# 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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, in light of *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), a court of appeal's alteration of circuit law on calculating the habeas corpus statute of limitations constitutes an "extraordinary circumstance" sufficient to vacate a final judgment pursuant to Federal Rule of Civil Procedure 60(b).

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## PETITION FOR WRIT OF CERTIORARI

Edward Alameida, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) reversing the district court's denial of respondent's motion to reconsider his Rule 60(b) motion, and granting the motion, is reported at 569 F.3d 1120 (9th Cir. 2009). The circuit court's orders denying panel rehearing and rehearing en banc (Pet App. 38) are unreported, as are its earlier orders denying a certificate of appealability (Pet. App. 42) and granting reconsideration of that denial (Pet. App. 39).

The previous opinion of the court of appeals, dismissing respondent's appeal from the district court's denial of respondent's original Rule 60(b) motion (Pet App. 57), is reported at 366 F.3d 722 (9th Cir. 2004).

The original memorandum opinion of the court of appeals, affirming the district court's dismissal of respondent's habeas corpus petition as untimely (Pet. App. 74), is unreported but appears at 2000 WL 329180, 2000 U.S. App. LEXIS 5954 (9th Cir. Mar. 29, 2000).

The orders and opinions of the United States District Court for the Northern District of California (Pet. App. 42, 71, 77), the California Court of Appeal (Pet. App. 90), and the California Supreme Court (Pet. App. 87, 89) are unreported.

## STATEMENT OF JURISDICTION

The opinion of the court of appeals was filed on June 25, 2009. The court of appeals denied rehearing and rehearing en banc on July 31, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2244(d) of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in part:

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.

Federal Rule of Civil Procedure 60(b) provides:

Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence, that with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

## STATEMENT OF THE CASE

In 1998, the district court dismissed respondent Phelps' federal habeas corpus petition as fifteen days late under 28 U.S.C. § 2244, which sets a limitations period of one year after finality of the state court criminal judgment. The Ninth Circuit affirmed, and this Court denied certiorari in 2001. Later that year,

the Ninth Circuit in *Bunney* v. *Mitchell* interpreted California law as sometimes providing an extra thirty days before such judgments become final. *Bunney* specifically considered the finality under state law of the summary denial of a state habeas petition. Under *Bunney*, respondent's 1998 petition might have been timely with fifteen days to spare rather than untimely as fifteen days late, if that decision also applied to the denial of a state petition for review. Respondent returned to federal court, arguing that that *Bunney*'s change in circuit law was an "extraordinary circumstance" that justified reopening his dismissed habeas corpus proceedings under Federal Rule of Civil Procedure 60(b)(6). Purporting to apply *Gonzalez* v. *Crosby*—where this Court *refused* to treat a change in the judicial law governing the calculation of the § 2244 limitations period as justifying Rule 60(b)(6) relief—the Ninth Circuit in 2009 granted respondent Rule 60(b) relief. The panel cited respondent's "diligence" and its detailed case-specific balancing of many factors.

1. In 1994, a California jury convicted Phelps of first-degree murder in the gang-related drive-by shooting of Mark Crosby. Pet. App. 90-94. The State's proof included eyewitness testimony identifying respondent as one of the shooters, motive evidence, and physical evidence—a loaded handgun, ammunition and fired casings seized from respondent's residences that matched shell casings at the crime scene and in the drive-by vehicle.

The California Court of Appeal, affirmed the judgment on direct review and, in a separate order, denied respondent's petition for writ of habeas corpus. Pet. App. 98-102. Respondent filed petitions for review of both court of appeal decisions. In January 1997, the California Supreme Court denied respondent's petition for direct review of the criminal judgment, and, on April 30, 1997, denied respondent's petition for review of the court of appeal's denial of habeas corpus relief. Pet. App. 87, 89.

2. On May 15, 1998—one year and fifteen days after the California Supreme Court denied the

petition for review in respondent's state habeas corpus case—respondent filed a federal habeas petition under 28 U.S.C. § 2254. Pet. App. 77, 79. On the State's motion, the district court dismissed the petition on the ground that the AEDPA statute of limitations, 28 U.S.C. § 2244(d)(1), had run on April 30, 1997—one year after the California Supreme Court had denied review in the state habeas case. Pet. App. 79. The district court rejected respondent's argument that, under California law, the state supreme court's denial of the petition for review in his state habeas case was not an "order" final upon filing but was instead a "decision" that did not become final for 30 days, delaying the commencement of the limitation period sufficiently to render his federal petition timely with fifteen days to spare rather than untimely as fifteen days late. *Ibid.*; see 28 U.S.C. § 2244(b)(1); former Cal. R. Ct. 24(a).[1]

In 2000, the Ninth Circuit Court of Appeals affirmed the judgment and denied respondent's petition for rehearing and rehearing en banc. Pet. App. 75-76. This Court denied respondent's petition for certiorari in January 2001. *Phelps* v. *Alameida*, 531 U.S. 1073 (2001). See Pet. App. 8.

