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PROTECTING FIRST FEDERAL HABEAS CORPUS PETITIONS: CLOSING THE OPENING LEFT BY *GOMEZ*

Lonchar v. Thomas, 116 S. Ct. 1293 (1996)

I. INTRODUCTION

In *Lonchar v. Thomas*,[1] the Supreme Court held that a court may not dismiss a first federal habeas corpus petition for ad hoc equitable reasons outside the framework of the Federal Habeas Corpus Rules.[2] *Lonchar* involved a petitioner who filed his first federal petition nearly eight years after a jury convicted him on three counts of malice murder and one count of aggravated assault.[3] In an opinion by Justice Breyer, the Court first noted that a court cannot deny a stay of execution when a first petition contains claims worthy of consideration, because that court would abuse its discretion by allowing the case to become moot as a result of the petitioner's death.[4] Justice Breyer then stated that the Eleventh Circuit improperly relied upon special ad hoc equitable reasons in vacating Lonchar's stay of execution and refusing to consider his first petition because of abusive delay.[5] The Court reversed the circuit court's decision because it was (1) contrary to the gradual evolution of formal judicial, statutory, and rules-based doctrines of law concerning habeas petitions, and (2) improperly based on *Gomez v. United States District Court for Northern District of California*,[6] which was applicable only to successive petitions.[7]

This Note argues that the Supreme Court's real purpose in *Lonchar* was to protect the availability of first federal habeas corpus petitions by narrowing the scope of the per curiam opinion in *Gomez*. The 1992 *Gomez* decision allowed for different valid interpretations of whether a court is permitted to dismiss a first federal habeas corpus petition based on a petitioner's abusive delay in filing the petition.[8]

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1 116 S. Ct. 1293 (1996).
2 *Id.* at 1298.
3 Brief of Respondent at 1, Lonchar v. Thomas, 116 S. Ct. 1293 (1996) (No. 95-5015).
4 *Lonchar*, 116 S. Ct. at 1297.
5 *Id.* at 1298.
6 503 U.S. 653 (1992).
7 *Lonchar*, 116 S. Ct. at 1298-1303.
8 *See Gomez*, 503 U.S. at 653-54.

Justice Breyer could have entirely avoided this problem based on the Court's unanimous opinion that Larry Lonchar's conduct was not abusive.[9] Instead, Breyer chose to limit the applicability of *Gomez* to successive petitions, and thereby prevented lower courts from using the "abuse of the writ" doctrine to dismiss first petitions.[10] This note further argues that Justice Breyer's protection of first petitions was consistent with congressional intent and Supreme Court precedent.

II. BACKGROUND

A. THE ORIGINS AND EARLY HISTORY OF AMERICAN FEDERAL HABEAS CORPUS LAW

For the imprisoned, the "Great Writ" of habeas corpus is a procedural safeguard protecting personal liberty.[11] The protection of the writ originated in English common law.[12] Article I, section 9 of the United States Constitution also guarantees the writ: "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[13] The writ was not designed to adjudicate the guilt of a prisoner, but merely allows the prisoner to contest the validity of his or her imprisonment.[14] Accordingly, the Judiciary Act of 1789[15] first empowered federal courts to issue the writ to federal prisoners who wanted to challenge the jurisdiction of their confining court[16] or to challenge detention without proper legal process by the President.[17] There was no expansion of the Great Writ's protection until 1867, when Congress also gave state prisoners the chance to contest their confinement in federal court.[18]

However, the Act of 1867 did not explicitly define the scope of the writ or the procedures associated with it.[19] Therefore, courts in the late nineteenth century usually followed the common law practice that res judicata[20] did not apply to a dismissed habeas corpus petition,

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9 The four Justices who chose not to join the majority opinion still concurred in the judgment. *Lonchar*, 116 S. Ct. at 1295.

10 *See id.* at 1297, 1301.

11 Fay v. Noia, 372 U.S. 391, 401 (1963).

12 *Id.* at 400.

13 U.S. CONST. art. I, § 9, cl. 2.

14 *Fay*, 372 U.S. at 423-24 n.34.

15 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 (1848).

16 McCleskey v. Zant, 499 U.S. 467, 478 (1991) (citing *Ex parte* Watkins, 7 L. Ed. 650 (1830)).

17 *Id.* (citing *Ex parte* Wells, 15 L. Ed. 421 (1856)).

18 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (Little, Brown 1868) (codified as 28 U.S.C. §§ 2241-55 (1994)).

19 *Fay*, 372 U.S. at 405-06.

20 Normally, the principle of res judicata dictates that a final judgment rendered by a

and prisoners were free to successively petition other courts.[21] When the appeal process for denial of these petitions later became available, confusion developed.[22] Some state courts denied habeas corpus appeals based on res judicata[23] while others used an intermediate approach allowing smaller numbers of successive petitions.[24]

The Supreme Court finally resolved the confusion in 1924 with *Salinger v. Loisel*[25] and *Wong Doo v. United States*.[26] These two cases clearly established that res judicata does not apply to the denial of federal habeas corpus petitions[27] and laid the groundwork for what would later be known as the "abuse of the writ" doctrine.[28] Due to the availability of appellate review, the Court determined in *Salinger* that successive petitions should be

> disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application.[29]

Soon after *Salinger*, the Court applied that decision's rule in *Wong Doo*.[30] The petitioner there presented two claims in his original petition, but argued only one.[31] After the district court denied his petition, he attempted to raise the abandoned claim in a successive petition which the court also dismissed.[32] The Supreme Court affirmed the lower court's ruling because the petitioner had ample opportunity to offer proof of his abandoned claim when he brought his first petition, and had no reason for not doing so.[33] The Court noted that "[t]o reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of

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court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

21 Salinger v. Loisel, 265 U.S. 224, 230-31 (1924).

22 *Id.*

23 *See, e.g.*, McMahon v. Mead, 139 N.W. 122, 123 (S.D. 1912); *Ex parte* Heller, 131 N.W. 991, 994 (Wis. 1911).

24 *See, e.g., Ex parte* Cuddy, 40 F. 62, 66 (S.D. Cal. 1889).

25 265 U.S. 224 (1924).

26 265 U.S. 239 (1924).

27 McCleskey v. Zant, 499 U.S. 467, 480 (1991) (quoting *Salinger*, 265 U.S. at 230).

28 *See id.* at 481 (quoting *Salinger*, 265 U.S. at 231).

29 *Salinger*, 265 U.S. at 231.

30 265 U.S. at 240-41.

31 *Id.* at 240.

32 *Id.*

33 *Id.* at 241.

habeas corpus."[34]

The Court next addressed abuse of the writ in 1948.[35] In *Price v. Johnston*, the Court delineated the burdens of both the government and the petitioner regarding possible abuse of the writ.[36] The Court held that the State must be clear and particular in establishing that a petitioner has abused the writ with a successive petition.[37] If the State met this standard, then the burden shifted to the petitioner to show that he or she had a valid reason for the delay in presenting a new claim.[38] The Court gave two examples of valid reasons: acquiring new relevant information or being unaware of the significance of prior known facts.[39]

B. 1948-1976: CODIFICATION OF THE COMMON LAW PERTAINING TO SUCCESSIVE HABEAS PETITIONS

One month after the Court decided *Price*, Congress enacted 28 U.S.C. § 2244, the first statute dealing with successive federal habeas corpus petitions.[40] This statute allowed a federal court to dismiss a subsequent petition that presented no new grounds for relief.[41] Some interpreters believed by negative implication that Congress was also forcing courts to accept petitions that alleged any new relief grounds.[42] However, this would have been contrary to common law principles recognizing that new claims could constitute abuse if a petitioner unreasonably excluded them from prior petitions.[43] Anticipating this confusion, the Reviser's Note to the statute pointed out that Congress did not intend to disrupt the judicial evolution of habeas principles,[44] so the abuse of the writ doctrine which the Court developed in *Wong Doo* and *Price* remained unchanged.[45]

In 1963, the Court confirmed the unchanged status of the abuse of the writ doctrine in *Sanders v. United States*.[46] The *Sanders* Court dealt with a related provision of the judicial code, 28 U.S.C. § 2255, which allowed a federal district court to refuse to entertain a subse-

