No.

In the Supreme Court of the United States

ALEXANDER BALBUENA, PETITIONER.
v.
BRIAN CATES, ACTING WARDEN, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court filing that seeks to amend a habeas petition pending on appeal constitutes a "second or successive" petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Balbuena v. Sullivan, Nos. 12-16414, 18-15432 (9th Cir.) (order granting certificate of appealability issued May 23, 2013; order staying appellate proceedings and remanding issued December 30, 2013; opinion issued August 17, 2020; amended opinion and order denying rehearing en banc issued November 17, 2020; mandate issued November 25, 2020).

Balbuena v. Davey, No. 11-cv-00228-RS (PR) (N.D. Cal.) (order denying initial habeas petition issued May 25, 2012; order dismissing subsequent habeas petition issued February 5, 2018).

In re Balbuena, No. A138534, (Cal. Ct. App.) (order denying habeas petition issued July 26, 2016).

People v. Balbuena, No. A122043, (Cal. Ct. App.) (order affirming conviction and modifying sentence issued May 5, 2010).

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OPINIONS BELOW

The amended decision of the court of appeals (Pet. App. 1a) is reported at 980 F.3d 619 (9th Cir. 2020). The decision of the district court (Pet. App. 66a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on August 17, 2020 and amended on November 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(b) states in relevant part:

> (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.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
>> (A) the 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; or

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

INTRODUCTION

This case squarely presents an important issue of statutory interpretation that, as the concurrence below emphasized, has sharply divided the federal courts of appeals. Pet. App. 45a (Fletcher, J., concurring). Deepening a 5-2 split, the Ninth Circuit held that any district court filing that seeks to amend a habeas petition pending on appeal constitutes a "second or successive" petition under AEDPA. Pet. App. 32a–33a, 44a. Two courts of appeals have disagreed, correctly holding that while a petition is pending on appeal, an attempt to amend is not a "second or successive" petition. This Court should "resolve the conflict in the circuits" and reject the Ninth Circuit's incorrect position. *See* Pet. App. 52a (Fletcher, J., concurring).

AEDPA entitles every prisoner to "one full opportunity to seek collateral review." *See Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.) (quoting *Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001)). This Court has never decided when that opportunity ends and the "second or successive" bar

is triggered. Consistent with the statutory scheme, courts agree that a filing will not be deemed a "second or successive" petition unless, at a minimum, an earlier-filed petition has been "finally adjudicated." *See Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016) (citing *Woods v. Carey*, 525 F.3d 886, 889 (9th Cir. 2008); 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 28.3[b], at 1674–75 (7th ed. 2016)). The courts of appeals disagree, however, about what constitutes a final adjudication for these purposes.

Five circuits, including the Ninth Circuit in the decision below, treat a district court's merits denial of a habeas petition as the "terminal point" and therefore characterize as a "second or successive" petition any effort to amend the underlying petition while review of the denial is pending on appeal. *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012). Those courts, in effect, attach a significant "unstated qualifier" to the "one full opportunity" AEDPA affords: "'one full opportunity to seek collateral review' *in the district* court." *United States v. Santarelli*, 929 F.3d 95, 104 (3d Cir. 2019).

The Second and Third Circuits have reached the opposite conclusion. Writing for a Second Circuit panel, then-Judge Sotomayor explained that "[i]n the AEDPA context, adjudication of an initial habeas petition is not necessarily complete, such that a subsequent filing constitutes a 'second or successive' motion, simply because the district court rendered a judgment that is 'final' within the meaning of 28 U.S.C. § 1291." *See Ching*, 298 F.3d at 178. In the Second Circuit, "so long as appellate proceedings following the district court's dismissal of the initial petition remain pending when a subsequent petition is

filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for 'second or successive' petitions." *Whab v. United* States, 408 F.3d 116, 118 (2d Cir. 2005); *Santarelli*, 929 F.3d at 105 ("join[ing] the Second Circuit" and rejecting "a rule that would construe as 'second or successive' all habeas petitions filed by a petitioner following a district court's denial of her habeas petition, regardless of whether she has exhausted her appellate remedies").

This conflict is current and highly unlikely to resolve on its own. Three circuits have recognized the split, three circuits have denied petitions for rehearing en banc, and Judge Fletcher "wr[o]te separately" in this case "to urge the Supreme Court to recognize the circuit split" and "resolve the conflict in the circuits" by granting review here and rejecting the Ninth Circuit's incorrect position. *See* Pet. App. 52a (Fletcher, J., concurring).

There are no threshold issues that would preclude this Court from reaching the question presented. And this case is an ideal vehicle: if an application to amend an underlying petition is not "second or successive" under AEDPA when filed while review of the petition is pending on appeal, the district court can for the first time consider on the merits petitioner's request to amend his petition. Certiorari is thus warranted.

STATEMENT

1. Among other amendments to post-conviction law and procedure, AEDPA imposed new procedural rules for the filing of a "second or successive application" for federal post-conviction relief. *See* 28 U.S.C. § 2244(b). "The phrase 'second or successive'" is a

"'term of art,' which 'is not self-defining.'" *Banister v. Davis,* 140 S. Ct. 1698, 1705 (2020) (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007)). This Court has "often made clear that [the phrase] does not 'simply refer' to all habeas filings made 'second or successively in time' following an initial application." *Id.* (quoting *Magwood v. Patterson*, 561 U.S. 320, 332 (2010)). Instead, the phrase "second or successive" "takes its full meaning from [this Court's] case law, including decisions predating [AEDPA]," *Panetti*, 551 U.S. at 944, and from "historical habeas doctrine and practice," *Banister*, 140 S. Ct. at 1705.

In particular, AEDPA's "provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine." *See Boumediene v. Bush*, 553 U.S. 723, 774 (2008) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). That doctrine arose in large part from the fact that, "[a]t common law, the denial by a court or judge of an application for habeas corpus was not res judicata." *Sanders v. United States*, 373 U.S. 1, 7–8 (1963) (citations omitted). Courts therefore developed principles to address the concern that some prisoners would abuse the habeas process by filing "endless applications for habeas relief without regard to the disposition of any prior petitions." *Muniz v. United States*, 236 F.3d 122, 126 (2d Cir. 2001) (citing *McCleskey*, 499 U.S. at 481).

In 1924, this Court set forth the guideposts federal courts were to use for successive petitions, instructing that although res judicata did not formally apply to the denial of a first habeas petition, such a denial might justify dismissal of a second. *See Salinger v. Loisel*, 265 U.S. 224, 231–32 (1924) (collect-

ing cases). This Court explained that "a prior refusal to discharge on a like application" "may be considered, and even given controlling weight," id. at 231, as could a previous denial when the petitioner "had [a] full opportunity to offer proof of [the grounds] at the hearing on the first petition" but "reserve[d] the proof . . . to support a later petition," *Wong Doo v. United States*, 265 U.S. 239, 241 (1924).

Congress in 1948 enacted the precursor to the current version of 28 U.S.C. § 2244(b). Under that provision, abuse of the writ was a defense that the Government had "the burden . . . to plead"; "[c]ontrolling weight" could be given "to denial of a prior application" for habeas relief if it involved "the same ground," "was determined adversely to the applicant . . . on the merits," and "the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders*, 373 U.S. at 15. If "a prisoner deliberately [withheld]" a ground for relief, or "deliberately abandon[ed] one of his grounds," "he may be deemed to have waived his right to a hearing" on those grounds. *Id.* at 18; *see also Rose v. Lundy*, 455 U.S. 509, 521 (1982).

In the 1980s, these issues attracted further attention from this Court and from Congress. In 1988, Chief Justice Rehnquist commissioned the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases to examine "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases, appointing retired Justice Lewis F. Powell as Chair. Judicial Conference of the United States, Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Comm. Report and Proposal (Lewis F. Powell, Jr., Chairman, Aug. 23, 1989), reprinted in *Habeas Corpus Reform: Hearings*

Before the S. Comm. on the Judiciary, S. Hrg. 101-1253, 101st Cong. 7-30 (1991), at 8. The resulting report (the "Powell Report") recommended limiting the availability of habeas relief in cases of "unnecessary delay and repetition." *Id.* at 9. The Powell Report's proposal recommended that capital cases "be subject to one complete and fair course of collateral review in the state and federal system." *Id.* at 13. The Powell Report further recommended that relief be unavailable after one entire "federal collateral process concludes without relief being granted." *Id.* at 14. A state prisoner would be granted "one opportunity to have his claims reviewed carefully by the federal courts." *Id.* at 14–15. As Justice Powell explained, the Committee proposed to "enhance finality by limiting the circumstances in which federal relief may be sought after one full course of litigation up to the Supreme Court." *Id.* at 42.

The Powell Report was submitted to Congress in 1989, and its recommendations informed the development of AEDPA. Like the Powell Report, AEDPA reflected a policy favoring both finality and the opportunity for one full opportunity for final adjudication of a habeas petitioner's claims in the federal courts. As then-Chairman of the Senate Judiciary Committee Orrin Hatch explained, its provisions would "guarantee prisoners one complete and fair course of collateral review in the Federal System." *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 2, 3 (1995).

"AEDPA made the limits on entertaining second or successive habeas applications more stringent than before." *Banister*, 140 S. Ct. at 1707. If an ap-

plication qualifies as "second or successive," the petitioner may file it only after complying with a "'gatekeeping' mechanism" requiring leave of the court of appeals based on a strict showing. *See Felker*, 518 U.S. at 657; 28 U.S.C. § 2244(b).

But "Congress did nothing to change . . . what qualifies as a successive petition." *Banister*, 140 S. Ct. at 1707. That "threshold inquiry into whether an application is 'second or successive'" is distinct from the question whether an application so designated may proceed. *Id.* (quoting *Magwood*, 561 U.S. at 336–37). There is thus no "indication that Congress meant to change the historical practice" reflected in the "abuse of the writ doctrine," the contours of which continue to define whether a subsequent request for habeas relief qualifies as "second or successive" under AEDPA. *Id.*; *see Felker*, 518 U.S. at 664 ("The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'").

2. Petitioner was charged with first degree murder, attempted murder, and street terrorism for his participation in a gang-related shooting death. Pet. App. 6a. At the time of the events, petitioner was 15 years old and had no prior arrests. Pet. App. 8a, 18a–19a.

A crucial piece of evidence for the state was petitioner's recorded confession. Pet. App. 19a. Police officers arrested petitioner in his apartment, where he was sleeping next to his pregnant girlfriend, at 2:00 AM the morning after the homicide. Pet. App. 19a. Detectives interviewed petitioner in a police interrogation room after reading him a warning that advised of his "right to an attorney prior to question-

ing" but omitted any reference to petitioner's right to counsel during the interrogation. Pet. App. 8a–9a.