3. In an unrelated case seven months later—*Bunney* v. *Mitchell*, 262 F.3d 973 (9th Cir. 2001) (per curiam)—the Ninth Circuit concluded that, under California law, the summary denial of a habeas corpus petition within the original jurisdiction of the state supreme court does not become final until 30 days later. The Ninth Circuit undertook its own

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[1] Former Rule 24(a) of the California Rules of Court stated in relevant part: "A decision of the Supreme Court becomes final 30 days after filing . . . . An order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed. [¶] A decision of a Court of Appeal becomes final as to that court 30 days after filing. . . . The decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction . . . , without issuance of an alternative writ or order to show cause . . . ."

interpretation of state law, acknowledging that it was only able to "predict as best we can" after unsuccessfully seeking an answer to the finality question by "certifying" it to the California Supreme Court for resolution. [2] *Id.* at 974.

4. After the Ninth Circuit decided *Bunney*, respondent filed a motion under Federal Rule of Civil Procedure 60(b), claiming that *Bunney* signaled a supervening change in circuit law that justified setting aside the dismissal of his 1998 petition. Pet. App. 9. Respondent urged that *Bunney*'s interpretation of when the denial of an *original habeas corpus petition* becomes final under California law also applied to the state supreme court's denial of his *petition for discretionary review* of the state court of appeal's denial of his state habeas corpus petition. On that premise, respondent argued that the 30-day delay in finality of the state supreme court's denial in his case set back the commencement of the AEDPA limitations period, so that the filing of respondent's 1998 federal petition really was timely and never should have been dismissed. The district court denied the motion.

Relying on *Tomlin* v. *McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989), the district court ruled that a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment. Treating respondent's Rule 60(b) motion as a "successive" habeas petition, the district court also concluded that it lacked subject matter jurisdiction in the absence of pre-filing authorization by the court of appeals. Pet. App. 72-73; see 28 U.S.C. § 2244(b)(3)(A); see also Pet. App. at 59 n.3.

The Ninth Circuit at first granted respondent a certificate of appealability (COA) on the question of whether the district court had erred in construing the motion as a successive habeas petition. Pet. App. 60.

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[2] Amendments to the California Rules of Court have since demonstrated that *Bunney* was wrong on this point. *See* Cal. Rules of Court, Rule 8.532, Advisory Committee Comment.

But it soon vacated the COA as improvidently granted. Pet. App. 70. The court of appeals explained that it did not matter how it might rule on the successive petition issue, for the district court alternately had denied respondent's motion on the merits under Rule 60(b) and no COA had issued on that alternative ruling. Pet. App. 66. The court pointed out that respondent had failed to seek expansion of the COA to encompass review of the merits of the Rule 60(b) motion and that he specifically had argued that his entitlement to Rule 60(b) relief was not at issue. See Pet. App. 69-70. The court therefore held that it was "without jurisdiction to affect the denial of [respondent's] Rule 60(b) motion." Pet. App. 70.

5. In November 2006—more than six years after the Ninth Circuit had affirmed the district court's judgment dismissing respondent's 1998 federal habeas petition as untimely, and more than five years after the decision in *Bunney*—respondent filed a second Rule 60(b)(6) motion that again argued, under *Bunney,* that his 1998 petition should not have been dismissed. Pet. App. 44. The district court denied the motion, and a Ninth Circuit motions panel denied a COA. Pet. App. 41-42. Later, however, another motions panel consisting of Judges Reinhardt and Wardlaw granted a COA on an issue not previously raised: "whether the inconsistent application of rules governing the finality of California Supreme Court habeas decisions deprived [respondent] of a fundamental right and constitutes an extraordinary circumstance warranting relief pursuant to Federal Rule of Civil Procedure 60(b)(6). See 28 U.S.C. § 2253(c)(3); see also 9th Cir. R. 22-1(e)." Pet. App. 39.

Then, in a published opinion authored by Judge Reinhardt, a Ninth Circuit panel in June 2009 reversed the district court's denial of Rule 60(b) relief. The panel asserted, first, that *Bunney* constituted a supervening "'clear and authoritative change in the governing law'" in respondent's favor, in calculating the AEDPA limitations period. Pet. App. 17.