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34 *Id.* (alteration omitted).
35 Price v. Johnston, 334 U.S. 266 (1948).
36 *Id.* at 292-93.
37 *Id.* at 292.
38 *Id.*
39 *Id.* at 291.
40 McCleskey v. Zant, 499 U.S. 467, 483 (1991).
41 28 U.S.C. § 2244 (1948).
42 *McCleskey*, 499 U.S. at 483.
43 *Id.* at 483-84.
44 *Id.*
45 Sanders v. United States, 373 U.S. 1, 12 (1963).
46 *Id.*

quent habeas corpus petition seeking "similar relief."[47] The Court simplified its analysis by concluding that § 2255 was the "material equivalent" of § 2244, and that § 2255 did not announce a stricter abuse of the writ standard.[48] With this equivalence in mind, the Court moved on to describe its interpretation of § 2244's coverage.[49] The Court explained that this statute addressed only a first situation of successive petitions based on relief grounds which a court had already heard and dismissed on the merits.[50] The Court distinguished a second situation commonly giving rise to abuse of the writ—where a petition contains a different ground for relief, or an earlier ground for relief which the petitioner abandoned[51]—and stated that it was not within the statute's coverage.[52] Where this second situation arose, a court could avoid considering the petition's merits only if there had been an abuse of the writ.[53] The opinion then stated that a court was to use equitable principles as a guide when determining if there had been abuse, including the principle that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."[54] The Court gave examples:

> if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.[55]

In 1966, Congress amended § 2244, accounting for the distinction drawn by the Court in *Sanders*.[56] Congress wanted to "introduc[e] a greater degree of finality of judgments in habeas corpus proceedings."[57] Subsection (b) of the amended statute addressed the second situation involving successive petitions, the situation which the *Sanders* Court found to be outside the prior statute's coverage.[58] The amended statute allowed a court to dismiss at its discretion this type of

47 *McCleskey*, 499 U.S. at 484.
48 *Sanders*, 373 U.S. at 13-14.
49 *See id.* at 12.
50 *Id.*
51 *Id.* at 17.
52 *Id.* at 12.
53 *Id.* at 17.
54 *Id.* at 17-18 (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)).
55 *Id.* at 18.
56 *See* McCleskey v. Zant, 499 U.S. 467, 485-86 (1991).
57 S. REP. No. 89-1797, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3663, 3664.
58 *See McCleskey*, 499 U.S. at 486.

successive petition unless the petitioner alleged a new ground for relief and had not intentionally withheld the new ground or "otherwise abused the writ."[59] If the petitioner met these conditions, the court was required to consider the merits of the petition as long as there were no other habeas errors such as nonexhaustion of state remedies or procedural default.[60] Conversely, even when a petition was clearly abusive, Congress did not intend the amended statute to limit a court's discretion to hear the petition if the court so chose.[61]

In 1976, Congress approved the Rules Governing Habeas Corpus Proceedings [hereinafter Federal Habeas Corpus Rules].[62] Rule 9(b), like § 2244(b), addressed the problem of a petitioner raising new grounds for relief in successive petitions:[63]

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.[64]

An earlier draft of Rule 9(b) included the phrase "was not excusable" instead of the "constituted an abuse of the writ" language.[65] However, Congress eventually decided that "the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition . . . . The 'abuse of the writ' standard brings Rule 9(b) into conformity with existing law."[66] Thus, similar to its enactment of 28 U.S.C. § 2244(b), Congress had again codified the principles set forth in *Sanders*.[67]

Rule 9(a) addressed another problem in habeas corpus proceedings—delay in filing petitions—on which judicial abuse of the writ doctrine did not touch.[68] Rule 9(a) stated:

> [a] petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.[69]

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59 28 U.S.C. § 2244(b) (1994).
60 *McCleskey*, 499 U.S. at 486-87.
61 *Id.* at 487.
62 28 U.S.C. § 2254 (1994).
63 *McCleskey*, 499 U.S. at 487.
64 28 U.S.C. § 2254 Rule 9(b) (1994).
65 *See* H.R. REP. No. 94-1471, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2481-82.
66 *Id.*
67 Rose v. Lundy, 455 U.S. 509, 521 (1982) (plurality opinion).
68 *See* Lonchar v. Thomas, 116 S. Ct. 1293, 1300 (1996).
69 28 U.S.C. § 2254 Rule 9(a) (1994).

While this rule is directly applicable to both first and successive petitions, in either case the state must still make a particularized showing that the delay prejudiced its ability to respond.[70] Another rule, Rule 4, is also relevant to both first and successive petitions.[71] It authorizes a court to dismiss a federal habeas petition summarily when "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief . . . ."[72] If the court can dismiss the petition on its merits, the court obviously does not have to further address those merits in another proceeding and can deny a stay of execution for a condemned prisoner.[73]

C. MODERN DEVELOPMENTS IN ABUSE OF THE WRIT DOCTRINE

In 1983, the United States Supreme Court held that the reverse principle of Federal Habeas Corpus Rule 4(a) is also true in the context of federal appeals: namely, if a court cannot dismiss a petition on its merits, the court must address those merits and stay a pending execution.[74] In *Barefoot v. Estelle,* a district court had denied a first federal habeas petition, but subsequently issued a certificate of probable cause for the petitioner to appeal to a circuit court.[75] Since this certificate of probable cause meant that the circuit court could not dismiss the petition on its merits, the Supreme Court ruled that the circuit court must grant a stay of execution pending disposition of the petitioner's claims.[76] Failing to grant the stay could have allowed the case to become moot as a result of the prisoner's execution.[77]

Two more recent decisions have also impacted the abuse of the writ doctrine.[78] The first came in 1991 when the United States Supreme Court decided *McCleskey v. Zant.*[79] The Court established a new, separate legal standard for abuse of the writ.[80] In addition to the *Sanders* example of deliberately abandoning a claim and then repleading it in a subsequent petition,[81] the Court decided that it would also find abuse of the writ if a petitioner raises a new claim in a subsequent petition which the petitioner did not raise earlier because of "inexcus-

70 *See* Vasquez v. Hillery, 474 U.S. 254, 265 (1986).
71 28 U.S.C. § 2254 Rule 4 (1994).
72 *Id.*
73 *See Lonchar,* 116 S. Ct. at 1297.
74 *See* Barefoot v. Estelle, 463 U.S. 880, 893-94 (1983).
75 *Id.* at 885.
76 *Id.* at 893-94.
77 *Id.*
78 *See* McCleskey v. Zant, 499 U.S. 467 (1991); Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992).
79 499 U.S. 467 (1991).
80 *Id.* at 489.
81 Sanders v. United States, 373 U.S. 1, 17 (1963).

able neglect."[82] In a dissenting opinion, Justice Marshall argued that the Court had no discretion to redefine the legal standard because Congress had already codified the "deliberate abandonment" test from *Sanders*.[83]

The second recent decision affecting the abuse of the writ doctrine is the 1992 per curiam opinion of *Gomez v. United States District Court for the Northern District of California*.[84] There, a petitioner tried to challenge his forthcoming method of execution via a non-habeas statute.[85] With the exception of a one-sentence fact statement, the full pertinent text of the Court's opinion vacating the petitioner's stay of execution was as follows:

> This action is an obvious attempt to avoid the application of *McCleskey v. Zant* to bar this successive claim for relief. [The petitioner] has now filed four prior federal habeas petitions. He has made no convincing showing of cause for his failure to raise the claim in his prior petitions.
>
> Even if we were to assume, however, that [the petitioner] could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or as [an alternative] action, [the petitioner] seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and [the petitioner's] obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.[86]

III. Facts and Procedural History

On October 13, 1986, Larry Grant Lonchar killed Charles Wayne Smith, Steven Smith and Margaret Sweat in a condominium in DeKalb County, Georgia.[87] Charles Wayne Smith and his son, Steven Smith, ran a bookmaking operation out of the condominium to which Larry Lonchar owed several thousand dollars.[88] On the night of the murders, Lonchar and a companion, Mitchell Wells, knocked on the

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82 *McCleskey*, 499 U.S. at 489. The Court equated "inexcusable neglect" with the "cause and prejudice" standard used in the state procedural default context for habeas petitions. *Id.* at 493. This meant that "inexcusable neglect" would be present unless the petitioner showed cause for not bringing the claim earlier and actual prejudice resulting from the alleged errors. *Id.* at 493-94 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986); United States v. Frady, 456 U.S. 152, 168 (1982)).

