No. 09-519

In the Supreme Court of the United States

EDWARD ALAMEIDA, WARDEN, *Petitioner,*

v.

KEVIN PHELPS, *Respondent.*

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

THE NINTH CIRCUIT'S CONSTRUCTION OF RULE 60(B)(6) POSES AN INSUPERABLE CONFLICT WITH *GONZALEZ* V. *CROSBY*, THE DECISIONS OF THREE OTHER FEDERAL CIRCUITS, AND THE HABEAS STATUTE OF LIMITATIONS

Certiorari is necessary because the Ninth Circuit decision is inconsistent with this Court's Rule 60(b) jurisprudence. The methodology employed by the Ninth Circuit to evaluate Rule 60(b)(6) motions in habeas cases is irreconcilable with both the reasoning and result in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). Relief was driven in this case by the Ninth Circuit's misinterpreation of *Gonzalez* as confirming rather than rejecting the availability of Rule 60(b)(6) relief where circuit decisional law on a given point is not well-settled and a habeas petitioner acts diligently to reopen the judgment in light of an intervening change in law.

The Ninth Circuit's reading entirely misses the point of *Gonzalez*. *Gonzalez* made clear that a change in decisional law that would have rendered a previously dismissed habeas petition timely is not an extraordinary circumstance under Rule 60(b)(6). That circumstance is no more extraordinary than in countless other cases where habeas applicants have found their petitions time-barred despite the law evolving in ways that later would have made those petitions timely. Conversely, it is no more extraordinary than in still other cases where a state judgment is overturned by the federal court on habeas corpus despite decisions that subsequently make clear the petition was filed out of time.

The evolution of the law in this regard simply does not warrant Rule 60(b)(6) relief. Nothing was proffered in the instant case as a basis for reopening the district court judgment apart from a purported change in circuit decisional law. Courts have uniformly held such changes are not a ground for relief on habeas corpus. *Gonzalez* v. *Crosby*, 545 U.S.

524, 536-37; *Omar-Muhammad* v. *Williams* 484 F.3d 1262, 1264 (10th Cir. 2007); *Stokes* v. *Williams*, 475 F.3d 732, 735 (6th Cir. 2007); *Hess* v. *Cockrell*, 281 F.3d 212, 216 & n.18 (5th Cir. 2002) (habeas case relying on civil precedents). Indeed, until this case, it had been considered an established principle in the Ninth Circuit itself that a change in the applicable law after a judgment has become final in all respects does not constitute an extraordinary circumstance sufficient to vacate a judgment pursuant to Rule 60(b)(6). *Tomlin* v. *McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989); *Delay* v. *Gordon*, 475 F.3d 1039, 1046 n. 13 (9th Cir. 2007).

According to the Ninth Circuit opinion, the Fourth, Tenth, and Federal Circuits recognize a per se rule, like that of *Tomlin*, that changes in the law are not extraordinary circumstances, while a majority of circuits follow a case-by-case approach when a change in the law is the proffered basis for reopening. Pet. App. at 22. In truth, however, while some circuits articulate a per se rule and others a case-by-case approach, all are uniform in the conclusion that a supervening change in the law does not, in and of itself, qualify as an extraordinary circumstance sufficient to reopen a final and fully executed judgment. [1] Significantly, none of the circuits have adopted the Ninth Circuit's "do-justice" test or granted relief to a habeas applicant on the theory proffered by the court of appeals in this case.

Ironically, *Stokes* v. *Williams*, 475 F.3d 732, the case cited by the Ninth Circuit in support of its approach, illustrates the point. In *Stokes,* the district court dismissed a habeas petition as untimely, concluding that the ninety-day time period for seeking a writ of certiorari from the Supreme Court for the denial of postconviction relief does not toll the

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[1] In *Ritter* v. *Smith,* 811 F.2d 1398 (11th Cir. 1987), by contrast, the judgment was not fully executed. The State was still required by the erroneous decision of the circuit court interpreting state law to retry the penalty phase of defendant's trial.

statute of limitations. As in the present case, at the time of the district court's decision, there was no controlling circuit precedent on this point. Seven months later, the Sixth Circuit ratified the district court's decision. Three years later, however, the circuit changed course and endorsed a view of tolling under which, the district court's earlier decision was erroneous. Stokes diligently moved to reopen on the basis that the new Sixth Circuit decisional law made clear that his habeas petition had been erroneously deemed untimely. The Sixth Circuit nevertheless affirmed the district court's denial of Stokes's motion to reopen despite his uncontested diligence. It reiterated the well-established principle that "a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief." *Stokes*, 475 F.3d at 736. Notably, the Sixth Circuit did not embrace Stokes's argument that his diligence compelled a different result than reached by this Court in *Gonzalez*.