Petitioner denied being at the scene of the shooting, but the detectives falsely told him that another individual had placed him there. Pet. App. 9a. The detectives warned petitioner to "be honest with us" and referenced petitioner's soon-to-be-born child. Pet. App. 9a.

Petitioner eventually acknowledged being at the scene but denied having a gun. Pet. App. 10a. The detectives continued to pressure him, implying that he would receive leniency if he spoke honestly and showed "remorse." Pet. App. 11a. After further questioning, petitioner told detectives that another person had given him a gun and instructed him to join others in shooting at the car in which the victim was seated. Pet. App. 11a.

3. Before trial, petitioner moved unsuccessfully to suppress his confession as involuntary. The confession was introduced into evidence, a jury convicted, and the trial court sentenced petitioner to 82-years-to-life imprisonment.

On direct appeal, the California Court of Appeals concluded petitioner's initial statements were voluntary. That court also determined, however, that the detectives thereafter improperly offered petitioner leniency if he made additional admissions. Concluding that petitioner had made critical admissions before detectives employed improper tactics, the court deemed harmless the admission of petitioner's statements made after the officers' coercive comments. Pet. App. 12a, 70a. The court reduced petitioner's sentence by 10 years on other grounds. Pet. App. 12a.

In 2011, petitioner filed a *pro se* habeas petition in the Northern District of California, arguing, among other things, that his confession was involuntary. Pet. App. 12a. The district court denied the petition and declined to grant a certificate of appealability. Pet. App. 12a. In May 2013, petitioner obtained from the Ninth Circuit a certificate of appealability on the question whether the trial court violated his due process rights by denying his motion to suppress his confession on the grounds that it was an involuntary product of coercion. Pet. App. 12a–13a. The Ninth Circuit also appointed counsel to represent petitioner on appeal. Pet. App. 12a–13a.

Within months of his appointment, petitioner's counsel requested that the Ninth Circuit stay the appeal and remand to the district court so that petitioner could file an amended petition. Pet. App. 13a. The Ninth Circuit initially denied the motion "without prejudice to filing a renewed motion accompanied by a written indication that the district court is willing to entertain the motion." Pet. App. 13a. Petitioner complied with those instructions and obtained the necessary indication from the district court. The Ninth Circuit stayed the appeal and remanded. Pet. App. 13a.

Petitioner then filed a motion in the district court seeking permission to reopen proceedings and amend his petition to argue that admission of his confession violated his *Miranda* rights because the officers failed to "clearly inform[] [him of his] right to consult with a lawyer and to have the lawyer with him during interrogation." Pet. App. 21a; *see Miranda v. Arizona*, 384 U.S. 436, 471 (1966). The district court denied the motion without prejudice to allow petitioner to exhaust his new claim in state court. Pet.

App. 13a. In January 2017, after petitioner had presented the *Miranda* claim in state court, the district court reopened proceedings and petitioner filed a renewed motion. Pet. App. 13a. Styled as a Rule 60(b) motion, the request sought permission "to amend to add a new claim in petitioner's habeas petition." Pet. App. 13a. The district court denied the motion as an unauthorized second or successive petition under 28 U.S.C. § 2244(b)(3)(A). Pet. App. 13a–14a.

4. The Ninth Circuit affirmed. Pet. App. 44a. It concluded that because petitioner's motion asserted a new claim, it was in reality a habeas petition. Pet. App. 32a–33a. The panel considered petitioner's argument that his motion, even if properly characterized as a petition, was not a "second or successive" one because the motion sought to amend an underlying petition whose denial was at that time subject to a timely appeal pending in the circuit. Pet. App. 27a–30a. The court recognized a divergence of authority on that question, but it reasoned that Ninth Circuit precedent compelled dismissal. Pet. App. 32a–33a (citing *Beaty v. Schriro*, 554 F.3d 780 (9th Cir. 2009)).

Judge Fletcher concurred. He agreed that circuit precedent required the panel to conclude that petitioner's "motion was a second or successive habeas petition, even though it was filed while an appeal on his initial habeas petition was awaiting adjudication." Pet. App. 45a (Fletcher, J., concurring). But he wrote "separately to register [his] disagreement with [that precedent] and to urge the Supreme Court to recognize the circuit split and to adopt the rule stated in" decisions of the Second and Third Circuits reaching a contrary conclusion. Pet. App. 45a (Fletcher, J., concurring). Judge Fletcher empha-

sized, among other points, that a petition is not second or successive if filed before an earlier-filed petition has been finally adjudicated on appeal. Pet. App. 48a (Fletcher, J., concurring). And "as a matter of ordinary language," Judge Fletcher observed, "it is hard to conclude that an initial habeas petition has been 'finally adjudicated' when, in fact, it has not been." Pet. App. 48a (Fletcher, J., concurring). Judge Fletcher also observed that "at least three cases" decided by this Court "suggest that [the cases on the other side of the split] got it right." Pet. App. 49a–50a (Fletcher, J., concurring) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642–44 (1998); *Panetti*, 551 U.S. at 942–45; *Slack*, 529 U.S. at 488). He concluded by again "encourag[ing] the Supreme Court to resolve the conflict in the circuits" and expressing "optimis[m]" that when this Court grants review, "it will agree with the Second and Third Circuits rather than ours." Pet. App. 52a (Fletcher, J., concurring).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to "resolve the conflict in the circuits," *see* Pet. App. 52a (Fletcher, J., concurring), on an important and recurring issue concerning access to habeas relief: whether a motion seeking to amend a habeas petition that the district court has denied is a "second or successive" petition under AEDPA when the underlying petition has not been finally adjudicated because it is pending on appeal.

This case meets all of this Court's criteria for granting review. It presents an important and recurring question of federal law that has produced an

acknowledged and intractable split in the courts of appeals. The Ninth Circuit's decision is incorrect, as two courts of appeals have concluded. And the case is an ideal vehicle. Certiorari is warranted.

A. The Question Presented Implicates an Intractable, Acknowledged Circuit Split That Only This Court Can Resolve.

Seven circuits have considered whether a district court filing that seeks to amend a habeas petition currently pending on appeal is a "second or successive" petition under AEDPA. Those decisions have produced an active 5-2 circuit split.

1. Five Courts of Appeals Treat a Filing Seeking to Amend a Habeas Petition Pending on Appeal as a "Second or Successive" Petition.

Five circuit courts have held that when a prisoner seeks to amend a habeas petition that is pending on appeal following denial in the district court, the filing constitutes a "second or successive" petition under AEDPA.

In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), the Eighth Circuit upheld the district court's dismissal of a prisoner's motions to add an additional claim to a habeas petition that the district court had previously denied. The petitioner argued "that his motions were not successive habeas petitions because the denial of his initial petition had not yet been affirmed." *Id.* at 1003. Although it acknowledged the question whether a district court decision is a final adjudication "for the purpose[s] of deter-

mining whether additional motions should be deemed second or successive habeas petitions," *id.* at 1001, the court of appeals "reject[ed petitioner's] claim that an amendment to a petition is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal." *Id.* at 1004.

The Tenth Circuit has adopted the same rule. In *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007) (per curiam), the court rejected petitioner's argument that the Section 2244(b) gatekeeping provision did not apply to his motion to amend his habeas petition because that "habeas action ha[d] not been finally adjudicated on appeal." *Id.* at 540. The Tenth Circuit held that "the pendency of an appeal from the denial of a first petition does not obviate the need for authorization of newly raised claims" under Section 2244(b), *id.* at 539; such authorization, the court reasoned, "is required whenever substantively new claims are raised" after "the district court has adjudicated a habeas action." *Id.* at 540.[1]

The Seventh Circuit agreed in *Phillips*, 668 F.3d 433. There, the panel concluded that, under this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), a prisoner's Rule 60(b) motion filed after the

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[1] In *Douglas v. Workman*, the Tenth Circuit deviated from this rule to allow "a habeas petitioner to supplement his habeas petition" when "his first habeas petition was already pending . . . on appeal." 560 F.3d 1156, 1189 (2009). The court noted that while it "would not ordinarily permit" such an amendment, *id.* (citing *Ochoa*, 485 F.3d at 540–41), the case presented "unique circumstances," including that the supplemental filing related to the prosecutor's active concealment of his own misconduct in a death penalty case, *id.* at 1169, 1190–96.

district court's denial must be characterized as "an 'application' for collateral relief." *Phillips*, 668 F.3d at 435. The court nevertheless recognized that such a characterization raised a different question: "But was it a *second* application?" *Id.* The court answered that question yes, rejecting the contention that "until a district court's decision has become final by the conclusion of any appeal taken," a request to add claims "should be treated as an amendment to the pending [petition], rather than as a new one." *Id.*

The Sixth Circuit has also endorsed this position. In *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016), the court acknowledged an apparent intra-circuit conflict between two panel decisions: one holding "that a post-judgment petition was not second or successive in a case where the petition was filed before the expiration of the time to appeal the district court's denial of the first petition," *id.* at 324 (citing *Clark v. United States*, 764 F.3d 653, 659 (6th Cir. 2014)); and another holding "that a habeas petition *was* a second or successive petition where the petition was filed during the pendency of the appeal from denial of the first petition," *id.* (citing *Post v. Bradshaw*, 422 F.3d 419, 421, 424–25 (6th Cir. 2005)). Recognizing its duty to "reconcile" these holdings, the court adopted a rule that a "motion to amend that seeks to raise habeas claims is a second or successive habeas petition when that motion is filed after the petitioner has appealed the district court's denial of his original habeas petition or after the time for the petitioner to do so has expired." *Id.* at 325.

In the decision below, the Ninth Circuit aligned itself with these circuits. Pet. App. 42a–44a. The court acknowledged the generally accepted principle

that "a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." Pet. App. 29a. (internal quotation marks omitted). The court reasoned, however, that the district court's denial of petitioner's initial habeas petition was a "final adjudication," and thus that the underlying petition was no longer "pending" even though it was on appeal. Pet. App. 30a–33a. The majority opinion acknowledged a split of authority on the question and "decline[d] to follow" Second and Third Circuit "cases conclud[ing] that [because] a habeas petition is not 'fully adjudicated' while its denial is pending on appeal," "a second petition filed while that appeal is pending is not a second or successive petition under § 2244." Pet. App. 33a.