83 *Id.* at 512 (Marshall, J., dissenting).

84 503 U.S. 653 (1992).

85 *Id.* at 653.

86 *Id.* at 653-54 (citations omitted).

87 Lonchar v. State, 369 S.E.2d 749, 750 (Ga. 1988).

88 *Id.*

condominium's door and entered the living room which was then occupied by Wayne Smith, Steven Smith, and Margaret Sweat.[89] Richard Smith, another son of Wayne Smith, was in a back bedroom.[90]

Lonchar displayed a badge, falsely identified himself as special agent Larry Lonchar, and proceeded to handcuff Wayne and Steven Smith.[91] Both Lonchar and Wells then killed Wayne Smith by shooting him in the chest, the back, and the head; they killed Steven Smith by shooting him in the chest and the head.[92] Lonchar shot Sweat in the shoulder, but he did not initially kill her.[93] Wells entered the back bedroom and shot Richard Smith several times,[94] but Smith feigned death and avoided further harm while Lonchar and Wells ransacked the condominium.[95] The assailants then left the condominium.[96] Lonchar returned a short time later to find Sweat on the telephone speaking to a 911 operator,[97] at which point he killed her, stabbing her 17 times in the neck and three times in the chest before leaving the condominium for the last time.[98]

Later that evening, Lonchar went to his cousin's house.[99] He complained to his cousin that he "couldn't kill the bitch," and told his cousin that he had cut Sweat's throat.[100] Lonchar's cousin drove him to Chattanooga, where he caught a plane to Texas.[101] Police later arrested Lonchar in Mission, Texas, when he attempted to pick up money that his cousin wired to him.[102]

Larry Lonchar was indicted in DeKalb County for both the felony and malice murders of Charles Wayne Smith, Steven Smith and Margaret Sweat and the aggravated assault of Richard Smith.[103] During his trial, Lonchar refused to assist his attorney in preparing his defense, specifically requested to remain absent from the trial proceedings whenever possible and told the judge that "being realistic . . . I have no case, Your Honor."[104] On June 27, 1987,[105] a jury found

89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 751.
93 *Id.*
94 *Id.*
95 *Id.* at 750.
96 *Id.*
97 *Id.*
98 *Id.* at 751.
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 Brief of Respondent at 1, Lonchar v. Thomas, 116 S. Ct. 1293 (1996) (No. 95-5015).
104 *Lonchar*, 369 S.E.2d at 752.
105 Brief for Petitioner at 4, Lonchar v. Thomas, 116 S. Ct. 1293 (1996) (No. 95-5015).

Lonchar guilty on three counts of malice murder (mooting the felony murder indictments) and one count of aggravated assault.[106] He received a sentence of death by electrocution for the three counts of murder and twenty years imprisonment for the aggravated assault conviction.[107] After the court denied a motion for a new trial, Lonchar's case came up for mandatory appellate review over his objection,[108] and the Georgia Supreme Court affirmed the sentences and convictions on July 13, 1988.[109] After initially refusing to authorize any collateral attacks on his conviction or sentence and writing the trial judge to request an execution date,[110] Lonchar made the first of numerous about-faces regarding his desire to die[111] by authorizing the filing of a petition for certiorari which the United States Supreme Court denied.[112] In early March, 1990, the Superior Court of DeKalb County issued a warrant authorizing Lonchar's execution during the week beginning March 23, 1990.[113]

Two days before the scheduled execution and against Larry Lonchar's wishes, his sister, Chris Kellogg, filed a "next friend"[114] habeas corpus petition in state court on March 21, 1990, claiming that Lonchar was incompetent.[115] She set forth his history of serious mental illness and supported it with new psychological evaluations.[116] Most of her sixteen claims for relief asserted that Lonchar had not received a fair trial and sentencing because of his psychological problems.[117] However, on March 28, 1990, the state court found Lonchar competent and thus dismissed Kellogg's petition because she had no standing.[118] The Georgia Supreme Court subsequently affirmed the competency finding[119] and the United States Supreme

106 Respondent's Brief at 1, *Lonchar* (No. 95-5015).

107 *Id.*

108 Petitioner's Brief at 7, *Lonchar* (No. 95-5015).

109 Lonchar v. State, 369 S.E.2d 749, 754-55 (Ga. 1988).

110 Lonchar v. Thomas, 116 S. Ct. 1293, 1295 (1996).

111 Petitioner's Brief at 7, *Lonchar* (No. 95-5015).

112 Lonchar v. Georgia, 488 U.S. 1019 (1989).

113 *Lonchar*, 116 S. Ct. at 1295.

114 A "next friend" is a person acting for the benefit of either an infant or another person unable to look after his or her own interests or to manage his or her own lawsuit. The next friend is not a regularly appointed guardian. BLACK'S LAW DICTIONARY 1043 (6th ed. 1990).

115 Petitioner's Brief at 7-8, *Lonchar* (No. 95-5015).

116 *Id.* at 8.

117 *Id.*

118 *Id.* at 8-9. A third person cannot raise a legal claim for an individual if the individual is capable of bringing the claim herself. If the court had judged Lonchar to be incompetent, then his sister would have had standing to bring the claim as a next friend.

119 Kellogg v. Zant, 390 S.E.2d 841 (Ga. 1990).

Court denied Kellogg's petition for certiorari.[120] Kellogg then presented the same claims in a next friend habeas petition in federal court on October 23, 1990.[121] Although the federal judge accepted the unanimous opinion of several psychiatrists that Lonchar had a mental illness,[122] he ruled that Lonchar was competent and dismissed Kellogg's petition.[123] The Court of Appeals for the Eleventh Circuit affirmed,[124] and the U.S. Supreme Court again denied certiorari.[125] In early February, 1993, the Superior Court of DeKalb County issued a warrant authorizing Lonchar's execution during the week beginning February 24, 1993.[126]

Larry Lonchar then uncharacteristically authorized his own habeas corpus petition in Georgia state court on February 24, 1993, less than an hour before his scheduled execution.[127] Lonchar subsequently changed his mind and asked to withdraw the petition.[128] On January 16, 1995, with the state conceding that the action was appropriate, the state court dismissed the habeas petition without prejudice.[129] The DeKalb County court later issued a death warrant for the third time, this time authorizing Lonchar's execution during the week beginning June 23, 1995.[130]

Milan Lonchar, Larry's brother, then filed his own "next friend" habeas petition in Georgia state court requesting a new competency examination for Larry Lonchar.[131] Milan Lonchar presented affidavits from two psychologists who believed Larry Lonchar might be incompetent based on his generally bizarre behavior—a 1993 suicide attempt in prison, his uncertainty about whether he wanted to live and his admittance that he lied to experts during previous competency evaluations.[132] A state expert who had found Lonchar competent during proceedings three years earlier also submitted an affidavit questioning the reliability of his previous findings.[133] Despite these

120 Kellogg v. Zant, 498 U.S. 890 (1990).
121 Petitioner's Brief at 9, *Lonchar* (No. 95-5015).
122 *Id.* at 11 n.29.
123 *Id.* at 10-11.
124 Lonchar v. Zant, 978 F.2d 637, 642 (11th Cir. 1992).
125 Lonchar v. Zant, 113 S. Ct. 1378 (1993).
126 Petitioner's Brief at 11, *Lonchar* (No. 95-5015).
127 Brief of Respondent at 5, Lonchar v. Thomas, 116 S. Ct. 1293 (1996) (No. 95-5015). This may have been a direct response to Lonchar's brother threatening to commit suicide if Lonchar did not seek to stop the execution. *See* Petitioner's Brief at 11, *Lonchar* (No. 95-5015).
128 Respondent's Brief at 5-6, *Lonchar* (No. 95-5015).
129 Petitioner's Brief at 12-13, *Lonchar* (No. 95-5015).
130 *Id.* at 13.
131 *Id.*
132 *Id.*
133 *Id.* at 13-14.

statements, and noting that Larry Lonchar himself opposed the "next friend" petition, the court found Lonchar competent and dismissed the petition for lack of standing on June 21, 1995.[134] The Georgia Supreme Court denied a certificate of probable cause to appeal and denied a stay of execution on June 22, 1995.[135] A federal district court[136] and the Eleventh Circuit[137] also dismissed Milan Lonchar's petition on June 22, 1995, and June 23, 1995, respectively.

