No. 18-9546

In the Supreme Court of the United States

EVERETT CHARLES WILLS, II,

Petitioner,

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent.

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO FILE AN AMENDED PETITION FOR A WRIT OF CERTIORARI

The State of Louisiana opposes Everett Wills' motion to amend his petition for a writ of certiorari because (1) there is no procedure or compelling reason enabling Wills to amend his petition months after his 90-day window closed; and (2) the motion amounts to an unauthorized successive habeas petition jurisdictionally barred under 28 U.S.C. § 2244.

BACKGROUND

The State charged Wills with second-degree murder after he admitted to killing Carlos Guster in a neighbor's front yard. Wills killed Guster because he "disrespected his mom's house." *State v. Wills*, 48,469 (La. App. 2 Cir. 9/25/13), 125 So. 3d 509, 515. After shooting Guster once, Wills' gun jammed. *Id.* at 516–17. Wills unjammed the gun, and then he shot Guster "four or five more times" while Guster was on the ground. *Id.* at 516. After the shooting, Wills' neighbor asked him if he was "going to leave the body in her yard." *Id.* In response, Wills picked up the body, walked across the street, and dumped it in a vacant lot before driving away. *Id.*

When questioned by officials, Wills admitted that he killed Guster—but he claimed that he acted in self-defense. *See id.* at 516. Wills wanted his attorney to pursue that defense at trial. *See* Pet. App., Magistrate's R. & R. at 9. In light of the overwhelming evidence suggesting that defense was implausible, the attorney instead pursued a manslaughter defense. *See id.* at 9–12 & n.1. Wills never raised any objection with the trial judge about his attorney's decision. *See* Am. Pet. at 6 ("[Wills] wanted to stop the trial and speak to the Judge. However, this never happened."). Ultimately, the jury convicted Wills of second-degree murder and he received a life sentence. R. & R. at 1. His conviction was affirmed on direct appeal.

Wills sought habeas relief in federal district court, arguing that he received ineffective assistance of counsel because his attorney failed to pursue his preferred defense. *See* R. & R. at 9. The magistrate judge's report and recommendation rejected that argument. *Id.* at 12.

A few days before the magistrate judge issued the report, this Court held in *McCoy v. Louisiana* that it is "unconstitutional to allow defense counsel to concede guilt over [a] defendant's intransigent and unambiguous objection." 138 S. Ct. 1500, 1507 (2019). In his objection to the magistrate judge's report, Wills contended that *McCoy* demonstrated that the state courts' denial of his ineffective assistance of counsel claim was contrary to and involved an unreasonable application of clearly established federal law. *See Objections to Magistrate R. & R.* at 3, No. 17-cv-753 (W.D. La. May 29, 2018). The district court adopted the magistrate judge's report and recommendation and distinguished *McCoy*—explaining that although McCoy

maintained he did not commit the murder, "Wills admitted he shot the victim and instead challenges counsel's decision to pursue a manslaughter defense over a defense of self or defense of others defense." Pet. App., Mem. Ruling at 1–2 & n.1.

Wills sought a COA from the Fifth Circuit, but his request was denied. Wills timely petitioned this Court for certiorari, and this Court requested a response from the State. The State sought and received an extension to December 5, 2019. Less than two weeks before the State's response was due—and nearly 180 days after Wills' 90-day window to file a petition for certiorari closed—Wills filed a motion to amend his petition for certiorari. The State opposes that motion.

ARGUMENT

I. There is no procedure or "compelling" reason to allow Wills to amend his petition months after his 90-day window closed.

Long after his 90-day window to file a petition for certiorari has closed,[1] Wills moves the Court to amend his petition to include "additional questions" that seek new relief. Pet'r's Mot. at 2; *see* Supreme Ct. Rule 13. Wills' request is extraordinary. This Court's rules do not provide a mechanism for amending a petition for certiorari once a petitioner's time for filing expires. Even outside of the habeas context, it is "not clear" whether the Court has jurisdiction to allow amendments once the 90-day window closes. Shapiro et al., *Supreme Court Practice* § 6.27, at 473 (10th ed. 2013).