Judge Fletcher's concurring opinion explained that the circuit precedent that foreclosed relief had been "a mistake" and urged this Court to "recognize the circuit split," grant review, and reverse. Pet. App. 45a, 48–51a (Fletcher, J., concurring).

2. Two Courts of Appeals Have Held That a Filing Seeking to Amend a Petition Pending on Appeal Is Not a "Second or Successive" Petition.

As the decision below correctly observed, two circuits have held, in clear conflict with the Ninth Circuit and four others, that a district court's denial of a habeas petition is not a final adjudication triggering the AEDPA gatekeeping requirements, and a subsequent filing while the denial is pending on appeal therefore is not a "second or successive" petition.

The Second Circuit established that rule in *Ching v. United States*. *See* 298 F.3d at 177. After

the district court denied a Section 2255 petition, and while the court of appeals was reviewing that decision, the prisoner filed a habeas application in the district court asserting additional grounds for relief. *Id.* at 176. The district court denied the subsequent petition on the ground that it was "second or successive," but the Second Circuit reversed. *Id.*

Then-Judge Sotomayor began by observing that AEDPA "does not define what constitutes a 'second or successive'" petition. *Id.* at 177. "Nonetheless," she reasoned, "it is clear that for a petition to be 'second or successive' within the meaning of the statute, it must at a minimum be filed subsequent to the conclusion of a proceeding that counts as the first." *Id.* While "[a] petition that has reached *final* decision counts for this purpose," the court explained, a "prior district court judgment dismissing a habeas petition does not conclusively establish that there has been a final adjudication of that claim" because "adjudication of [an] initial § 2255 motion [is] still ongoing during the period of appellate review." *Id.* at 177–78.

Applying that reasoning, the court held that because "the denial of the [underlying petition] was still pending on appeal before this Court and no final decision had been reached with respect to [its] merits," the district court "erred in treating [the subsequent] petition as" second or successive. *Id.* at 178–79. The court of appeals instructed that "instead, the district court should have construed it as a motion to amend [the] original § 2255 petition." *Id.* at 177.

The Second Circuit followed that holding in *Whab*, 408 F.3d at 116. Emphasizing that "the law allows every petitioner one full opportunity for collateral review," the court confirmed in an opinion by Judge Leval that a petition is not "second or succes-

sive" when it is filed while the denial of an earlier petition is pending on appeal. *Id.* at 118 (internal quotations omitted). Applying *Ching*, the court explained:

> [U]ntil the adjudication of an earlier petition has become final, its ultimate disposition cannot be known. Thus, so long as appellate proceedings following the district court's dismissal of the initial petition remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for "second or successive" petitions.

Id. (citations omitted). Citing the broader understanding of "finality" in the post-conviction context, the court explained that an appealable denial "did not ma[ke] the adjudication of the earlier petition final; that adjudication will not be final until petitioner's opportunity to seek review in the Supreme Court has expired." *Id.* at 120; *see also Floyd v. Kirkpatrick*, No. 17-451, 2017 WL 3629902, at *1 (2d Cir. Apr. 21, 2017) ("Because that motion was filed during the pendency of Petitioner's appeal from the denial of his first § 2254 petition, his proposed § 2254 petition would not be successive."); *Grullon v. Ashcroft*, 374 F.3d 137, 139 (2d Cir. 2004) (per curiam) (holding "that *Ching*'s rationale is applicable in the context of § 2241 petitions as well") .

In a recent decision, the Third Circuit explicitly aligned itself with the Second Circuit. *See Santarelli*, 929 F.3d at 105. There, the court was "asked to decide whether a petition is 'second or successive' for purposes of AEDPA when it is filed during the pen-

dency of appellate proceedings concerning a district court's denial of a petitioner's initial habeas petition." *Id.* at 103–04. The court answered no: "a subsequent habeas petition is not 'second or successive' under AEDPA when a petitioner files such a petition prior to her exhaustion of appellate remedies with respect to the denial of her initial habeas petition, and thus AEDPA does not require us to perform the gatekeeping function prior to a petitioner's filing such a subsequent petition in a district court." *Id.* at 104.

In reaching that conclusion, the court considered the position advanced by the Government and adopted by circuits on the opposite side of the split, which "construe[s] as 'second or successive' all habeas petitions filed by a petitioner following a district court's denial of her initial habeas petition, regardless of whether she has exhausted her appellate remedies." *Id.* The court viewed that position as tantamount to arguing "that we should interpret 'one full opportunity to seek collateral review' to include an unstated qualifier: 'one full opportunity to seek collateral review' *in the district court*." *Id.* The Third Circuit rejected that interpretation as "counter to Supreme Court precedent on the finality of district court judgments in the AEDPA context." *Id.* It explained that this Court's decisions "counsel that a subsequent habeas petition is not necessarily a 'second or successive' petition simply because the district court has issued a 'final' judgment denying a petitioner's initial habeas petition." *Id.*

The Third Circuit instead adopted the Second Circuit's interpretation, concluding that a prisoner has not "expended the 'one full opportunity to seek collateral review'" until "after [she] has exhausted all

of her appellate remedies with respect to her initial habeas petition or after the time for appeal has expired." *Id.* at 104–05. The court stated:

> We thus join the Second Circuit in holding that "so long as appellate proceedings following the district court's dismissal of the initial petition remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for 'second or successive' petitions" at the time of the subsequent petition's filing.

Id. at 105 (quoting *Whab*, 408 F.3d at 118).

The decision below attempted to distinguish and harmonize *Ching*, *Whab*, and *Santarelli* by highlighting minute procedural differences among them, but the particular postures of the cases do not explain their conflicting outcomes. The divergent holdings in these decisions instead result from a fundamental disagreement about the meaning of AEDPA: does the fact that the district court has issued an appealable denial mean that a petitioner's habeas petition has been "finally adjudicated" for purposes of triggering application of that statute's gatekeeping mechanism? Five circuits answer yes and therefore treat any filing while the denial is on appeal as "second or successive." Two circuits answer no because the ongoing appeal means that the underlying petition is still

pending within the federal system. The cases themselves leave no doubt that they are in stark conflict.[2]

3. The Issue Is Important and the Circuit Split Will Not Resolve Without a Decision From This Court.

This split among the circuits is entrenched and unlikely to resolve without action by this Court. Three circuits have recognized the split of authority on the question presented, *see* Pet. App. 33a; *Santarelli*, 929 F.3d at 104; *Ochoa*, 485 F.3d at 543, three circuits have denied petitions for rehearing en banc, Pet. App. 5a; Order, *Phillips v. United States*, Nos. 10-2154 & 11-1498 (7th Cir. Feb. 21, 2012); Order, *Williams v. Norris*, No. 04-3485 (8th Cir. Jan. 11, 2007), and the concurrence below "encourage[d] the Supreme Court to resolve the conflict," Pet. App. 52a (Fletcher, J., concurring). There is no realistic prospect that the circuit conflict will disappear on its own.

This issue need not percolate further. Seven circuits have squarely decided the question presented, and the arguments on both sides of the split have

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[2] In circuits that have not resolved the issue, there is confusion. The Eleventh Circuit, for example, "has no published opinion establishing when the adjudication of a § 2255 motion becomes final such that the 'second or successive' limitation applies to all future motions." *Amodeo v. United States*, 743 F. App'x 381, 385 (11th Cir. 2018) (per curiam). "In two unpublished opinions, however, [that court] appear[s] to have taken opposite positions." *Id.* at 385 n.1 (citing *United States v. Terrell*, 141 F. App'x 849 (11th Cir. 2005) (per curiam); *In re Cummings*, No. 17-12949 (11th Cir. July 12, 2017) (per curiam) (docket entry 3)).

been fully aired. The conflict has persisted after this Court's decisions in *Gonzalez* and *Banister*, and neither side has changed its position in light of either decision. The Third Circuit considered *Gonzalez* in deciding *Santarelli* but nevertheless rejected the interpretation adopted by five circuits and aligned itself with that of the Second Circuit. The Second Circuit has declined to reconsider its position post-*Gonzalez*. *See, e.g.*, *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 582 (2d Cir. 2016) (citing *Whab*, 408 F.3d at 120); *Fuller v. United States*, 815 F.3d 112, 113 (2d Cir. 2016) (citing *Whab*, 408 F.3d at 116; *Ching*, 298 F.3d at 177). And as the concurrence below explained, *Banister* "has little relevance for [this] case," Pet. App. 51a (Fletcher, J., concurring); its holding that a Rule 59(e) motion is not a "second or successive" petition does not address, and is not likely to change any circuit's position, on the question presented here. *See infra*, at 31–32.

Not only is the circuit split clear and established, but it is also important and recurring. Two circuits in the past two years alone have addressed the question presented in a published opinion. Resolution by this Court is especially necessary because the split threatens consequences that Congress could not have intended. The conflict subjects prisoners across the country to different habeas regimes based solely on where they are held and thereby undermines AEDPA's goals of "comity, finality, and federalism." *See Panetti*, 551 U.S. at 945 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). Prisoners held in New York or Philadelphia may file a subsequent petition while denial of the initial petition is pending on appeal. Similarly situated prisoners in Chicago,

Los Angeles, and Cleveland cannot. Allowing this split to persist not only creates intolerable geographic disparities but also threatens to bar petitioners in five circuits from presenting potentially meritorious claims to a federal court.

B. The Decision Below Is Incorrect.

The Ninth Circuit erred in holding that an effort to amend a habeas petition that is pending on appeal is a "second or successive" petition. That decision misconstrues AEDPA's text and purpose, conflicts with this Court's approach to finality in the post-conviction context, and lacks justification in any policy concern.

1. The decision below misreads AEDPA. While the statute does not define "second or successive," it is well-settled that AEDPA "ensures 'every prisoner one full opportunity to seek collateral review.'" *Ching*, 298 F.3d at 177 (quoting *Littlejohn*, 271 F.3d at 363); *see also Santarelli*, 929 F.3d at 104–05; *Phillips*, 668 F.3d at 436. Consistent with AEDPA's foundations and historical practice, that opportunity contemplates "one full course of litigation up to the Supreme Court." Powell Report at 42; *see Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 3 (1995) (statement of Chairman Hatch) (noting goal of providing "prisoners one complete and fair course of collateral review in the Federal System"). Under the Ninth Circuit's approach, however, a habeas petitioner is limited to "one full opportunity to seek collateral review *in the district court*." *See Santarelli*, 929 F.3d at 104. There is no basis for concluding

that AEDPA implicitly introduced such a severe limitation.