On June 23, 1995, Larry Lonchar again changed his mind and decided to file his second petition for habeas corpus relief in his own behalf in Georgia state court.[138] He presented twenty-two claims and told the court he wished to pursue each, but that his purpose was to delay his execution in the hope that Georgia would change to lethal injection execution so he could donate his organs.[139] After temporarily staying the execution, the court denied the petition on June 25, 1995, because Lonchar did not show a genuine intention to pursue most of his claims.[140]

Lonchar immediately filed the same twenty-two claims in his first federal habeas corpus petition.[141] The State requested dismissal of the petition on two grounds: first, the State felt Lonchar's conduct in waiting almost six years to file his first federal petition constituted "inequitable conduct";[142] and second, the State believed that Lonchar had waived his federal claims by not raising them at previous opportunities.[143] The district court found no inequitable conduct because Lonchar's petition presented significant issues concerning the validity of his conviction and sentence which no federal court had previously reviewed.[144] It noted that Habeas Corpus Rule 9 authority to dismiss for "abuse of the writ" specifically applied only to second or successive habeas petitions.[145] The court was unsure about the State's waiver claim, so it ordered a stay of execution on June 28, 1995, to consider that issue further.[146] The next day, the Eleventh Circuit vacated the stay, asserting that equitable doctrines independent of Rule 9 pre-

134 *Id.* at 15.
135 *Id.*
136 *Id.*
137 Lonchar v. Thomas, 58 F.3d 588 (11th Cir. 1995).
138 Brief for Petitioner at 15, Lonchar v. Thomas, 116 S. Ct. 1293 (1996) (No. 95-5015).
139 Lonchar v. Thomas, 116 S. Ct. 1293, 1296 (1996).
140 Petitioner's Brief at 16, *Lonchar* (No. 95-5015).
141 *Lonchar*, 116 S. Ct. at 1296.
142 *Id.*
143 Petitioner's Brief at 16, *Lonchar* (No. 95-5015).
144 *Id.* at 17.
145 *Id.*
146 *Id.*

cluded even this first habeas petition.[147] The Eleventh Circuit took note of the Supreme Court's per curiam opinion in *Gomez v. United States District Court for the Northern District of California*,[148] which it read to bar relief even for first petitions when the petitioner's conduct is abusive.[149] Regardless of the waiver claim, the Eleventh Circuit held Lonchar's conduct was abusive because of his lengthy delay in filing his petition and his failure to raise the issues during the "next friend" proceedings.[150]

Lonchar then filed an application with the United States Supreme Court to stay the execution, and simultaneously filed a petition for certiorari.[151] On June 29, 1995, the Court granted the stay of execution and the petition for certiorari[152] to consider whether the Court of Appeals could properly dismiss a first habeas petition for special ad hoc "equitable" reasons not within the framework of Rule 9.[153]

IV. Summary of Opinions

A. Majority Opinion

In an opinion written by Justice Breyer,[154] the Supreme Court overruled the Eleventh Circuit's decision vacating Larry Lonchar's death sentence.[155] Justice Breyer first noted that when a first habeas corpus petition presents original claims that are worthy of consideration but a court still denies a stay, that court abuses its discretion by allowing the case to become moot as a result of the petitioner's execution.[156] Thus, although the Court was dealing with an order vacating a stay of execution, the analysis was the same as if it were considering an order to dismiss a first habeas petition. With that in mind, the Court then listed six main reasons supporting its holding that the Eleventh Circuit incorrectly vacated Lonchar's stay of execution by improperly relying upon special ad hoc "equitable" reasons which neither the Federal Habeas Corpus Rules nor prior precedents embody.[157]

Justice Breyer began by asserting that the court of appeals could

147 Lonchar v. Thomas, 58 F.3d 590, 593 (11th Cir. 1995).
148 503 U.S. 653 (1992).
149 *Lonchar*, 58 F.3d at 593.
150 *Id.*
151 Petitioner's Brief at 19, *Lonchar* (No. 95-5015).
152 Lonchar v. Thomas, 115 S. Ct. 2640 (1995).
153 Lonchar v. Thomas, 116 S. Ct. 1293, 1298 (1996).
154 Justices Stevens, O'Connor, Souter and Ginsburg joined Justice Breyer in the majority opinion.
155 *Lonchar*, 116 S. Ct. at 1303.
156 *Id.* at 1297.
157 *Id.* at 1298-1303.

only lawfully vacate Lonchar's stay of execution if that court could lawfully dismiss his first federal habeas corpus petition.[158] He noted that vacating the stay—and thus executing Lonchar—would effectively dismiss the petition because it would prevent the court from considering the petition's merits.[159] Prior precedent from *Barefoot v. Estelle* had established that "a court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal."[160] The Court determined that this same principle logically applies to a district court faced with a similar dilemma; thus, a petitioner like Larry Lonchar, whose claims the court cannot summarily dispose of on the merits, must receive a stay of execution until such time as the court can properly adjudicate the claims.[161]

The Court then rejected the concurrence's proposition that the per curiam opinion of *Gomez v. United States District Court for Northern District of California*[162] had displaced the rationale of *Barefoot*.[163] *Gomez* said that a "court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."[164] However, Justice Breyer distinguished *Gomez* because, unlike the court in Lonchar's case, the Court in *Gomez* could have justifiably dismissed the habeas petition within the existing framework of the Federal Habeas Corpus Rules.[165] Thus, Breyer argued that *Gomez* did not create ad hoc standards for first federal petitions, and the concurrence's reading of that opinion seriously conflicted "with *Barefoot*'s well-settled treatment of first habeas petitions."[166]

The Supreme Court next answered the question of whether a court could properly use the Eleventh Circuit's special ad hoc "equitable" reasons, even though they are not within the framework of Rule 9, to dismiss a first federal habeas petition.[167] In concluding it was improper to use these special ad hoc reasons, the Court noted first that the history of the Writ of Habeas Corpus shows the gradual evolu-

158 *Id.* at 1296.

159 *Id.*

160 *Id.* at 1297 (citing Barefoot v. Estelle, 463 U.S. 880, 893-94 (1983)).

161 *Id.*

162 503 U.S. 653 (1992).

163 *Lonchar*, 116 S. Ct. at 1297.

164 *Id.* (citing *Gomez*, 503 U.S. at 654).

165 *Id.* The court could have dismissed the petition as an "abuse of the writ" under Federal Habeas Corpus Rule 9(b) because it was a fifth attempt at review regarding an issue which the petitioner could have easily raised in an earlier petition.