Omar-Muhammad v. *Williams*, 484 F.3d 1262, is remarkably similar to the case at bar and demonstrates that it is the erroneous legal test employed by the Ninth Circuit that explains the opposition conclusion reached. Omar-Muhammad's federal habeas petition was dismissed as untimely by twelve days because the district court did not award him an additional fifteen days after the New Mexico Supreme Court had denied review, concluding that the state court's order had become final the day after its disposition of his state habeas claim. *Id.* at 1263. The district court denied Omar-Muhammad's request for a certificate of appealability, as did the Tenth Circuit. Three years later, the Tenth Circuit held that the statute of limitations should be tolled during the fifteen-day period allowed under state law for filing a petition for rehearing following the denial by the New Mexico Supreme Court of a petition for writ of certiorari. *Id.* Omar-Muhammad filed a Rule 60(b)(6) motion claiming that, based on this new Tenth Circuit decision, the dismissal of his federal habeas petition in 1997 was improper. The court of appeals rejected that argument as a basis for

reopening, even though, as in the case at bar, no clearly established circuit law on this specific topic existed at the time the district court dismissed the petition as untimely. *Id.* at 1265. Reciting *Gonzalez*'s teachings that relief under Rule 60(b)(6) requires extraordinary circumstances and will be exceedingly rare in the habeas context, the Tenth Circuit denied relief, recognizing that relief was precluded by *Gonzalez*.

Respondent cannot distinguish his case from *Gonzalez* or from these circuit decisions. Circuit courts, apart from the Ninth Circuit, do not read *Gonzalez* to require an assessment either of the relative degree of diligence of the habeas applicant in asserting a change in law or the degree of clarity of precedent at the time of the judgment sought to be reopened. Respondent's bald assertions—that the Ninth Circuit's third and most recent judgment in his case is merely fact-driven and that the Ninth Circuit's approach to Rule 60(b)(6) is jurisprudentially mainstream—ring hollow. Br. in Opp'n at 10.

Neither one of those characterizations applies to this case. The only rational explanation for the result reached by the Ninth Circuit panel in this case as well as for the marked variance between the Ninth Circuit's current view of Rule 60(b)(6) and that controlling in the other circuits, is that the Ninth Circuit has promulgated an entirely new legal test, contrary to *Gonzalez*, for motions to reopen. Under that test, a district court is compelled to reopen final and fully executed judgments if the controlling law was purportedly unsettled,[2] the movant is diligent,

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[2] Respondent tries to makes much of the fact that there were contrary decisions being written by different panels of the court at the same time. Br. in Opp'n at 7. But, as explained in the Petition for Writ of Certiorari, the decisions can be reconciled on the basis that those panels which awarded an additional thirty days to applicants challenging their California convictions were examining state-court orders denying original habeas petitions rather than petitions for review. Also, even if

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there is a similarity of issues, and the nonmoving party does not establish fact-specific prejudice. Its "do justice" test all but dispenses with respect for the finality of judgments—an especially objectionable flaw in habeas proceedings attacking final criminal judgments. Under that subjective value-laden approach, diligent habeas petitioners will always be entitled to relief with respect to procedural dismissals because the Ninth Circuit now has concluded that the State suffers no prejudice by reopening if the merits of the habeas petition have not been considered. App. at 30.

The Ninth Circuit's new test of Rule 60(b)(6) posits that justice remains unachieved absent merits review of federal habeas petitions. That construction of Rule 60(b)(6) contravenes the plain purpose of Congress in enacting the habeas statute of limitations. Here, the State had won its case at trial, successfully defended its judgment in the state courts, and successfully defended it again under the then-prevailing circuit interpretation of state court rules. As the panel opinion below observes, respondent's statute of limitations "arguments have been evaluated by no less than twelve federal judges and nine Supreme Court Justices—not including his petitions for rehearing en banc which were reviewed by every judge of this court." Pet. App. at 36. Eleven years have passed since the judgment's finality. Congress has decided that in such circumstances further reconsideration will be strictly limited to a very small set of exceptionally compelling cases. See 28 U.S.C. § 2244(b). A great many cases that would be considered incorrectly decided under later case law do not meet these strict criteria. Congress nevertheless considered the finality of judgments in

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the state rule applied the same way to both kinds of orders, an intra-circuit split in decisional law is not an "extraordinary circumstance." See *U.S. ex rel. Garibaldi* v. *Orleans Parrish School Bd.* 397 F.3d 334, 338 (5th Cir. 2005); *United Airlines, Inc.* v. *Brien* ___F.3d ___, 2009 WL 3923336 (2d Cir. 2009).

criminal cases important enough to outweigh the need for error correction in all but the cases specified in the statute. See *id.*

By deciding that a subsequent alteration in the interpretation of a procedural rule "justifies" relief under Rule 60(b)(6) in order to do justice in a particular case, the Ninth Circuit has substituted its value judgment for that of Congress. The "do-justice" test adopted by the Ninth Circuit plainly conflicts with Congress' intent to limit federal habeas corpus review. It follows that respondent's assertion that this case only involves the application of a settled rule to an unusual set of circumstances is untenable.

Until this case, Rule 60(b)(6) had not been understood as regulating the retroactive application of intervening decisions to final judgments. Properly construed, the rule does not deprive habeas judgments resolved on procedural grounds of finality. Yet that would be the logical result, and by and large the inevitable result in the Ninth Circuit, unless this Court intervenes.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 17, 2009

Respectfully submitted

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