It is also broadly accepted that "a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." *Goodrum*, 824 F.3d at 1194; *United States v. Sellner*, 773 F.3d 927, 931–32 (8th Cir. 2014). For "a petition to be 'second or successive,' . . . it must at a minimum be filed subsequent to the conclusion of 'a proceeding that "counts" as the first.'" *Ching*, 298 F.3d at 177 (quoting *Littlejohn*, 271 F.3d at 363). But a petition that is currently pending on appeal has not reached its "conclusion" or been "finally adjudicated." As "a matter of ordinary language, it is hard to conclude that an initial habeas petition has been 'finally adjudicated' when, in fact it has not been." *See* Pet. App. 48a–49a (when "a district court denies a habeas petition and the petitioner appeals, there is no final adjudication until the appeal has been finally adjudicated"); *Whab,* 408 F.3d at 118 (holding that a petition has not reached final adjudication while "appellate proceedings following the district court's dismissal of the initial petition remain pending").

2. The position adopted by the Ninth Circuit "runs counter to Supreme Court precedent" in two respects. *Santarelli*, 929 F.3d at 104.

a. As the Second and Third Circuits have concluded, and as the concurrence below explained, this Court's decisions in *Martinez-Villareal*, *Panetti*, and *Slack* foreclose the conclusion that an application seeking post-conviction relief is "second or successive" simply because it is filed after the district court's resolution of an earlier habeas petition.

Martinez-Villareal involved a prisoner who had filed an earlier habeas petition contending, among other things, that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). *See* 523 U.S. at 639–40. The district court had denied the petition and dismissed the *Ford* claim as premature. Later, after his execution date had been set, the petitioner again raised his *Ford* claim. *Id.* at 640. This Court, in an opinion by Chief Justice Rehnquist, held that the subsequent petition was not "second or successive" even though it was "the second time [petitioner] had asked the federal courts to provide relief on his *Ford* claim." *Id.* at 643.

Slack reinforced this approach. The district court dismissed petitioner's initial federal habeas filing for failure to exhaust in state court. 529 U.S. at 478–79. After exhaustion, Slack—like petitioner here—returned to federal court and filed a subsequent petition adding claims not present in his initial federal petition. *Id.* at 479. Justice Kennedy, writing for the Court, rejected the Government's argument that the subsequent petition was "second or successive" under AEDPA. *Id.* at 488–89.

And in *Panetti*, this Court reaffirmed *Martinez-Villareal*. 551 U.S. at 944–45. After his initial federal habeas petition was adjudicated, the prisoner filed a subsequent petition that raised a *Ford* claim for the first time. *Id.* at 938–39. The Government argued that the later-in-time petition was "second or successive." *Id.* at 942. This Court disagreed, explaining that it "has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Id.* at 944.

The second petition was not barred, this Court explained, because there was "no argument that [the prisoner's] actions constituted an abuse of the writ." *Id.* at 947.

The same conclusion should apply here. The Ninth Circuit incorrectly focused its analysis on the sequence of petitioner's filings, rather than on whether the effort to amend qualified as an "abuse of the writ" under equitable principles that AEDPA incorporated through the term "second or successive." Because petitioner's motion sought to amend a petition that was still pending and was not otherwise abusive, *see infra* at 28–30, the Ninth Circuit should not have subjected it to the Section 2244 gatekeeping requirement.

b. In treating as "finally adjudicated" a petition that is pending on appeal, the Ninth Circuit also departed from "this Court's consistent understanding of finality in the context of collateral review." *See Clay v. United States*, 537 U.S. 522, 524 (2003). In this context, "finality has a long-recognized, clear meaning": a case is final after appellate review has been exhausted or the time for such review has lapsed. *Id.* at 527. Thus, in *Clay*, this Court unanimously concluded that the term "becomes final" in AEDPA means "when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Id.* at 527. Indeed, the Government in that case *conceded* that a conviction becomes final "only when the possibility of further direct review is exhausted." *See* Br. of United States at 15, *Clay v. United States*, 537 U.S. 522 (2003).

Similarly, writing for a unanimous Court in *Jimenez v. Quarterman*, Justice Thomas reaffirmed

the "settled understanding" of finality in the post-conviction context. 555 U.S. 113, 119 (2009). The underlying proceeding "has not come to an end" until appellate review has been exhausted. *Id.* (internal citation and alteration omitted). And in *Teague v. Lane*, among other cases, this Court stated that it "defined final to mean a case 'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.'" 489 U.S. 288, 295 (1989) (quoting *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986)); *see also, e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897, 909 (2018) (newly passed law may apply to cases on appeal because such cases are "not final"); *Miller v. French*, 530 U.S. 327, 344 (2000) ("The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired) . . . "); *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 n.14 (1974) (defining "final judgment" as "one where 'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed").

Carey v. Saffold, 536 U.S. 214 (2002), further confirms the applicable understanding of finality. Applying the dictionary definition and "ordinary meaning" of the word "pending," this Court held that a petition for collateral review remains "pending" for AEDPA purposes during the time between "consideration of a petition by a lower state court and further consideration by a higher state court." *Id.* at 218. Until "the application has achieved final resolution through the State's post-conviction procedures," including any available appeals, "by definition it remains 'pending.'" *Id.* at 220; *see also id.* at 230 (Kennedy, J., dissenting) (observing that "an appeal

is not a new application; rather, it is a request that the appellate court order the lower court to grant the original application"; "[t]hus, an application may remain 'pending' in the lower court while the prisoner pursues his appeal, because the lower court may grant the original application at some point in the future"). Just so here: a petition for collateral review is "pending" (and therefore not final) while under appellate review as part of the federal habeas process.

That "long recognized, clear" meaning of finality accords with the understanding of that concept in analogous contexts. This Court has emphasized that for constitutional purposes, a district court's merits decision pending on appeal is not final. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court invalidated a law that purported to require federal courts to reopen certain final judgments in private civil actions. *Id.* at 227. In so holding, Justice Scalia's opinion for the Court observed that "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the [judicial] department as a whole." *Id.* Justice Scalia specifically distinguished "lower court judgments that are pending on appeal (or may still be appealed)" from "lower-court judgments that are final." *Id.* Only the latter, he noted, are "finally adjudicated." *Id.*

Accordingly, the Ninth Circuit departed from this Court's cases in concluding that a habeas petition is "finally adjudicated" when one federal court is actively reviewing the decision of another.

3. The circuits aligned with the Ninth Circuit have sought to justify their incorrect understanding of "final adjudication" on concerns about the effects of a rule permitting amendment to a habeas petition

that remains pending on appeal. Those concerns are misplaced. The "abuse of the writ" doctrine was developed for circumstances in which "the prisoner files a motion, loses on the merits, *exhausts appellate remedies*, and then files another motion." *See Johnson v. United States*, 196 F.3d 802, 804 (7th Cir. 1999) (emphasis added); *see also Ching*, 298 F.3d at 178.

The circumstances at issue here present none of the same concerns. A prisoner may successfully amend a habeas petition pending on appeal only if, as petitioner did here, he requests and obtains the agreement of the court of appeals to remand to the district court for consideration, Pet. App. 62a, and only if the district court permits amendment under the ordinarily applicable rules, which require that any new filing relate back to the same events and arise from the same facts as the underlying petition. *See Mayle v. Felix*, 545 U.S. 644, 649 (2005). The prisoner's window for requesting amendment is limited to the time the appellate proceedings remain pending. And in all events, courts may still invoke the abuse-of-the-writ doctrine to dismiss filings "whose purpose is to vex, harass, or delay." *See Ching*, 298 F.3d at 179. As the Second Circuit explained, "[t]he fact that a petition is not technically 'second or successive,' and subject to the gatekeeping requirements of §§ 2244 and 2255, does not necessarily mean that its filing might not be found abusive under the traditional equitable doctrine." *Whab*, 408 F.3d at 119 n.2. Thus, rejecting the Ninth Circuit's position would in no sense "provid[e] a free pass to prisoners to file numerous petitions before an initially filed petition is finally adjudicated on the merits." *Id.*

The history of this case is illustrative. Petitioner, who at 15 years old had no criminal history at the time of the offense, was sentenced to an effective life sentence for a conviction based on his middle-of-the-night confession. Pet. App. 19a–20a. After his state appeal concluded, he filed a *pro se* federal habeas petition that alleged his confession was involuntary but did not include the separate argument that the warnings he received violated *Miranda.* Pet. App. 12a. After the district court denied the petition, the Ninth Circuit granted a certificate of appealability on the voluntariness issue and appointed counsel. Pet. App. 12a. Counsel identified the *Miranda* issue, moved to stay appellate proceedings, and obtained leave from the Ninth Circuit and the district court to file the request to amend. Pet. App. 13a. Counsel then moved in the district court to amend the petition and filed declarations from petitioner's prior counsel affirming that the failure to raise the *Miranda* claim earlier was not a tactical decision but the result of inattention and lack of knowledge.

Nothing in that history evinces an abuse of the writ or warrants the categorical refusal to consider the amended petition on the ground that it is "second or successive." It instead reflects a good faith exercise of the "opportunity—part of every civil case—" to "add or drop issues while the litigation proceeds." *Ching*, 298 F.3d at 177 (internal citation omitted). "A petitioner who seeks to assert new claims before his first petition has been finally adjudicated is not, by any stretch, abusing the writ." *Goodrum*, 824 F.3d at 1194.

Indeed, as this case demonstrates, the erroneous interpretation adopted below "may result in a disastrous deprivation of a future opportunity to have a

well-justified grievance adjudicated" in a filing that is not remotely abusive. *Ching*, 298 F.3d at 177 (internal citation omitted). These "practical effects" of the Ninth Circuit's decision "should be considered when interpreting AEDPA"—particularly when, as here, "petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review.'" *Panetti*, 551 U.S. at 945–46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)).

4. The Ninth Circuit also sought to justify its position on the basis of this Court's decisions in *Gonzalez* and *Banister*, but those cases do not "pose the barrier that [the Ninth Circuit's] opinion suggests." *See* Pet. App. 50a (Fletcher, J., concurring).

Gonzalez concerned a motion to reopen a district court decision that was filed long after the time for seeking appellate review had passed. 545 U.S. at 527. This Court therefore did not address the specific question presented here: whether a request to amend a petition that is currently pending on appeal is a "second or successive" petition under AEDPA. Nor did *Gonzalez* address the fundamental disagreement underlying the circuit split: whether a district court decision that is pending on appeal is a "final adjudication" for AEDPA purposes. *Gonzalez* did not impact the circuit split here because the district court decision at issue in that case would qualify as final—and the prisoner's subsequent motion as "second or successive"—under any of the circuits that have addressed the question presented.