166 *Id.*

167 *Id.* at 1298.

tion of formal judicial, statutory, and rules-based doctrines, and not individual judges dismissing writs at their discretion.[168] Congress, the Rule writers, and courts had developed principles that regularized and narrowed judicial discretion.[169] Justice Breyer pointed out that those principles seek to maintain the courts' freedom to issue the writ, and they reflect a balancing of objectives which Congress normally makes, but which courts will make when Congress has not resolved the question.[170]

Secondly, the majority emphasized that a court cannot ignore the principles embodied in statutes, rules, and precedents even if the writ is considered an "equitable" remedy.[171] Justice Breyer noted that equitable rules guiding lower courts "reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in 'finality' such rules often further."[172] While criticizing any departure from settled rules, the Court was particularly concerned about ad hoc dismissals of first federal habeas petitions which would entirely deny petitioners the writ's protection.[173] The Court noted that Federal Habeas Corpus Rule 4 presents a concrete standard for deciding whether first habeas petitions are worthy for a court to consider, obviating the need for any ad hoc judgments.[174]

As its third point, the Court emphasized that the use of ad hoc rules was unnecessary and inappropriate because Congress specifically addressed the main factor which led the Eleventh Circuit to dismiss Lonchar's petition—delay—in Habeas Corpus Rule 9(a).[175] The Court noted that dismissal is appropriate under Rule 9(a) if by an unnecessary delay in filing the state is prejudiced in its ability to respond to the petition.[176] However, the State specifically did not rely on Rule 9(a), so the Eleventh Circuit's ad hoc "equitable" reasons for dismissal did not include a finding of prejudice.[177] The Court pointed out that when the Rules' framers included the prejudice requirement, they did so to acknowledge "the equitable maxim that a

168 *Id.*; *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 479-89 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 451 (1986) (plurality opinion); Barefoot v. Estelle, 463 U.S. 880, 892 (1983); Sanders v. United States, 373 U.S. 1, 15 (1963); Townsend v. Sain, 372 U.S. 293, 313 (1963).

169 *Lonchar*, 116 S. Ct. at 1298.

170 *Id.*

171 *Id.*

172 *Id.* at 1299.

173 *Id.*

174 *Id.*

175 *Id.* at 1300.

176 *Id.*

177 *Id.*

petitioner's conduct may disentitle him to relief."[178] Justice Breyer found that the Eleventh Circuit relied on this very same maxim as authority for acting outside the Rules and *not* requiring prejudice.[179] Furthermore, Justice Breyer recognized that (1) Congress rejected a draft Rule that would have eased the burden of the prejudice requirement by presuming prejudice after a delay of five years,[180] and (2) since 1986 more than eighty bills proposing presumptions of prejudice after certain time periods have failed.[181]

The Court's fourth reason for overruling the Eleventh Circuit's decision was a narrow interpretation of *Gomez v. United States District Court for the Northern District of California.*[182] The Eleventh Circuit understood *Gomez* to mean a court could refuse a first habeas petition for generalized "equitable" reasons.[183] According to the Court, however, *Gomez* simply meant established "equitable" rules apply regardless of what vehicle a petitioner uses to bring a habeas petition.[184] Justice Breyer distinguished *Gomez* by emphasizing that "equitable" rules were appropriate there because it was the petitioner's fifth petition, not his first like that of Larry Lonchar.[185]

The Court also examined its proposition in *Gomez* that a "'court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.'"[186] In giving its fifth reason for allowing a stay of execution, the Court again stated that *Gomez* involved a successive petition, not a first, and that Habeas Corpus Rule 9(b) directly authorizes dismissal of successive, not first, petitions for unduly late filings as "abuse of the writ."[187]

Finally, Justice Breyer recognized that other circumstances upon which the Eleventh Circuit relied were unimportant and irrelevant to the Court's decision.[188] The "next friend" petitions did not aggravate or mitigate Lonchar's delay in filing his own petition; a possible state-law procedural bar to the petition was at most an issue which required litigation and therefore a stay of execution; and consideration of Lonchar's motive was improper because his claim was valid on its

178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.* at 1301 (citing Appendix to the opinion).
182 *Id.*
183 Lonchar v. Thomas, 58 F.3d 590, 593 (1995).
184 *Lonchar*, 116 S. Ct. at 1301.
185 *Id.*
186 *Id.* (quoting Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653, 654 (1992)).
187 *Id.* at 1302.
188 *Id.*

face.[189]

B. CHIEF JUSTICE REHNQUIST'S CONCURRENCE IN THE JUDGMENT

Chief Justice Rehnquist concurred in the judgment[190] but disagreed with the Court's reasoning.[191] Chief Justice Rehnquist proposed that decisions regarding stays of execution are not the same as decisions regarding the merits of a habeas petition because the former involve more than determining an applicant's likelihood of success.[192] The Chief Justice asserted that *Gomez v. United States District Court for the Northern District of California* stands for the proposition that inequitable conduct such as abusive delay and manipulation may disentitle a habeas petitioner to a requested stay of execution, even if the conduct concerns a first federal petition.[193] He also distinguished *Barefoot v. Estelle,* determining that it only addresses how the merits of a habeas petition, and not the petitioner's conduct, can determine whether a petitioner obtains a stay.[194] Regardless of his problems with the Court's reasoning, Chief Justice Rehnquist still felt it proper to overturn the Eleventh Circuit's decision because he did not feel that Larry Lonchar's conduct constituted abuse of the writ.[195]

Chief Justice Rehnquist began by acknowledging that the Court correctly determined there was no basis for denying a stay of execution since Lonchar's claims had merit.[196] However, he disagreed with the Court by drawing a distinction between denying a stay of execution based on a petition's merits and denying a stay of execution based on a petitioner's conduct.[197] The Chief Justice read *Gomez* broadly, deciding that "a habeas petitioner's misconduct in applying for a stay of execution may disentitle him to the stay even if the petition is his first."[198] This conclusion was tenable, Rehnquist reasoned, because (1) *Gomez* stated that abusive delay and obvious manipulation attempts constituted equities for a court to consider in ruling on an execution stay, and (2) *Gomez* stated that this abuse could prevent a court from granting a stay even if merit-based factors which the Court laid out in *McCleskey v. Zant* did not.[199] In fact, Chief Justice Rehn-

189 *Id.*

190 Justices Scalia, Kennedy and Thomas joined Chief Justice Rehnquist's concurrence in the judgment.

191 *Lonchar,* 116 S. Ct. at 1304 (Rehnquist, C.J., concurring in the judgment).

192 *Id.* (Rehnquist, C.J., concurring in the judgment).

193 *Id.* at 1306 (Rehnquist, C.J., concurring in the judgment).

194 *Id.* at 1306-07 (Rehnquist, C.J., concurring in the judgment).

195 *Id.* at 1307 (Rehnquist, C.J., concurring in the judgment).

196 *Id.* at 1304 (Rehnquist, C.J., concurring in the judgment).

197 *Id.* (Rehnquist, C.J., concurring in the judgment).

198 *Id.* at 1306 (Rehnquist, C.J., concurring in the judgment).

199 *Id.* (Rehnquist, C.J., concurring in the judgment).

quist pointed out that the Court in *Gomez* explicitly avoided vacating the stay because of the petition's merits, instead opting to dismiss the petition based on the petitioner's abusive conduct.[200]

Chief Justice Rehnquist then criticized the majority's interpretation of *Barefoot v. Estelle* as a proposition that a court must grant a stay if it does not dismiss a first federal habeas petition on the merits.[201] The Chief Justice emphasized that *Barefoot* only addressed how the merits of a habeas petition, and not the petitioner's conduct, may determine whether a petitioner obtains a stay.[202] He also pointed out language in the *Barefoot* decision which seems contradictory to the majority's belief that a decision on a first federal habeas petition is necessary to validate a state conviction:

> '[t]he role of federal habeas proceedings . . . is secondary and limited. Federal courts are not forums in which to relitigate state trials . . . . The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error.'[203]

However, Chief Justice Rehnquist eventually concurred with the Court's judgment in overturning the Eleventh Circuit's decision because he neither felt that a court could dismiss Lonchar's first federal habeas petition on its merits, nor felt that Lonchar's conduct had been abusive.[204]

V. ANALYSIS

This Note argues that the Supreme Court's real purpose was to narrow the scope of the per curiam opinion in *Gomez v. United States District Court for the Northern District of California*[205] and to protect the availability of first federal habeas corpus petitions. *Gomez* was sufficiently terse and vague to allow different valid interpretations of whether it permitted a court to dismiss a first petition based on a petitioner's abusive conduct. Justice Breyer could have entirely avoided this question based on the Court's unanimous opinion that Larry Lonchar's conduct was not abusive.[206] Instead, he chose to clarify the holding of *Gomez* and thereby prevent lower courts from using the

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200 *Id.* at 1305-06 (Rehnquist, C.J., concurring in the judgment).

201 *Id.* at 1306 (Rehnquist, C.J., concurring in the judgment).