Either way, this Court will not grant a motion to amend absent "the most compelling of reasons"—which Wills has not provided here. *Id.* His motion explains

[1] The Fifth Circuit denied Wills' motion for a COA on March 1, 2019, so Wills' 90-day window closed on May 30, 2019. Wills failed to file his amended petition until November 22, 2019—almost 180 days after May 30 and less than two weeks before the State's brief in opposition is due on December 5, 2019.

that allowing him to amend would enable the Court to consider a split between the Fifth Circuit and the Louisiana Supreme Court and it would allow the Court to consider "key issues" concerning *McCoy*'s retroactivity.[2] Pet'r's Mot. at 4–6. Although the Court may be interested in those issues as a general matter, Wills has failed to explain why the Court must decide them *in this case*. There is no need for this Court to go to extraordinary lengths here when it could simply wait for the next case to come along.

And, importantly, this case does not squarely present the issue of *McCoy*'s retroactivity because *McCoy*'s holding is not implicated here. Unlike the defendant in *McCoy*, Wills never raised his objection with the trial judge. That's an important distinction because the question presented in *McCoy* was whether it was "unconstitutional to allow defense counsel to concede guilt over [a] *defendant's intransigent and unambiguous objection*." 138 S. Ct. at 1507 (emphasis added).[3] Moreover, as the district court found—and Wills implicitly concedes in question 1 of his amended petition—this Court would need to expand *McCoy* to apply when a

[2] Wills' motion also contends that allowing him to amend his petition would enable the Court to consider whether the Fifth Circuit's decision should be summarily reversed. Pet'r's Mot. at 7. But this is simply a request for error correction. And this Court is "not a court of error correction." *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Statement of Alito, J., respecting the denial of certiorari).

[3] Wills' failure to raise his objection with the trial judge makes his case more like *Florida v. Nixon*, 543 U.S. 175 (2004) than *McCoy*. In *Nixon*, "this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial 'when [the] defendant, informed by counsel, neither consents nor objects.'" *McCoy*, 138 S. Ct. at 1505 (quoting *Nixon*, 542 U.S. at 178). The *Nixon* court held that defense counsel did not violate the defendant's constitutional rights. *See id.* The *McCoy* court distinguished *Nixon* by explaining that "[McCoy] vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant 'committed three murders. . . . [H]e's guilty.'" *Id.* (citations omitted). That distinction applies to the present case too.

defendant admits to killing the victim.[4] Pet. App., Mem. Ruling at 1–2 & n.1; Am. Pet. at i.

Finally, allowing petitioners to amend their filings risks eliciting a flood of motions that would further strain the States' and this Court's limited resources. Because Wills waited to file his motion until less than two weeks before the State's response is due, the State was obliged to stop preparing the opposition and respond to the motion instead. Uncertainty about which petition to address cripples the State's ability to prepare any response. Even assuming the Court denies Wills' motion, the State will have lost valuable time it could have used preparing a response to Wills' original petition. If the Court grants Wills' motion, that would open the flood gates and elicit a deluge of similar motions as petitioners devise ways to improve their filings months after their deadlines have passed.

II. Wills' amended petition is a successive habeas application.

Even assuming this Court has the jurisdiction and the appetite to grant a motion to amend in a run-of-the-mine case, because this is a habeas action, Wills' motion must be considered in light of the rules and "policies embodied in AEDPA." *Gonzalez v. Crosby*, 545 U.S. 524, 533 (2005); *see Calderon v. Thompson*, 523 U.S. 538, 554–59 (1998). And, under this Court's precedent, Wills' motion amounts to an unauthorized "second or successive habeas corpus application."[5]

[4] This is no minor distinction. Under this Court's precedent, "[a]mong the decisions that counsel is free to make unilaterally . . . [is] choosing the basic line of defense." *McCoy*, 138 S. Ct. at 1516 (Alito, J., dissenting). Giving more power to defendants to dictate "bizarre defense[s]" is "extraordinarily unwise." *Id.* at 1515.