Similarly, *Banister* neither addresses the issue in this case nor supports the decision below. *Banister* broadly held that a Rule 59(e) motion is never a second or successive habeas petition, and it distinguished such motions from the kind of Rule 60(b)

filing at issue in *Gonzalez*. 140 S. Ct. at 1710. To the extent its reasoning is relevant here, *Banister* noted that abuse-of-the-writ principles counsel against treating as "second or successive" a filing that seeks to amend a pending petition and that can be brought only within a limited window. *Id.* at 1708. As discussed above, *supra* at 29, those same considerations reinforce the Second and Third Circuit's position that a motion to amend a habeas petition pending on appeal is not subject to AEDPA's gatekeeping provision.

Gonzalez bears on this case in one limited respect: it concluded that a filing that seeks to present a "claim" for post-conviction relief, whatever its caption or however it is styled, is properly characterized as a habeas petition for AEDPA purposes. 545 U.S. at 531. But *Gonzalez* did not purport to hold that all filings containing such "claims" are necessarily "second or successive" petitions. To the contrary, as courts on both sides of the circuit split have recognized, *Gonzalez* addressed a separate question from the one presented here: even if a motion to amend was a habeas petition, "was it a *second* application?" *Phillips*, 668 F.3d at 435. The Second and Third Circuits correctly recognize that a later-in-time petition seeking to amend one that remains pending on appeal is not "second or successive" because it was not filed "subsequent to the conclusion of 'a proceeding that "counts" as the first.'" *Ching*, 298 F.3d at 177 (quoting *Littlejohn*, 271 F.3d at 363); *see also Santarelli*, 929 F.3d at 104. *Gonzalez* does not address or define when the first proceeding concludes.

To the extent the Ninth Circuit concluded that *Gonzalez* applies here because petitioner sought to amend his underlying petition through a filing for-

mally captioned under Rule 60(b), that was error. *Gonzalez* did not hold that any motion bearing a Rule 60(b) label is necessarily "second or successive." To the contrary, all Justices of this Court have agreed that the proper characterization of a filing for these purposes "depends on the substance of the motion, not the label that is affixed to it." *Banister*, 140 S. Ct. at 1712 (Alito, J. dissenting); *id.* at 1709 (majority opinion) (analysis goes "far beyond their labels"). The relevant question is whether the "later-in-time filing would have 'constituted an abuse of the writ'" as that concept was traditionally understood. *Id.* at 1706. Because a motion to amend a petition that remains pending is not abusive, petitioner's filing, whatever its label, was not "second or successive."

C. This Case Presents an Ideal Vehicle.

This case cleanly presents the issue that has divided the circuit courts. The Ninth Circuit squarely decided the question presented, declining to follow the Second and Third Circuits, and Judge Fletcher urged this Court to "recognize the circuit split," grant review, and reverse. *See* Pet. App. 45a (Fletcher, J., concurring). Petitioner has raised the question presented at every available opportunity, and it is dispositive here. Because the Ninth Circuit dismissed petitioner's motion on the ground that it was "second or successive," the district court has not addressed the merits of petitioner's request for leave to amend. *See* Pet. App. 13a–14a. This case is therefore a suitable vehicle. A decision by this Court that petitioner's request to amend is not a "second or successive" petition barred by the gatekeeping mechanism would permit the district court to consider that request un-

der the correct legal standard, and, if it agrees to permit the amendment, to address the substance of the amended petition.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALEXANDER BALBUENA,
Petitioner-Appellant,

No. 12-16414
D.C. No. 3:11-cv-00228-RS

v.

WILLIAM JOE SULLIVAN, Warden;
ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA
Respondents-Appellees.

ALEXANDER BALBUENA,
Petitioner-Appellant,

No. 18-15432
D.C. No. 3:11-cv-00228-RS

v.

WILLIAM JOE SULLIVAN, Warden;
Respondent-Appellee.

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court for the Northern District of California

Argued and Submitted November 12, 2019
San Francisco, California

Filed August 17, 2020
Amended November 17, 2020

Before: William A. Fletcher, Mark J. Bennett, and-Bridget S. Bade, Circuit Judges.

Order;
Opinion by Judge Bade;
Concurrence by Judge W. Fletcher

SUMMARY[*]

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Habeas Corpus

The panel filed an amended opinion, denied a petition for rehearing, and denied on behalf of the court a petition for rehearing en banc, in appeals arising from the district court's denial of (1) Alexander Balbuena's habeas corpus petition in which he argued that the admission of his confession violated his due process rights because the statements were the involuntary product of coercion; and (2) his motion pursuant to Fed. R. Civ. P. 60(b) for relief from judgment to allow him to amend his habeas petition to add a new claim that the admission of his confession violated his *Miranda* rights.

Applying AEDPA's deferential standards of federal habeas review, and affirming the denial of the petition, the panel held that the state court's conclusion that Balbuena's confession was voluntary was not contrary to or an unreasonable application of federal law. The panel wrote that the state court did not unreasonably conclude that Balbuena was sixteen years old and considered his age, experience, and maturity as part of the totality of the circumstances of his confession. The panel considered Balbuena's arguments regarding the adequacy of his *Miranda* warnings as part of the totality of the circumstances relevant to his Fourteenth Amendment claim rather than as a separate Sixth Amendment claim, and concluded that the state court's determination that Balbuena was advised of his *Miranda* rights was not objectively unreasonable. The panel wrote that the state court did not unreasonably conclude that the circumstances of the interview, which included the detectives' limited references to Balbuena's unborn

child, use of "alternative scenarios," and implied offers of leniency were not coercive. The panel wrote that a video recording of the interview refutes Balbuena's argument that those tactics overbore his will and rendered his confession involuntary.

The panel held that the district court properly denied Balbuena's Rule 60(b) motion as an unauthorized second or successive petition under 28 U.S.C. § 2244(b)(3)(A). Balbuena argued that the district court should have considered his Rule 60(b) motion as a motion to amend his habeas petition because he filed it while his appeal from the denial of his habeas petition remained pending before this court and that his claim therefore was not "fully adjudicated." The panel wrote that a Rule 60(b) motion that asserts a new claim is a disguised habeas corpus petition that is subject to the requirements of § 2244(b), and that because Balbuena neither sought nor obtained authorization from this court to file a second or successive habeas petition, the district court lacked jurisdiction to consider his new claim. The panel rejected Balbuena's contention that even if his Rule 60(b) motion is a disguised habeas petition, it is not a second or successive petition under § 2244(b) because the denial of his initial petition was pending on appeal.

Concurring in the result, Judge W. Fletcher agreed that the state court did not unreasonably conclude that Balbuena's confession was voluntary. He also agreed that *Beaty v. Schriro*, 554 F.3d 780, 783 n.1 (9th Cir. 2009), requires the panel to hold that Balbuena's Rule 60(b) motion was a second or successive habeas petition, even though it was filed while an appeal on his initial habeas petition was

awaiting adjudication in this court. He wrote separately to register his disagreement with *Beaty* and to urge the Supreme Court to recognize the circuit split and to adopt the rule stated in *Ching v. United States*, 298 F.3d 174, 178 (2d Cir. 2002), and *United States v. Santarelli*, 929 F.3d 95, 104–05 (3d Cir. 2019).

COUNSEL

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Jill M. Thayer (argued), Deputy Attorney General; Peggy S. Ruffra, Supervising Deputy Attorney General; Gerald A. Engler, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Francisco, California; for Respondents-Appellees.

ORDER

The opinion filed on August 17, 2020 and published at 970 F.3d 1176 is amended by the opinion filed concurrently with this order.

With this amended opinion, the panel has voted to deny the petition for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, the petition for rehearing and rehearing en banc is **DENIED**. No further

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petitions for panel rehearing or rehearing en banc may be filed.

OPINION

BADE, Circuit Judge:

In these consolidated appeals, Alexander Balbuena challenges the district court's denial of his federal habeas petition, and its denial of his Federal Rule of Civil Procedure 60(b) motion to set aside the judgment and amend his habeas petition to add a new claim. For his role in a gang-related shooting, a jury convicted Balbuena of first-degree murder, attempted murder, and street terrorism. Balbuena argues that the state court's admission of his confession violated his due process rights because it was the involuntary product of coercion. Balbuena also argues that his Rule 60(b) motion was a proper motion to amend his habeas petition and not a disguised second or successive petition subject to 28 U.S.C. § 2244. We affirm in both matters.

I.

A.

On January 17, 2006, Jose Segura was shot and killed while sitting in his car with Oralia Giron, and their children. According to Giron, several men surrounded the car. The man standing nearest to Segura said that the men wanted revenge for the

murder of "Gizmo" and then shot a gun, killing Segura.[1] Giron was also shot and injured during the encounter, but fortuitously Segura's and Giron's three-year old daughter and three-month-old son were not injured.

Police detectives investigating the murder scene found shell casings on the street for .32-caliber and 9-millimeter handguns, and bullet fragments in the car and a fence. They searched a nearby house, pursuant to a search warrant, and found a .38-caliber handgun and ammunition for .22-caliber and 9-millimeter handguns. Kristina Lawson, who rented a room in the house from Juan Herrera (a/k/a Willow), told officers that she saw Balbuena and Julius Stinson (a/k/a Jukas or Jujakas) with guns just before the shooting. She also stated that she heard gun shots, saw Balbuena and Stinson running to the house, and saw Balbuena enter the house apparently trying to hide a gun under a couch. She also said that, later in the day at the "Green Store," Balbuena told her that he shot Segura in the forehead.[2]

After interviewing Lawson, the detectives drove her to the apartment building where she said

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[1] Luis Ochoa (a/k/a Gizmo) had been shot and killed the previous day.

[2] Balbuena lived in an apartment known to be affiliated with the street gang Richmond Sur Trece in a neighborhood called the "RST compound." The RST compound included the "Green Store" that only RST gang members could use to sell narcotics.

Balbuena lived and she pointed out his apartment.[3] Around 2:00 a.m., after obtaining a warrant, the detectives found Balbuena in his apartment asleep with his pregnant girlfriend and arrested him.[4]

B.

Balbuena was taken to a police station where two detectives questioned him, for approximately ninety minutes, starting at about 2:45 a.m. Balbuena, who was around sixteen years old, had no prior arrests. Before the detectives started the interview, Balbuena asked a police officer if he could use the restroom. The police officer responded that it was "up to [the detectives]" and that Balbuena could "ask them."