Next, the panel found that the district court had abused its discretion in invoking the circuit's *Tomlin* rule that a supervening change in case law is insufficient to warrant relief under Rule 60(b). Pet. App. 19. According to Judge Reinhardt's opinion, *Tomlin* now was "irreconcilable" with *Gonzalez* v. *Crosby*, 545 U.S. 524. In *Gonzalez*, this Court declined to treat its earlier decision in *Artuz* v. *Bennett*, 531 U.S. 4 (2000), which had recognized that certain flawed state petitions nevertheless tolled the AEDPA limitations period, as an "extraordinary circumstance" that might authorize Rule 60(b)(6) relief for a prisoner whose federal habeas petition earlier had been dismissed under contrary Eleventh Circuit law. In the Ninth Circuit panel's view, however, *Gonzalez* did not automatically rule out such changes in case law as grounds for Rule 60(b) relief; instead, it required a detailed case-by-case inquiry balancing many factors. Pet. App. 19-24.

Then, undertaking that detailed inquiry itself,[3] Pet. App. 24, the panel opined that *Bunney* had not overturned "settled" circuit law; that respondent had pursued his limitations claim with "diligence"; that the State had not relied to its detriment on the finality of the district court's dismissal of respondent's habeas petition; that there was a "close relationship" between the circuit's adoption of *Bunney*'s AEDPA-calculation rule and the limitations-period issue resolved in the district court's original dismissal; and that no considerations of comity were implicated since respondent's Rule 60(b) motion simply sought review of his claims for habeas corpus relief on their merits. Pet. App. 26-34. Judge Reinhardt's opinion did not mention any effect on comity or finality considerations when state

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[3] The court of appeals' opinion in respondent's third federal appeal, in effect, reopens the judgment and vacates its long final panel opinion in respondent's second federal appeal. There, as noted, the Ninth Circuit found the district court denied the Rule 60(b) motion on the merits in an alternative ruling not challenged by respondent. See Pet. App. 66, 69-70.

criminal judgments are subject to review and invalidation in remote federal habeas corpus proceedings.

On July 31, 2009, the Ninth Circuit denied petitions for panel rehearing and rehearing en banc. Pet. App. 38. The district court granted the State a stay on October 19, 2009, pending the resolution of this petition.

## REASONS FOR GRANTING THE WRIT

### INTRODUCTION

Certiorari is necessary because the Ninth Circuit decision is fundamentally inconsistent with this Court's Rule 60(b) jurisprudence as recently reaffirmed in *Gonzalez* v. *Crosby,* 545 U.S. 524. There, this Court held that Rule 60(b) relief in a habeas case should be rare and limited, and that a supervening decision by this Court establishing the proper application of the AEDPA statute of limitations was not an "extraordinary circumstance" warranting reopening a final judgment of dismissal of a habeas petition. Here, contrary to *Gonzalez,* the Ninth Circuit held that a supervening limitations-period *circuit* decision constituted an "extraordinary circumstance." In swinging open the door to habeas relief on such grounds, the Ninth Circuit incorrectly minimized the comity concerns that traditionally inform habeas corpus policy, so that Rule 60(b)(6) will work in this area only as a one-way ratchet threatening the finality of state criminal judgments.

Indeed, the Ninth Circuit's decision conflicts with the Tenth, Eleventh, and District of Columbia Circuits in its interpretation of *Gonzalez* in particular. And it conflicts with decisions of the Fifth, Sixth, and Tenth Circuits on the question of whether supervening decisional law regarding the calculation of the AEDPA statute of limitations constitutes an extraordinary circumstance under Rule 60(b).

## THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *GONZALEZ* V. *CROSBY*

1. In *Gonzalez* v. *Crosby,* 545 U.S. 524, this Court rejected the argument that a subsequent judicial decision regarding the calculation of the AEDPA statute of limitations is an "extraordinary circumstance" within the meaning of Rule 60(b)(6) that justifies reopening a final judgment dismissing a habeas corpus petition.

Although acknowledging that Rule 60(b) applies in habeas corpus cases, this Court recognized that the characteristics of the rule, its demanding standard that the movant demonstrate "extraordinary circumstances," and the limited and deferential nature of appellate review of any such motion will make its availability in habeas proceedings rare. *Id.* at 534-35. In discussing the "extraordinary circumstances" language of Rule 60(b)(6) specifically, the Court correctly discerned that "such circumstances will rarely occur in the habeas context." *Id.* at 535.