202 *Id.* (Rehnquist, C.J., concurring in the judgment).

203 *Id.* at 1307 (Rehnquist, C.J., concurring in the judgment) (quoting Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983)).

204 *Id.* (Rehnquist, C.J., concurring in the judgment).

205 503 U.S. 653 (1992).

206 The four Justices who chose not to join in the majority still concurred in the judgment. *See Lonchar*, 116 S. Ct. at 1295.

"abuse of the writ" doctrine to dismiss first federal habeas petitions.[207] Justice Breyer's reasoning for this action was consistent with congressional intent and Supreme Court precedent because courts developed the abuse of the writ doctrine in regards to successive petitions only,[208] and Congress has already codified statutes which are relevant to a petitioner's conduct in the instance of a first petition.[209]

A. DID THE *GOMEZ* COURT INTEND TO SUBJECT FIRST FEDERAL HABEAS PETITIONERS TO THE SAME CONDUCT STANDARDS AS SUCCESSIVE PETITIONERS?

Both Justice Breyer's majority opinion[210] and Chief Justice Rehnquist's concurrence in the judgment[211] give plausibly valid interpretations of the scant language in *Gomez.* Their disagreement arises mainly because the factual aspects of the *Gomez* decision make its intended coverage ambiguous.[212] Specifically, the Federal Habeas Corpus Rules did not apply in *Gomez* due to the form in which the petitioner brought his final claim.[213]

The petitioner in *Gomez,* Robert Alton Harris, brought a claim which contested California's method of execution as cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[214] Rather than bringing the claim as a habeas corpus petition, he instead brought it as a member of a class-action suit under 42 U.S.C. § 1983.[215] Presumably it was the inapplicability of the Habeas Corpus Rules to this type of claim which led the *Gomez* court to decree that "[e]ven if we were to assume, however, that Harris could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy."[216]

It is reasonable to infer, as Justice Breyer did,[217] that the Court's language indicates *McCleskey*'s abuse of the writ doctrine would have governed the petitioner's case if the petitioner had brought the action as a habeas petition. This assumption is justifiable for two reasons.

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207 *See id.* at 1297, 1301.

208 *See generally* McCleskey v. Zant, 499 U.S. 467 (1991).

209 *See* 28 U.S.C. § 2254 Rules 4, 9(a), 9(b) (1976).

210 *Lonchar,* 116 S. Ct. at 1295.

211 *Id.* at 1304 (Rehnquist, C.J., concurring in the judgment).

212 *See generally* Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992).

213 *See id.* at 653-54.

214 *See Lonchar,* 116 S. Ct. at 1305 (Rehnquist, C.J., concurring in the judgment).

215 *Id.* at 1306 n.3 (Rehnquist, C.J., concurring in the judgment).

216 *Gomez,* 503 U.S. at 653-54.

217 *Lonchar,* 116 S. Ct. at 1301.

First, *McCleskey's* abuse of the writ doctrine was meant to apply to second or successive petitions,[218] and the *Gomez* Court noted that Harris had already filed four habeas petitions.[219] Second, the Court also noted that Harris had made no convincing showing of cause for his failure to raise the cruel and unusual punishment claim in his prior petitions.[220] This situation of raising a new ground which a petitioner should have included in an earlier petition was precisely one which *McCleskey* listed as being abusive and subject to dismissal.[221]

While *McCleskey* could not directly govern the non-habeas proceeding at issue in *Gomez*, Justice Breyer decided that *McCleskey's* equitable abuse of the writ principles could.[222] Again, this is reasonable because the *Gomez* Court pointed out that Harris was still seeking an equitable remedy similar to habeas corpus relief even if he did not bring his petition in habeas form.[223] This, Breyer believed, was all that *Gomez* intended to state.[224] His statement that "*Gomez* did not, and did not purport to, work a significant change in the law applicable to the dismissal of first habeas petitions"[225] finds strong support in the fact that the *Gomez* Court made specific reference to Harris having filed four previous petitions.[226] The *Gomez* Court was likely using this fact in the first paragraph to frame the later discussion concerning the applicability of the equitable rationale behind abuse of the writ doctrine.[227]

However, Chief Justice Rehnquist saw a contrary significance to the mention of the four previous petitions.[228] Because of that reference's placement in the first paragraph, Rehnquist was of the opinion that the "[e]ven if . . ." language[229] of the second paragraph had to refer to *all* situations involving habeas petitions.[230] He proposed that if the second paragraph only referred to successive petitions, then it would have been superfluous.[231] This argument is not persuasive. While the per curiam opinion would probably accomplish the same objectives with or without the second of its two paragraphs, that does

218 McCleskey v. Zant, 499 U.S. 467, 470 (1991).
219 *Gomez*, 503 U.S. at 653.
220 *Id.*
221 *McCleskey*, 499 U.S. at 489.
222 *Lonchar*, 116 S. Ct. at 1301.
223 *See Gomez*, 503 U.S. at 653-54.
224 *Lonchar*, 116 S. Ct. at 1301.
225 *Id.*
226 *See Gomez*, 503 U.S. at 653.
227 *See id.*
228 *Lonchar*, 116 S. Ct. at 1306 (Rehnquist, C.J., concurring in the judgment).
229 *See* note 216 and accompanying text.
230 *Lonchar*, 116 S. Ct. 1306 (Rehnquist, C.J., concurring in the judgment).
231 *Id.* (Rehnquist, C.J., concurring in the judgment).

not necessarily suggest that the second paragraph's inclusion is either significant or insignificant. Chief Justice Rehnquist failed to consider that the *Gomez* Court may have inserted the second paragraph merely for clarity. He also weakened his argument by failing to explain the rationale behind his superfluousness contention.[232]

Another argument which Rehnquist raised is worthy of stronger consideration. There are two plausible readings of the "[e]ven if" language[233] in *Gomez*. One, which the majority adopted, assumes that Harris could have "avoid[ed] the application of *McCleskey*" because he used a non-habeas vehicle to bring his claim.[234] A second reading, which Chief Justice Rehnquist espoused, is that the Court was speaking *hypothetically* of a situation where *any* petitioner could "avoid the application of *McCleskey*."[235] One such situation would be a first habeas petition because *McCleskey*'s abuse of the writ doctrine concerns successive petitions only.[236] Thus, the *Gomez* Court was stating that, along with other possible avenues where *McCleskey* would be inapplicable, it would not consider first habeas petitions if they involved conduct indicating abusive delay.

While it would seem that *Barefoot v. Estelle* establishes precedent against Rehnquist's theory, he correctly noted that it may not be exactly relevant.[237] While *Barefoot* intimates that a court should grant a stay of execution if it cannot dismiss a first petition on its merits,[238] there is no specific discussion of how the petitioner's conduct might affect the decision. Regardless, even if Rehnquist could get around the *Barefoot* precedent, he cannot get around the plain words of the *Gomez* decision. The Court there unequivocally stated that it was examining a situation where Harris—who had previously brought four habeas petitions—could avoid the application of *McCleskey*.[239] If the Court had meant to consider situations involving first petitions, as Rehnquist suggested,[240] then it surely would have used broader generic language such as "a petitioner" instead of specifically naming Harris. Also, despite *Barefoot*'s possible silence regarding the conduct of the petitioner, the Federal Habeas Corpus Rules Advisory Committee's Note specifically indicates that the framers drafted Rule 9(a) to

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232 *See id.* (Rehnquist, C.J., concurring in the judgment).

233 *See* note 216 and accompanying text.

234 *See Lonchar*, 116 S. Ct. at 1301.

235 *See id.* at 1306 (Rehnquist, C.J., concurring in the judgment).

236 McCleskey v. Zant, 499 U.S. 467, 470 (1991).

237 *Lonchar*, 116 S. Ct. at 1306-07 (Rehnquist, C.J., concurring in the judgment).