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[3] Immediately after the interview at the house, Lawson made similar statements in a recorded interview at the police station. Lawson testified at trial and recanted the statements that she made at her house and in the recorded interview. At the time of the interviews, Lawson was fifteen years old and had some connection to Balbuena. When officers arrested Balbuena, he was in bed with his girlfriend and a child who was Lawson's son. Lawson also told detectives that Balbuena lived with her sister-in-law.

[4] Several months later, the detectives also recorded an interview with another witness, Kay Daniels. Daniels was in federal custody for drug related offenses and wanted to trade information for a reduction in his sentence. Daniels said that a few days after Gizmo's murder, he was outside Herrera's house with Herrera, Balbuena (a/k/a Jay Leno), the "dude that used to work at Beacon," and Lawson, when Stinson arrived. Herrera, the "dude that used to work at Beacon," and Stinson ran up to a car, and then Daniels heard several shots. Daniels identified Stinson and the "dude that used to work at Beacon" as the shooters. Daniels saw Herrera run back to his house with two guns. He was unsure of Balbuena's movements; he "didn't really see him too much."

When the detectives entered the interview room, Balbuena told them he was "cool." Near the end of the interview, Balbuena asked, and was permitted, to use the restroom.

At the beginning of the interview, one of the detectives read Balbuena his Miranda rights as follows:

> So, you know you have the right to remain silent anything you say can be used against you in a court, you have the right to an attorney, you have the right to an attorney prior to your questioning if you desire, if you can't afford to hire one, one will be represented to you free of charge. You understand all those rights? You're nodding your head like you do, right? Okay, you're probably curious as to why we're wanting to talk [to] you tonight, is that true? With that in mind, are you willing to talk to us about why we were at your house tonight? Okay.

Balbuena responded, "Yup. Yup."

Balbuena initially denied being at the scene of Segura's murder. The detectives then falsely told Balbuena that they knew he was at the scene with Stinson (Jujakas) because they had already talked to him. They encouraged Balbuena to speak honestly, saying "it's important for you to be honest with us so if there is some way to help yourself out this is the time to do it." They also referred to Balbuena's impending fatherhood, describing Balbuena as "the sixteen year old that's going to be a father soon."

During the interview, the detectives also presented Balbuena with alternative scenarios.

They stated, "Either you are a young man that is angry because your best friend was just killed . . . [o]r somebody like Jujakas forced you to do this . . . maybe you weren't thinking straight, maybe you were upset, maybe that guy aimed the gun at you, maybe he's a gang member, maybe he's the guy that killed Gizmo . . . . Was it a spur of the moment type thing or did you plan it for the whole night?" After this last question, Balbuena acknowledged that he was at the scene of the murder but denied having a gun.

The detectives continued to present alternatives: "[I]f it's a justifiable homicide or it's something you did out of rage and you just weren't thinking straight then that's important for us to get down accurately. If you're just a killer that just wants to go around to kill people . . . then by all means tell us and we'll document that as such." "Maybe you were shooting in defense and just, right maybe trying to scare him." The detectives also continued making general appeals to Balbuena's honesty. Balbuena continued to deny that he had a gun but admitted he was "right there in front of the car."

One of the detectives then stated, "[R]emember, we are giving you the opportunity to try to work through this so maybe you can be there for your kid in a few years." Balbuena again admitted being in front of the car and again denied having a gun. The detectives told Balbuena that witnesses saw him shooting a gun and asked what type of gun he had, as "only one of them hit somebody . . . .[s]o it's important which one you had." Balbuena then admitted having a .32-caliber handgun, shooting three or four rounds at the car's front window, and seeing two people in the car.

As the interview progressed, the detectives referred to the possible sentences Balbuena faced, stated that he would be tried as an adult, and implied that he would receive lenient treatment if he spoke honestly and showed "remorse." After these statements, Balbuena provided details about the incident. Balbuena told the detectives that Herrera gave him the gun and told him to shoot, Balbuena and the others—including Stinson, Herrera, and another person—approached Segura's car from behind, Balbuena belonged to the RST gang, and Segura's murder was gang retaliation for the murder of another RST member, "Gizmo."

C.

Before trial, Balbuena moved to suppress his statements as involuntary, and the trial court denied the motion. In April 2008, a jury found Balbuena guilty of first-degree murder, attempted murder, and street terrorism. The trial court sentenced Balbuena to eighty-two-years'-to-life imprisonment. On direct appeal, Balbuena argued, among other things, that his confession was coerced in violation of his constitutional rights. The California Court of Appeal concluded that the detectives improperly offered Balbuena leniency during the latter part of the interview, but Balbuena made critical admissions—that he was in front of the car, that he had a .32-caliber gun, and that he fired three or four rounds at the front window of the car—before the detectives employed improper tactics. After considering the totality of the circumstances, including the video recording of the interview, the circumstances of the interview, Balbuena's age, experience, and

demeanor, and Balbuena's waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the court concluded that Balbuena's statements were voluntary.

The state appellate court further found any error in admitting Balbuena's statements harmless because the evidence against him was "very strong." This evidence included Lawson's statements that she saw Balbuena near the murder scene with a gun shortly before she heard shots, and that Balbuena told her later that same day that he shot Segura in the forehead. The court reduced Balbuena's sentence to seventy-two-years'-to-life imprisonment but otherwise affirmed. The California Supreme Court denied review.

In January 2011, Balbuena filed a timely petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254. Balbuena challenged his conviction and argued, among other things, that the state court's admission of his confession violated the Fourteenth Amendment's Due Process Clause because his statements were involuntary. In May 2012, the district court denied Balbuena's habeas petition on the merits of his claims, entered judgment in favor of respondents, and denied a certificate of appealability.[5] Balbuena appealed, and, in May 2013, this court appointed counsel and issued a certificate of appealability on the sole issue of whether the state court violated Balbuena's right to

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[5] "A disposition is 'on the merits' if the district court either considers and rejects the claims or determines that the underlying claim will not be considered by a federal court." *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (citation omitted).

due process by denying his motion to suppress his confession on the ground that it was an involuntary product of coercion.

In August 2013, Balbuena asked this court to stay his appeal and remand to the district court with instructions to "permit [him] to file an amended petition." Balbuena acknowledged that if this court denied his motion he would "be left to file a new successive habeas petition," which is generally barred by 28 U.S.C. § 2244(b)(3). In October 2013, this court denied the motion without prejudice to refiling with a written indication that the district court would be willing to entertain the motion. Balbuena obtained written indication from the district court stating that it "was willing to entertain" further proceedings but also that it was making "no comment on the merits of such a motion." He then filed a renewed motion to stay the appeal and remand to the district court to file an amended petition. In December 2013, this court stayed the appeal and remanded under Federal Rule of Appellate Procedure 12.1(b) to permit the district court to consider Balbuena's Rule 60(b) motion.

Balbuena returned to the district court and filed a Rule 60(b) motion for relief from judgment to allow him to amend his habeas petition to add a new claim that the admission of his confession violated his Miranda rights. In November 2014, the district court denied the motion without prejudice and stayed proceedings to allow Balbuena to exhaust his new claim in state court. In January 2017, the district court reopened proceedings, and Balbuena filed a renewed Rule 60(b) motion in March 2017. In February 2018, the district court denied the motion as an unauthorized second or successive petition

under 28 U.S.C. § 2244(b)(3)(A). Balbuena appealed that decision, and this court consolidated the appeals.

II.

This court reviews de novo a district court's denial of a habeas corpus petition, *Smith v. Ryan*, 813 F.3d 1175, 1178–79 (9th Cir. 2016), and a dismissal of a Rule 60(b) motion as an unauthorized second or successive § 2254 petition, *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013). Both claims are governed by standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. §§ 2244(b), 2254(d).

III.

A.

Under § 2254, a state prisoner may challenge the constitutionality of his custody by filing a petition for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(a). In his habeas petition, Balbuena challenged his state custody arguing, among other things, that the admission of his confession violated his due process rights because his statements were the involuntary product of coercion and, therefore, the state trial and appellate courts unreasonably found his confession voluntary.

We consider Balbuena's petition under the framework of AEDPA and apply a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333

n.7 (1997)). Under AEDPA, a federal court may only grant habeas corpus relief when the state court's ruling was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

Under the first clause of § 2254(d)(1), a state court's decision is "contrary to" clearly established federal law if it contradicts governing law in Supreme Court cases, or if it reaches a different result than Supreme Court precedent when considering materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). Under the second clause, a state court's decision is an "unreasonable application" of clearly established federal law if it identifies the correct "governing legal rule but applies it unreasonably to the facts" of the case. *Id.* at 407–08. "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous"; it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citing *Williams*, 529 U.S. at 409–10, 412).

Under § 2254(d)(2), a state court's factual determinations are not "unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). That "[r]easonable minds reviewing the record might disagree" about a factual finding is insufficient to "supersede" the state court's determination. *Rice v. Collins*, 546 U.S. 333, 341–42 (2006).

When applying these standards to a petitioner's claims, this court considers the last reasoned state court decision—here, the decision of the California Court of Appeal. *See Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018). Balbuena's claim that the state court violated his due process rights by admitting his coerced confession challenges the constitutionality of his custody. Accordingly, we consider whether the state court's adjudication of this claim resulted in a decision that was "contrary to" or involved an "unreasonable application of" established federal law, or that was based on an unreasonable determination of the facts considering the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d).

B.

An involuntary or coerced confession violates a defendant's right to due process under the Fourteenth Amendment and is inadmissible at trial. *Jackson v. Denno*, 378 U.S. 368, 385–86 (1964); *see Dickerson v. United States*, 530 U.S. 428, 433–34 (2000). To determine whether a confession is involuntary, we must ask "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession," considering "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Dickerson*, 530 U.S. at 434 (internal quotation marks and citations omitted). "The characteristics of the accused can include the suspect's age, education, and intelligence as well as a suspect's prior experience with law enforcement," *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)

(citations omitted), and the suspect's maturity, *Withrow v. Williams*, 507 U.S. 680, 693 (1993). The "potential circumstances" of the interrogation include its length and location, and "the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." *Id.* at 693–94 (citation omitted).

Generally telling a suspect to speak truthfully does not amount to police coercion. *See Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997), *overruled on other grounds by United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014) (en banc). Police deception alone also "does not render [a] confession involuntary," *United States v. Miller*, 984 F.3d 1028, 1031 (9th Cir. 1993) (citing *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969)), nor is it coercive to recite "potential penalties or sentences," including the potential penalties for lying to the interviewer, *United States v. Haswood*, 350 F.3d 1024, 1029 (9th Cir. 2003) (citations omitted).