[5] Of course, under § 2244(b)(2), a habeas petitioner can present a claim in a second or successive habeas application if "[t]he applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." But Wills' amended petition adopts the position that

28 U.S.C. § 2244(b)(2); *see Gonzalez*, 545 U.S. at 531. Because AEDPA places a jurisdictional bar on successive habeas petitions, the Court is without power to grant Wills' motion. *See* § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

This Court has explained that "[a] habeas petitioner's filing that seeks [to challenge a federal court's previous resolution of a claim on the merits] is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' [AEDPA]." *Gonzalez*, 545 U.S. at 531; *accord Calderon*, 523 U.S. at 553. For example, this Court has held that Rule 60(b) motions that "seek[] to add a new ground for relief . . . will of course qualify" as successive habeas petitions. *Gonzalez*, 545 U.S. at 531. The same is also true of a Rule 60(b) motion that "attacks [a] federal court's previous resolution of a [habeas] claim on the merits." *Id.* at 532. Similarly, "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a

McCoy "did not announce a 'new' rule." Am. Pet. at 23. Whether or not Wills is correct, this Court should not allow Wills to (1) argue that *McCoy* announced a new rule to hurdle AEDPA's jurisdictional bar in his motion to amend; and (2) argue that *McCoy* did *not* announce a new rule in his amended petition. Even if this Court decided that *McCoy* announced a new rule, presenting a successive habeas application in the Supreme Court violates the procedures articulated in AEDPA. *See* § 2244(b)(3)(A)–(E).

second or successive application for purposes of § 2244(b)."[6] *Calderon*, 523 U.S. at 553.

Like the motions this Court recharacterized as successive habeas petitions in *Gonzalez v. Crosby* and *Calderon v. Thompson*, Wills' late-in-the-day amended petition[7] provides new grounds for relief and attacks the lower courts' resolution of his habeas claim on the merits. Wills' motion frankly admits that the amended petition "articulates additional questions that were either necessarily included within, or closely related to, those set out in the original petition." Pet'r's Mot. at 2. And Wills' very first question in his amended petition asks the Court to expand its holding in *McCoy* to apply when "the client does not deny the *actus reus* but instructs counsel to present a defense that would negate criminal liability." Am. Pet. at i.

Even if the Court believed that the amended petition did not raise new grounds for relief, the fact remains that the amended petition attacks the lower courts' previous resolution of his habeas claim on the merits. Because Wills' motion is not authorized by AEDPA, this Court's rules, the Federal Rules of Civil Procedure, or the Federal Rules of Appellate Procedure, his motion amounts to an unauthorized

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[6] In this vein, the Court has granted certiorari on the question of "[w]hether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*." *Banister v. Davis*, 18-6943. Oral argument is scheduled for December 4, 2019.

[7] Wills had "a full and fair opportunity to raise [his] claim[s]." *See Magwood v. Patterson*, 561 U.S. 320, 345 (2010) (Kennedy, J., dissenting). He raised issues implicating *McCoy v. Louisiana* in the district court, the court of appeals, and his original petition for certiorari. It is only now, long after his 90-day window expired here, that Wills seeks to add more grounds for relief and rehash old claims. Thus, none of the issues in *Banister v. Davis*, 18-6943, are relevant here.

successive habeas petition. Thus, it is inconsistent with the "policies embodied in AEDPA" and should be denied. *Gonzalez*, 545 U.S. at 533; § 2244(b)(2).

CONCLUSION

The State prays that the Court will deny Wills' motion to amend the petition. But, if the Court grants the motion, the State requests that the Court allot the State additional time to prepare a brief in opposition addressing Wills' additional questions and issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that the accompanying Opposition to Petitioner's Motion to File an Amended Petition for a Writ of Certiorari was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served by email on November 27, 2019 or by United States mail properly addressed to each of them and with first-class postage prepaid to the following names and addresses:

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