238 Barefoot v. Estelle, 463 U.S. 880, 893-94 (1983).

239 Gomez v. United States Dist. Ct. for N. Dist. of Cal., 503 U.S. 653 (1992) (per curiam).

240 *Lonchar*, 116 S. Ct. at 1306 (Rehnquist, C.J., concurring in the judgment).

account for conduct concerns.[241] Rule 9(a), which is applicable to all habeas petitions, allows a court to dismiss even a first petition if a petitioner unreasonably delays its filing to a point where the state is prejudiced in its ability to respond.[242] In fact, when drafting this rule, the framers even took into account the equitable maxim that a petitioner's conduct may disentitle him to relief.[243] This ultimately seems to swing the balance in favor of Justice Breyer's opinion that (1) *Gomez* referred only to a special situation involving a successive habeas petition, (2) *Gomez* did not make first federal habeas petitions subject to the abuse of the writ doctrine which governs successive petitions, and (3) *Gomez* did not create new standards for dismissing first habeas petitions which are different from the standards in the existing Federal Habeas Corpus Rules.[244]

B. THE FIRST FEDERAL HABEAS CORPUS PETITION: JUSTICE BREYER USES *LONCHAR* TO STRENGTHEN THE PROTECTION AFFORDED TO THE HIGHEST SAFEGUARD OF LIBERTY.

All nine Justices unanimously agreed that Larry Lonchar's conduct was not abusive.[245] This factual determination alone would have been sufficient for the Court to overrule the Eleventh Circuit's decision to vacate Lonchar's execution stay.[246] However, Justice Breyer no doubt recognized that *Gomez* had left lower courts confused about the exact standards which they should use to evaluate first federal habeas petitions. Overruling the Eleventh Circuit's decision on purely factual grounds would have implied that the Court accepted that circuit's interpretation of the law, and other courts of appeals would likely have followed the Eleventh Circuit's reading of *Gomez* and allowed dismissal of first petitions for inequitable conduct. Realizing that he needed to close the door on this possibility and that he had the necessary votes to do it, Justice Breyer used the *Lonchar* opinion to render *Gomez* and abuse of the writ doctrine inapplicable to first federal habeas petitions.[247] Justice Breyer's protection of the ability to bring first petitions receives support from the existing Federal Habeas Corpus Rules, modern legislative history, and other Supreme Court decisions.

First, the Federal Habeas Corpus Rules already provide well-de-

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241 *See* 28 U.S.C. § 2254 Rule 9(a) note (1994).

242 *Id.* § 2254 Rule 9(a) (1994).

243 *Id.* § 2254 Rule 9(a) note (1994).

244 *See Lonchar*, 116 S. Ct. at 1301.

245 The four Justices who chose not to join in the majority opinion still concurred in the judgment. *Id.* at 1295.

246 *See* Lonchar v. Thomas, 58 F.3d 590, 593 (11th Cir. 1995).

247 *See Lonchar*, 116 S. Ct. at 1301.

fined avenues for dismissing first habeas petitions.[248] One of these, Rule 9(a), allows a court to dismiss a first petition if the petitioner's conduct was improper and prejudiced the state's ability to respond.[249] The legislative history of the Rules shows that Congress was reluctant to further compromise a petitioner's ability to bring a first petition.[250] Congress removed from an early draft of Rule 9(a) a provision that would have presumed prejudice on the part of the petitioner if he or she had brought the habeas claim after a delay of more than five years.[251] This indicates that Congress considered the petitioner's right to bring a first petition more important than any problems which the passage of time might cause.

Second, the United States Congress has been hesitant to restrict the present availability of first habeas petitions. While more than eighty bills in the past ten years proposed a statute of limitations for instituting federal habeas corpus proceedings,[252] none succeeded until Congress finally passed the Antiterrorism and Effective Death Penalty Act of 1996.[253] The relevant habeas corpus provisions of the Act strive to lessen abuse of the writ by further restricting a petitioner's ability to bring successive petitions[254] and by implementing a one year statute of limitations for bringing any federal petition.[255] However, the Supreme Court has already decreed that "although the Act does impose new conditions on [the Court's] authority to grant relief, it does not deprive [the] Court of jurisdiction to entertain original habeas petitions."[256] Similarly, in congressional hearings which occurred immediately prior to the Antiterrorism Act's introduction, one of the Act's main senatorial sponsors specifically voiced his support

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248 *Id.* § 2254 Rules 4, 9(a) (1994).

249 28 U.S.C. § 2254.

250 *See* H.R. REP. No. 94-1471, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2478, 2481.

251 *Compare Rules of Procedure: Communication from the Chief Justice of the United States Transmitting Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of Title 28*, H.R. Doc. No. 94-464, at 38-39 (1976), *with* 28 U.S.C. § 2254 Rule 9(a).

252 *Lonchar*, 116 S. Ct. at 1303 (appendix to the opinion of the Court).

253 Pub. L. No. 104-132, 110 Stat. 1214 (1996).

254 *See id.* at §§ 105, 106.

255 *Id.* at § 101. Section 101 provides that

> [t]he limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

256 Felker v. Turpin, 116 S. Ct. 2333, 2337 (1996).

for the availability of first petitions.[257] Senator Orrin Hatch of Utah, the chairman of the Senate Committee on the Judiciary, testified that "[h]abeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny."[258] He stated that it was his intention to pass a bill "that will guarantee prisoners one complete and fair course of collateral review in the federal system, free from the time pressures of impending execution and with the assistance of competent counsel for the defendant."[259]

Thus, there is a clear legislative intent to ensure prisoner access to the protections of the Great Writ. The existence of the Federal Rules obviates the need for ad hoc judicial discretion.[260] Adding restrictions to first petitions would not be acting where Congress has been silent, but rather ignoring specific limits which Congress has placed on judicial discretion to dismiss first federal habeas petitions.

Finally, the Supreme Court has handed down 110 decisions regarding habeas corpus proceedings since the beginning of 1976,[261]

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257 *Senate Judiciary Comm. Hearing on Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process*, 104th Cong. (1995) (statement of Senator Orrin Hatch, Chairman of the Senate Committee on the Judiciary).

258 *Id.*

259 *Id.* In the same hearings, a high-ranking member of the Department of Justice also cautioned against restricting the availability of first petitions: "Shortening the habeas corpus process need not mean giving short shrift to constitutional claims . . . . We support streamlining the process while preserving the traditional role of the federal courts by having one full round of federal habeas review." *Id.* (statement of Kevin DiGregory, United States Deputy Assistant Attorney General, Criminal Division). Also, when signing the Act into law, President William J. Clinton offered further support by noting that "provisions of this important bill could be [wrongly] interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims . . . ." Statement by President William J. Clinton Upon Signing S. 1965, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996).

260 *See* Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

261 *See* Felker v. Turpin, 116 S. Ct. 2333 (1996); Gray v. Netherland, 116 S. Ct. 2074 (1996); Calderon v. Moore, 116 S. Ct. 2066 (1996); Bowersox v. Williams, 116 S. Ct. 1312 (1996); Lonchar v. Thomas, 116 S. Ct. 1293 (1995); Thompson v. Keohane, 116 S. Ct. 457 (1995); Netherland v. Tuggle, 116 S. Ct. 4 (1995); Foster v. Gilliam, 116 S. Ct. 1 (1995); Garlotte v. Fordice, 115 S. Ct. 1948 (1995); Purkett v. Elem, 115 S. Ct. 1769 (1995); Kyles v. Whitley, 115 S. Ct. 1555 (1995); Goeke v. Branch, 115 S. Ct. 1275 (1995); O'Neal v. McAninch, 115 S. Ct. 992 (1995); Schlup v. Delo, 115 S. Ct. 851 (1995); Duncan v. Henry, 115 S. Ct. 887 (1995); McFarland v. Scott, 114 S. Ct. 2568 (1994); Reed v. Farley, 512 U.S. 339 (1994); Caspari v. Bohlen, 510 U.S. 383 (1994); Schiro v. Farley, 510 U.S. 222 (1994); Burden v. Zant, 510 U.S. 132 (1994); Delo v. Blair, 509 U.S. 823 (1993); Gilmore v. Taylor, 508 U.S. 333 (1993); Withrow v. Williams, 507 U.S. 680 (1993); Brecht v. Abrahamson, 507 U.S. 619 (1993); Arave v. Creech, 507 U.S. 463 (1993); Graham v. Collins, 506 U.S. 461 (1993); Herrera v. Collins, 506 U.S. 390 (1993); Dobbs v. Zant, 506 U.S. 357 (1993); Richmond v. Lewis, 506 U.S. 40 (1992); Sawyer v. Whitley, 505 U.S. 333 (1992); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); In re Blodgett, 502 U.S. 236 (1992); Estelle v. McGuire, 502 U.S. 62 (1991); Ylst v. Nunnemaker, 501 U.S. 797 (1991); Coleman v. Thompson, 501 U.S. 722 (1991); McCleskey v. Zant, 499 U.S. 467 (1991); Lozada v. Deeds,

the year in which Congress officially passed the Federal Habeas Corpus Rules into statutory law. In all of these decisions, a substantial number of which involved first petitions, the Court has never dismissed a first federal habeas petition because of a petitioner's abusive conduct.[262] In one case, the Court even protected a petitioner's future right to bring a first petition by granting a stay of execution after a petitioner filed a motion requesting court-appointed counsel to assist in the petition's preparation.[263]