"The [voluntariness] determination 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.'" *Dickerson*, 530 U.S. at 434 (second alteration in original) (quoting *Stein v. New York*, 346 U.S. 156, 185 (1953)). Thus, the court reviews a confession from a teenager with "special caution." *Doody v. Ryan*, 649 F.3d 986, 1011 (9th Cir. 2011) (en banc). Even in the case of a juvenile, however, indicating that a cooperative attitude would benefit the accused does not render a confession involuntary unless such remarks rise to the level of being "threatening or coercive." *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (quoting *Fare v. Michael* C., 442 U.S. 707, 727 (1979)).

C.

Balbuena argues that his statements were involuntary based on three factors: (1) his youth, inexperience, and immaturity; (2) the *Miranda* warnings, which he characterizes as incomplete; and (3) the interrogation tactics. We consider whether Balbuena's will was overborne under the totality of the circumstances. *Dickerson*, 530 U.S. at 434. We address each of these arguments in turn, with the transcript and the video recording of the interview to assist our review. *See Doody*, 649 F.3d at 1009 (stating that "[t]he audiotapes of [the petitioner's] interrogation are dispositive in this case, as we are not consigned to an evaluation of a cold record, or limited to reliance on the detectives' testimony.").

1.

First, Balbuena's status as "a juvenile is of critical importance in determining the voluntariness of his confession." *Id.* at 1008; *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (observing that the voluntariness of a statement depends on "the characteristics of the accused," including his "youth" (citation omitted)). Balbuena asserts that he was fifteen years old at the time of the interview and suggests that the state court's determination that he was sixteen years old was an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d)(2), (e). The evidence in the record, however, including Balbuena's telling the detectives he was sixteen years old, supports the conclusion that

Balbuena was sixteen years old. Thus, the state court's conclusion was not unreasonable.

Conceding that "whether he was 15 or 16 at the time of the shooting is of little legal significance," Balbuena argues that the state court failed to "evaluate the impact of the officers' statements on an isolated youngster with no relevant experience." Balbuena argues that this failure was objectively unreasonable. But Balbuena's argument is based on the false premise that the state court "mentioned his age only once in passing." Instead, the state court addressed Balbuena's age when considering the totality of circumstances to determine whether his will was overborne. That section of the state appellate court opinion reads, in part, as follows:

> Having reviewed the videotape of [Balbuena's] confession, we find ourselves in agreement with the trial court's commendably thorough and detailed ruling regarding the nature of the interview. While [Balbuena] was a minor without criminal history, he was hardly a "child" as characterized in his briefs: He was 16 years old, arrested in bed with his pregnant girlfriend, and well versed in the gang activities in his neighborhood. The atmosphere of the hour and a half long interview (which included periods when he was left in the interview room by himself) was not overly harsh or threatening, and [Balbuena's] demeanor throughout was relaxed and displayed no intimidation or fear.

People v. Balbuena, No. A122043, 2010 WL 1783558, *15 (Cal. Ct. App. May 5, 2010) (citation omitted). The state court's conclusion that Balbuena's

confession was voluntary, after considering his age and lack of criminal record, was not an unreasonable application of the law.

2.

Second, although Balbuena did not assert a separate *Miranda* claim in the state trial or appellate court, we consider the adequacy of the warnings he received as another factor in the voluntariness determination.[6] *See Withrow*, 507 U.S. at 693–94. Moreover, Balbuena argues that because he has "consistently raised" the "claim of involuntariness," this court must weigh "[a]ll circumstances, including the failure to advise an in-custody suspect of his right to counsel." Therefore, as part of the totality of the circumstances relevant to Balbuena's Fourteenth Amendment claim, we consider his arguments that the *Miranda* warnings he received were deficient; we do not consider these arguments as a separate Sixth Amendment claim.

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[6] Although Balbuena did not assert a *Miranda* claim in the trial court, he challenged the admission of his confession on other grounds and the court held a voluntariness hearing. The state submitted the videotape and transcript of Balbuena's interview, including the *Miranda* warnings. On cross examination, one of the detectives testified that Balbuena was advised "of his rights," and defense counsel did not challenge that statement. The trial court concluded that Balbuena was "given his *Miranda* rights at the beginning of the interview and he did expressly waive those rights." In the appellate court, Balbuena challenged the voluntariness of his confession, but again did not assert that the *Miranda* warnings were inadequate. The appellate court stated, without explanation, that Balbuena "was advised of his *Miranda* rights and waived them."

Balbuena argues that the warnings he received were deficient because the detectives failed to advise him that he had the right to have an attorney present during questioning. *See Miranda*, 384 U.S. at 471 (holding that a suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation"). He argues that the state appellate court's failure to consider the detectives' *Miranda* violation "was objectively unreasonable and contrary to precedent."

The *Miranda* decision, and the warnings it requires as "absolute prerequisite[s] to interrogation," 384 U.S. at 471, are long standing and clearly established federal law. *See Williams*, 529 U.S. at 412 (explaining that "clearly established Federal law" under § 2254(d)(1) "refers to the holdings . . . of [the Supreme] Court's decisions as of the time of the relevant state-court decision"). Moreover, Balbuena correctly notes that this court has concluded that *Miranda* warnings are inadequate when they advise a defendant of the right to counsel before questioning, but do not advise a defendant of the right to counsel during questioning. *See United States v. Bland*, 908 F.2d 471, 473–74 (9th Cir. 1990); *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984). But decisions of this court, including *Bland* and *Noti*, are not "clearly established Federal law" for purposes of review under the AEDPA. *See Williams*, 529 U.S. at 412. Instead, we must look to Supreme Court precedent as we consider whether the state appellate court's determination that Balbuena's confession was voluntary, based on the totality of the circumstances including the *Miranda* warnings, *Withrow*, 507 U.S.

693–94, was an unreasonable application of federal law.

Although the Supreme Court "has not dictated the words in which the essential information must be conveyed," *Florida v. Powell*, 559 U.S. 50, 60 (2010), the warnings must "reasonably convey to a suspect his rights as required by *Miranda*." *Id.* (modification, citation, and quotation marks omitted); *see also Duckworth v. Eagan*, 492 U.S. 195, 202 (1989) (explaining that the Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision."). In *Powell*, the Supreme Court considered an argument similar to Balbuena's argument—that a defendant's *Miranda* warnings were constitutionally infirm because the detectives advised him that he had a right to an attorney before questioning, but they did not advise him that he had the right to have an attorney present during questioning. *See* 559 U.S. at 60–62. In *Powell*, the defendant was advised that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of these rights at any time [he] want[ed] during this interview." *Id.* at 54. The defendant, however, was not advised that he had the right to have an attorney present during questioning. *See id.*

The Court considered whether these *Miranda* warnings satisfied the requirement "that an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Id.* at 60 (quoting *Miranda*, 384 U.S. at 471). The Court concluded that the challenged warnings "reasonably conveyed [the defendant's] right to have an attorney present, not only at the

outset of interrogation, but at all times." *Id.* at 62. "To reach the opposite conclusion, i.e., that the attorney would not be present throughout the interrogation, the suspect would have to imagine an unlikely scenario: To consult counsel, he would be obliged to exit and reenter the interrogation room between each query." *Id.*

Here, Balbuena was advised that he had the right to an attorney "prior to" questioning and was also advised that he "ha[d] the right to an attorney."[7] Although these warnings are not identical to those described in *Powell*, there could be "fairminded disagreement," *see Harrington v. Richter*, 562 U.S. 86, 103 (2011), over whether the warnings in this case and in *Powell* were sufficiently similar to conclude that the warnings "reasonably conveyed" Balbuena's right to have an attorney present at all times, *Powell*, 559 U.S. at 62. Therefore, the state court's determination that Balbuena was advised of his *Miranda* rights was not "objectively unreasonable." *See Lockyer*, 538 U.S. at 75. Based on the record in the state court, and applying the deferential review of the AEDPA, we conclude it was not unreasonable for the state court to conclude, under the totality of the circumstances including the *Miranda* warnings, that Balbuena's confession was voluntary.

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[7] Balbuena was advised: "you have the right to an attorney, you have the right to an attorney prior to your questioning if you desire, if you can't afford to hire one, one will be represented [sic] to you free of charge."

Third, Balbuena asserts that the detectives used coercive techniques and compares the circumstances of his interview to Preston where, on direct appeal, this court held that a thirty-eight minute noncustodial interview of an eighteen-year old with an IQ of sixty-five was coercive and rendered his confession involuntary. 751 F.3d at 1028. Balbuena also compares this case to *Rodriguez v. McDonald*, where the court held that police officers' suggestion that cooperation would result in leniency supported the conclusion that the suspect's waiver of the right to counsel was involuntary. 872 F.3d 908, 923–24 (9th Cir. 2017). In *Rodriguez*, the defendant was fourteen years old and had Attention Deficit Hyperactivity Disorder and a "borderline" IQ. *Id.* at 923–23. The officers continued to question the defendant even after he requested a lawyer, and "impressed upon [the defendant] that he would imminently be charged with murder." *Id.* at 924.

Like the defendants in *Preston* and *Rodriguez*, Balbuena was a youth at the time of the interview, but unlike those defendants there is no evidence that Balbuena had a limited IQ or that he was "easily confused" and "highly suggestible and easy to manipulate." *See Preston*, 751 F.3d at 1022, 1028, 1030 (suggesting that the court might "reach a different conclusion regarding someone of normal intelligence"). Additionally, unlike the defendant in *Rodriguez*, Balbuena was advised of his *Miranda* rights and never asked to speak to an attorney.

On the other hand, as Balbuena argues, the detectives in this case used some of the same interview techniques employed in *Preston* and *Rodriguez*—such as suggesting alternative scenarios and making implied offers of leniency. *See Preston*,

751 F.3d at 1025–26; *Rodriguez*, 872 F.3d at 923–34. References to a suspect's unborn child, in some circumstances, could also be considered a coercive interview tactic. *See Brown v. Horell*, 644 F.3d 969, 980–82 (9th Cir. 2011) (deeming a confession involuntary in light of the defendant's limited education, relatively young age (twenty-one years), repeated references to his unborn child, and lengthy custodial interrogation).

But "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Instead, we consider the totality of the circumstances under a highly deferential standard to determine the reasonableness of the state court's conclusion that Balbuena's statements were voluntary. *See Yarborough*, 541 U.S. at 664. The "totality of the circumstances" test is a general standard requiring "even greater deference under AEDPA." *Cook v. Kernan*, 948 F.3d 952, 968 (9th Cir. 2020).

