessing [a petitioner's] habeas claims, we analyze the last reasoned state decision"); Appellee's Brief, *Harris v. Felker*, 2011 WL 3468132, *14, No. 09-15884 (9th Cir. filed Jul. 29, 2011) ("When there is no reasoned opinion from the highest state court on the petitioner's claim, the court looks to the last reasoned state court opinion in deciding the petition").

Court in *Johnson v. Williams*,[5] it offers no proposal for how its merits argument would apply that precedent.

4. Finally, certiorari is inappropriate here because the State's Question Presented is unlikely to prove material to the result. Under *Gonzalez*, 667 F.3d at 980, Cannedy is entitled, at a minimum, to a remand to the district court, with directions to stay the federal habeas proceeding and hold it in abeyance so that Cannedy may present to the state court the evidence adduced at his federal hearing. The State does not acknowledge Cannedy's alternative argument under *Gonzalez*, or that this Court denied certiorari in *Gonzalez*. *See Chappell v. Gonzales*, 133 S. Ct. 155 (2012).

With the evidence developed at the evidentiary hearing supporting Mr. Cannedy's claim of ineffective assistance of counsel, the state court would likely give Cannedy the relief he seeks. If not, the district court would then evaluate Cannedy's petition based on the full record consistent with this Court's holding in *Pinholster*. Thus, Cannedy would have received the same relief as he did in this action, without the scenario about which the State complains ever coming to pass. Certiorari is inappropriate here.

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[5] The State's blindness to that precedent is so far-reaching that *Johnson v. Williams* does not appear in the Petition's string-cite of instances where this Court has reversed Ninth Circuit decisions granting habeas relief, even though that footnote re-cites *Richter*. *See* Pet. at 13.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for certiorari.

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