These reasons strongly justify Justice Breyer's action to protect the use of first federal habeas petitions from additional restrictions. *Lonchar* is significant because it indicates that Rule 9(a) is the only possible avenue for dismissing a first petition due to a petitioner's

498 U.S. 430 (1991); Burden v. Zant, 498 U.S. 433 (1991); Parker v. Dugger, 498 U.S. 308 (1991); Lewis v. Jeffers, 497 U.S. 764 (1990); Sawyer v. Smith, 497 U.S. 227 (1990); Demosthenes v. Baal, 495 U.S. 731 (1990); Delo v. Stokes, 495 U.S. 320 (1990); Whitmore v. Arkansas, 495 U.S. 149 (1990); Selvage v. Collins, 494 U.S. 108 (1990); Terrell v. Morris, 493 U.S. 1 (1989); Maleng v. Cook, 490 U.S. 488 (1989); Dugger v. Adams, 489 U.S. 401 (1989); Harris v. Reed, 489 U.S. 255 (1989); Castille v. Peoples, 489 U.S. 346 (1989); Teague v. Lane, 489 U.S. 288 (1989); Amadeo v. Zant, 486 U.S. 214 (1988); Kimmelman v. Morrison, 477 U.S. 365 (1986); Ford v. Wainwright, 477 U.S. 399 (1986); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986); Cabana v. Bullock, 474 U.S. 376 (1986); Vasquez v. Hillery, 474 U.S. 254 (1986); Thomas v. Arn, 474 U.S. 140 (1985); Miller v. Fenton, 474 U.S. 104 (1985); Hill v. Lockhart, 474 U.S. 52 (1985); Francis v. Franklin, 471 U.S. 307 (1985); Evitts v. Lucey, 469 U.S. 387 (1985); Wainwright v. Witt, 469 U.S. 412 (1985); Reed v. Ross, 468 U.S. 1 (1984); Mabry v. Johnson, 467 U.S. 504 (1984); Strickland v. Washington, 466 U.S. 668 (1984); Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294 (1984); Antone v. Dugger, 465 U.S. 200 (1984); Pulley v. Harris, 465 U.S. 37 (1984); Woodard v. Hutchins, 464 U.S. 377 (1984); Rushen v. Spain, 464 U.S. 114 (1983); Wainwright v. Goode, 464 U.S. 78 (1983); Maggio v. Williams, 464 U.S. 46 (1983); Autry v. Estelle, 464 U.S. 1 (1983); California v. Ramos, 463 U.S. 992 (1983); Zant v. Stephens, 462 U.S. 862 (1983); Maggio v. Fulford, 462 U.S. 111 (1983); Cardwell v. Taylor, 461 U.S. 571 (1983); Marshall v. Lonberger, 459 U.S. 422 (1983); Landon v. Plasencia, 459 U.S. 21 (1982); Anderson v. Harless, 459 U.S. 4 (1982); Engle v. Isaac, 456 U.S. 107 (1982); Lane v. Williams, 455 U.S. 624 (1982); Sumner v. Mata, 455 U.S. 591 (1982); Rose v. Lundy, 455 U.S. 509 (1982); Smith v. Phillips, 455 U.S. 209 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); McCarthy v. Harper, 449 U.S. 1309 (1981); Sumner v. Mata, 449 U.S. 539 (1981); Mabry v. Klimas, 448 U.S. 444 (1980); Cuyler v. Sullivan, 446 U.S. 335 (1980); Pilon v. Bordenkircher, 444 U.S. 1 (1979); Rose v. Mitchell, 443 U.S. 545 (1979); Moore v. Duckworth, 443 U.S. 713 (1979); Jackson v. Virginia, 443 U.S. 307 (1979); County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140 (1979); Greene v. Massey, 437 U.S. 19 (1978); Arizona v. Washington, 434 U.S. 497 (1978); Smith v. Digmon, 434 U.S. 332 (1978); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257 (1978); Wainwright v. Sykes, 433 U.S. 72 (1977); Blackledge v. Allison, 431 U.S. 63 (1977); Brewer v. Williams, 430 U.S. 387 (1977); Castaneda v. Partida, 430 U.S. 482 (1977); Swain v. Pressley, 430 U.S. 372 (1977); Stone v. Powell, 428 U.S. 465 (1976); United States v. MacCollom, 426 U.S. 317 (1976); Francis v. Henderson, 425 U.S. 536 (1976).

262 The Court only dismissed first petitions for procedural reasons, such as nonexhaustion of state remedies. *See, e.g., Dugger*, 489 U.S. at 410.

263 *See* McFarland v. Scott, 114 S. Ct. 2568, 2573 (1994).

abusive conduct.[264] This solidifies the availability of first petitions because a state is rarely able to prove that a petitioner's conduct prejudiced its ability to prosecute. However, it is doubtful for two reasons that there will be noticeable consequences. First, the Court will rarely, if ever, confront the issue. Death row inmates will suffer dire consequences if they hesitate in bringing their petitions, and other prisoners generally do not wait because they logically prefer release sooner to release later.[265] Second, courts had not interpreted *Gomez* as Chief Justice Rehnquist did prior to the Eleventh Circuit's decision in Larry Lonchar's case.[266] Therefore, the view which Rehnquist took had not gained widespread acceptance or attention.

Still, a minor change may occur. Prisoners may file a marginally greater number of first federal habeas petitions. A majority of these claims will come from long-jailed inmates who have never filed a habeas corpus petition. The *Lonchar* decision may give them confidence that courts will at least consider the merits of their petitions, rather than summarily dismissing them for abusive delay. Also, as this Note previously pointed out, if Justice Breyer had simply relied on the Court's unanimous finding of nonabusive conduct, lower courts likely would have seen the Court as tacitly approving the Eleventh Circuit's improper reading of *Gomez*. By instead clarifying *Gomez's* meaning, Justice Breyer prevented a possibly large expansion of judicial discretion concerning the dismissal of first petitions.

VI. CONCLUSION

The United States Supreme Court held that a court may not dismiss a first federal habeas corpus petition for special ad hoc equitable reasons outside the framework of the Federal Habeas Corpus Rules.[267] By not simply finding Larry Lonchar's conduct nonabusive, but rather going further and limiting the applicability of *Gomez* to successive petitions, Justice Breyer foreclosed a possible avenue for the dismissal of first petitions and protected their availability. The Court was justified in reaching this result because congressional intent and judge-made legal doctrines support the preservation of access to first petitions.

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264 Lonchar v. Thomas, 116 S. Ct. 1293, 1300 (1996).

265 Delay is apt to disadvantage the petitioner more than the state because the habeas petitioner generally bears the burden of proof. *See* Garlotte v. Fordice, 115 S. Ct. 1948, 1952 (1995).

266 Since that time, there has been only one unreported opinion (dissent) which employs a rationale similar to that of Chief Justice Rehnquist. *See* Duffey v. Lehman, No. 94-9003, 1996 WL 13154 (3d Cir. 1996).

267 *Lonchar*, 116 S. Ct. at 1298-1301.