More specifically, this Court in *Gonzalez* held that its ruling in *Artuz* v. *Bennett,* 531 U.S. 4—that a procedurally-defective application for state post-conviction relief nonetheless tolls the AEDPA one-year limitations period—was not an "extraordinary circumstance" entitling the petitioner to relief from a final judgment of dismissal shown after the fact to have been erroneous under *Artuz.* The Court's precise explanation for its ruling in *Gonzalez* was simple and clear: "if subsequent decisions would justify reopening long-ago dismissals based on erroneously restrictive interpretations of the statute's tolling provisions, then other decisions from the Court would justify reopening long-ago grants of habeas relief based on erroneously generous interpretations of those provisions." *Gonzalez,* 545 U.S. at 536-37. That explanation leaves no room for the vague, open-ended, case-by-case balancing test that the Ninth Circuit somehow inferred from this Court's *Gonzalez* opinion.

It is true that, after this Court in *Gonzalez* had concluded that even a subsequent decision of its own was not an "extraordinary circumstance" within the meaning of Rule 60(b)(6), it further observed that "the change in the law worked by *Artuz* is *all the less extraordinary* in petitioner's case, because of his lack of diligence." *Id.* at 537 (emphasis added). But this observation hardly represented a retraction, in cases of alleged "diligence, of the Court's fundamental explanation for its holding in *Gonzalez.* In contrast to the Ninth Circuit's misreading of it, the Court's observation merely recognized that Gonzalez' lack of diligence in pursuing relief rendered that which already was non-extraordinary even more so.

2. Having seized on and misinterpreted this Court's observation about Gonzalez' diligence, the Ninth Circuit ended up treating this Court's *Gonzalez* decision as somehow endorsing an elaborate case-by-case test for Rule 60(b)(6) motions in habeas cases. As Judge Reinhardt's opinion tells it, a change favorable to a habeas applicant in federal judicial decisions concerning the AEDPA limitations period (and, by logical extension, decisions concerning procedural bars and other issues) may be an "extraordinary circumstance" so long as there is sufficient reason to reconsider the final judgment to "do justice" in the case. Given that this "do justice" test reads out of the calculus proper consideration of the fundamental habeas corpus policies of comity and finality of state criminal judgments, *Woodford* v. *Garceau,* 538 U.S. 202, 206 (2003), it will work only in favor of a habeas petitioner seeking relief from a federal court decision and not in favor of a State seeking to do the same. So, in this way too, the Rule 60(b)(6) standard applied by the Ninth Circuit in granting petitioner relief in this case contradicts the precise explanation this Court gave in *Gonzalez* for refusing to grant relief on the theory that a supervening change in AEDPA-limitations case law might be "extraordinary."

3. Not surprisingly, then, the Ninth Circuit's eccentric interpretation of *Gonzalez* conflicts with the straightforward interpretation of *Gonzalez* by

other circuits. The Tenth, Eleventh, and District of Columbia Circuits have all read *Gonzalez* as clearly precluding Rule 60(b)(6) relief based on subsequent decisional law after a judgment has become final.

In *Omar-Muhammad* v. *Williams,* 484 F.3d 1262 (10th Cir. 2007), the Tenth Circuit held that *Gonzalez* required the rejection of the habeas applicant's argument that a subsequent appellate decision correcting a clearly erroneous interpretation of the statute of limitations constitutes an extraordinary circumstance under Rule 60(b)(6). After discussing *Gonzalez,* the court concluded: "We see no way in which we might arrive at a different result in this case." [4] *Id.* at 1265.

In *Outler* v. *United States,* 485 F.3d 1273 (11th Cir. 2007), the Eleventh Circuit rejected a claim that a subsequent change in decisional law could constitute "extraordinary circumstances" sufficient for equitable tolling, relying by analogy on *Gonzalez*'s holding that such a change is not an "extraordinary circumstance" for purposes of Rule 60(b)(6).

And in *Kramer* v. *Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007), the Court of Appeals for the District of Columbia Circuit cited *Gonzalez* for the principle that intervening decisional law is not an "extraordinary circumstance" within the meaning of Rule 60(b)(6).

Although the Sixth and Fifth Circuits have not yet interpreted *Gonzalez*, both are in conflict with the Ninth Circuit regarding the availability of Rule 60(b)(6) relief in these circumstances as well as the significance of a petitioner's diligence in pursuing said relief.

In *Stokes* v. *Williams*, 475 F.3d 732 (6th Cir. 2007), the Sixth Circuit denied the petitioner's Rule 60(b)(6) motion despite a subsequent Sixth Circuit decision that had resolved the statute of limitations

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[4] Even the Ninth Circuit, in a case decided after *Gonzalez,* denied relief after concluding that a change in decisional law is not a sufficient basis for Rule 60(b)(6) relief. See *Delay* v. *Gordon*, 475 F.3d 1039, 1046 n.13 (9th Cir. 2007).

calculation favorably to the habeas applicant. The State argued that *Gonzalez* precluded relief. Stokes attempted to distinguish *Gonzalez* citing his diligence. The Sixth Circuit found it unnecessary to resolve these competing interpretations of *Gonzalez* citing circuit precedent that supervening changes in decisional law are not usually sufficient to reopen a final judgment and therefore the district court did not abuse its discretion in giving the greatest weight to the finality of the judgment.

In *Hess* v. *Cockrell,* 281 F.3d 212 (5th Cir. 2002) the Fifth Circuit flatly rejected the proposition that a subsequent appellate decision by the circuit regarding the calculation of the statute of limitations could constitute an extraordinary circumstance under Rule 60(b)(6). *Id.* at 216. As was explained in *Garibaldi* v. *Orleans Parish Sch. Bd.,* 397 F.3d 334 (5th Cir. 2005), "*minimal delay between finality and motion for relief, denotes the absence of a disqualifying factor rather than the presence of an affirmative one*—and is not truly distinctive but may be present in many cases which do not call for Rule 60(b)(6) relief because extraordinary circumstances are not present." *Id.* at 339 (emphasis added).

4. The heightened comity and finality interests implicated in habeas corpus cases here gives added force to the general principle that developments in judicial decisions do not warrant re-opening final judgments. Federal Rule of Civil Procedure 60(b)(6) allows a district court to relieve a party from a final judgment only in "extraordinary circumstances." *Liljeberg* v. *Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 (1987) (citing *Ackermann* v. *United States,* 340 U.S. 193 (1950)). This Court has stated that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) . . . ." *Agostini* v. *Felton,* 521 U.S. 203, 239 (1997). The important policy favoring finality of litigation mandates the rule, recognized by this Court and followed by every court of appeals that has considered the question, that an intervening change in decisional law alone generally does not constitute an extraordinary circumstance

and is not a proper basis for relief from a fully executed final judgment under Rule 60(b)(6). See *Biggins* v. *Hazen Paper Co*, 111 F.3d 205, 212 (1st Cir. 1997); *DeWeerth* v. *Baldinger*, 38 F.3d 1266, 1272-73 (2d Cir. 1994); *Seese* v. *Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (per curiam); *Dowell* v. *State Farm Fire & Casualty Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *Hess* v. *Cockell*, 281 F.3d 212, 216 (5th Cir. 2002); *Bailey* v. *Ryan Stevedoring Co.*, 894 F.2d 157, 159-60 (5th Cir. 1990); *Stokes* v. *Williams*, 475 F.3d 732, 735 (6th Cir. 2007); *Cincinnati Ins. Co.* v. *Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-30 (7th Cir. 1997); *Carter* v. *Romines*, 593 F.2d 823, 824 (8th Cir. 1979); *Omar-Muhammad* v. *Williams*, 484 F.3d 1262, 1264 (10th Cir. 2007); *Ritter* v. *Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987).

In contrast, the Ninth Circuit stands alone in its misreading of *Gonzalez* as having created a multi-factor test for deciding Rule 60(b)(6) motions based upon federal decisional law that alters the legal landscape existing when a judgment on procedural grounds was entered against the moving party. Likewise, the judgment below appears to be the only post-*Gonzalez* decision to have concluded that if a habeas applicant acts diligently, a change in federal decisional law regarding the AEDPA statute of limitations is an extraordinary circumstance that may compel reopening a final judgment of dismissal.

* * *

The Ninth Circuit in this case failed to abide by this Court's decision in *Gonzalez*. Further, in treating its *Bunney* rule— itself a (mis)construction of a former state appellate rule rather than any core constitutional principle—as an "extraordinary circumstance" that justifies reopening long final judgments, it also undermined Congress' purpose in enacting AEDPA and in creating the one-year statute of limitations in 28 U.S.C. § 2244(d). Congress enacted that statute in order "to reduce delays in execution of state and federal criminal sentences . . . . and 'to further the principles of comity, finality, and federalism.'" *Woodford* v. *Garceau*, 538 U.S. 202, 206

(2003) (citations omitted). Unless this Court corrects the Ninth Circuit, the approach employed by the panel in this case will put into question each final dismissal of a habeas corpus petition with every incremental change in the applicable federal decisional law. Over time, such an approach could, as a practical matter, eliminate the one-year limitations period on habeas relief imposed by Congress.

## CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 27, 2009

Respectfully submitted

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