To be sure, Balbuena's youth and lack of experience with law enforcement, the time of the interview, the location of the interview, and the detectives' tactics are all factors that could potentially support a conclusion that Balbuena's confession was involuntary. *See*, *e.g.*, *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948) (finding confession involuntary when a fifteen-year-old was questioned for five hours, between midnight until dawn, by "relays of" one or two officers at a time); *Doody*, 649 F.3d at 1009, 1012–13 (finding confession involuntary when a seventeen-year-old was questioned for nearly thirteen hours by "tag teams" of two, three, and four detectives, while isolated,

sleep deprived, and held in a room with only a straight-backed chair and no table to lean on, and relentlessly questioned even after he stopped responding, and told that he had to answer questions). But the circumstances of Balbuena's interview are a far cry from *Haley* and *Doody*.

Contrary to Balbuena's arguments that the detectives overbore his will, the video recording reveals that the tone of the interview was non-threatening. Balbuena spoke easily with the detectives, displayed a calm demeanor with no indication of fear or intimidation, and did not react when the detectives referred to his unborn child. He even spontaneously offered to show the detectives his tattoo. The interview lasted ninety minutes, including breaks and an approximately thirty-minute period when Balbuena was left alone in the room. The same two detectives conducted the interview and Balbuena was not subjected to "tag team" questioning, nor was he surrounded by multiple officers. Balbuena sat in a chair next to a table in a relaxed posture with his hands behind his head or with one arm slung over the back of chair for a large portion of the interview. About an hour into the interview, Balbuena yawned and leaned on the table when the detectives left the room, but he returned to a more upright posture and alternated between leaning on the table and sitting upright for the remainder of the interview.

In sum, the video recording of Balbuena's interview, like the audio recording in *Doody*, is dispositive and supports the state court's conclusion that Balbuena voluntarily confessed.

D.

We conclude that the state court's voluntariness determination was not contrary to or an unreasonable application of federal law. The state court considered the totality of the circumstances, including the adequacy of the *Miranda* warnings. The state court did not unreasonably conclude that Balbuena was sixteen years old and considered his age, experience, and maturity as part of the totality of the circumstances of his confession. Finally, the state court did not unreasonably conclude that the circumstances of the interview, which included the detectives' limited references to Balbuena's unborn child, use of "alternative scenarios," and implied offers of leniency, were not coercive. The video recording of the interview refutes Balbuena's argument that those tactics overbore his will and rendered his confession involuntary. Therefore, applying AEDPA's highly deferential standard for habeas corpus review, we conclude that the state court's determination that Balbuena's confession was voluntary was not unreasonable.

IV.

We next address whether the district court erred by denying Balbuena's Rule 60(b) motion as an unauthorized second or successive petition under 28 U.S.C. § 2244(b)(3)(A). Balbuena argues that the district court should have considered his Rule 60(b) motion as a motion to amend his habeas petition because he filed it while his appeal from the denial of his habeas petition remained pending before this court. Therefore, Balbuena contends, his claim was not "fully adjudicated." Because Balbuena asserted a

new claim in his Rule 60(b) motion despite the district court's previously adjudicating his habeas petition on the merits, we conclude that the district court properly denied that motion as an unauthorized second or successive petition.

A.

AEDPA generally bars second or successive habeas petitions. Section 2244(b)(1) states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). No exceptions exist to this statutory bar. *See Goodrum v. Busby*, 824 F.3d 1188, 1193 (9th Cir. 2016) (explaining that claims asserted in an earlier petition "must be dismissed, period").

"If a second or successive petition presents new claims that were not previously raised, those claims must be dismissed as well . . . ." *Id.* (citing 28 U.S.C. § 2244(b)(2)). Congress, however, provided two narrow exceptions to this statutory bar. The first applies if the "new claim relies on a new rule of constitutional law, made retroactive on collateral review." 28 U.S.C. § 2244(b)(2)(A). The other applies if the new claim turns on newly discovered evidence that shows a high probability of actual innocence. *Id.* § 2244(b)(2)(B).

Before filing a second or successive petition, a petitioner must file a motion in the appropriate court of appeals and obtain an order authorizing the district court to consider the petition. *See id.* § 2244(b)(3)(A). This requirement is jurisdictional. *See Cooper v. Calderon*, 274 F.3d 1270, 1274–75 (9th Cir. 2001) (per curiam). Here, the district court

concluded that Balbuena attempted to assert a new claim through his Rule 60(b) motion and, therefore, it was "in truth a request to file an unauthorized second or successive habeas petition" because Balbuena had not obtained an order from this court authorizing the district court to consider it.

Balbuena argues that the district court mischaracterized his Rule 60(b) motion as a second or successive petition subject to § 2244, when it should have construed it as a motion to amend his habeas petition under Rules 15 and 60(b). Balbuena's argument turns on his characterization of his habeas petition as "pending" because "all proceedings, including appellate proceedings, have not been completed."

Generally, "a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." *Goodrum*, 824 F.3d at 1194 (citing *Woods v. Carey*, 525 F.3d 886, 889 (9th Cir. 2008)). "Thus, when a petitioner files a new petition while his first petition remains pending, courts have uniformly held that the new petition cannot be deemed second or successive." *Id.* (citations omitted).

Moreover, a movant does not make a habeas corpus claim, and therefore does not file a successive petition, "when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005); *see also Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000) (concluding that a habeas petition filed "after an initial habeas petition was unadjudicated on its merits and dismissed for failure

to exhaust state remedies is not a second or successive petition"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998) (explaining that a habeas petition filed after an earlier petition was dismissed as premature was not a second or successive petition but part of the adjudication of the first petition).

Balbuena does not dispute that the district court denied his habeas petition on the merits. Instead, he argues that a habeas petition is not "finally adjudicated," even after a district court has denied it on the merits, if that denial is pending on appeal. Therefore, we first consider whether Balbuena's habeas petition was "pending" for purposes of § 2244 because its denial was on appeal in this court when he filed his Rule 60(b) motion in the district court.

B.

To support his argument, Balbuena relies on two cases from this circuit, *Woods* and *Goodrum*, and attempts to distinguish another, *Beaty v. Schriro*, 554 F.3d 780 (9th Cir. 2009) (published order). But we have not adopted the meaning of "finally adjudicated" that Balbuena advocates. Therefore, Balbuena's reliance on *Woods* and *Goodrum* is misplaced, and his attempt to distinguish *Beaty* fails.

Furthermore, these cases do not address Rule 60(b) motions. As we explain later, this is a significant procedural distinction that we must consider in light of the Supreme Court's holding in *Gonzalez* that a Rule 60(b) motion that asserts a claim on the merits is in effect a habeas petition and is subject to requirements of § 2244(b) for successive petitions. *See* 545 U.S. at 531–32.

1.

Contrary to Balbuena's characterization of *Woods* and *Goodrum*, we have not held that a habeas petition is pending, and thus not "fully adjudicated," simply because the denial of that petition is before this court on appeal. In *Woods*, we considered whether § 2244(b) barred a pro se petitioner's second habeas petition, which he filed while his first petition was still pending in the district court. 525 F.3d at 887. We held that the district court should have construed the second petition as a motion to amend the petition that was still pending in the district court. *Id.* at 890. But we did not consider how to treat a second petition that is filed while a prior petition is pending on appeal. Therefore, *Woods* establishes only that a petition that is still pending in the district court is not final for purposes of § 2244. It offers no support for Balbuena's position.

Our decision in *Goodrum* similarly fails to support Balbuena's argument. There, we explained—interpreting *Woods*—that if a petitioner files a second petition in the district court while his first petition is still pending in that court, the district court must rule on the second petition as a motion to amend under Rule 15. 824 F.3d at 1195. If a petitioner files an application for leave to file a second or successive petition in this court and "informs us that an earlier-filed petition remains pending" in the district court, we must construe that application as a motion to amend, but "we lack[] authority to rule on such a motion in the first instance." *Id.* Instead, "[w]e can issue an order advising the pro se petitioner that his application is

being denied as unnecessary on the ground that the new petition he seeks to file is not second or successive and that he is therefore free to file it in the district court," or if the new petition is attached to the application, as our rules require, "we can transfer the petition to the district court." *Id.* But our decision in *Goodrum* does not resolve the question here: whether a petition should be considered "finally adjudicated" when its denial is pending on appeal.

If our decisions in *Woods* and *Goodrum* do not support Balbuena's position, then our decision in *Beaty* defeats it. There, after the district court denied the petitioner's habeas petition in the first instance and on remand after a first appeal, he filed a motion to amend his petition and argued that it should be considered part of his original habeas proceeding. *Beaty*, 554 F.3d at 782. The district court denied the motion to amend, the petitioner appealed again, and while that appeal was pending, he applied to file a second or successive petition, arguing his additional claims should be considered as part of his original habeas proceeding. *Id.* We rejected the petitioner's arguments and "decide[d] that [he] cannot use *Woods* to amend his petition after the district court has ruled and proceedings have begun in this court . . . ." *Id.* at 783 n.1. Because the petitioner did not move to amend until "after the district court had denied his claims," he was required to satisfy the requirements for successive petitions under § 2244(b). *Id.* at 782–83.

Here, like the petitioner in *Beaty*, Balbuena sought to add a new claim after the district court denied his petition and he appealed that denial. Applying *Beaty*, the district court properly

considered Balbuena's Rule 60(b) motion a second or successive application for habeas corpus relief. Because Balbuena neither sought, nor obtained, authorization from this court to file a second or successive habeas petition, the district court lacked jurisdiction to consider Balbuena's new claim. *See* 28 U.S.C. § 2244(b)(3); *Cooper*, 274 F.3d at 1274–75.

2.

Despite *Beaty*'s clear command, Balbuena urges this court to follow the Second Circuit's decisions in *Ching v. United States*, 298 F.3d 174 (2d Cir. 2002), and *Whab v. United States*, 408 F.3d 116 (2d Cir. 2005), as well as the Third Circuit's decision in *United States v. Santarelli*, 929 F.3d 95 (3d Cir. 2019). In contrast to our holding in *Beaty*, each of these cases concluded that a habeas petition is not "fully adjudicated" while its denial is pending on appeal and, therefore, a second petition filed while that appeal is pending is not a second or successive petition under § 2244. *Santarelli*, 929 F.3d at 104–05; *Whab*, 408 F.3d at 118; *Ching*, 298 F.3d at 175. To the extent these cases conflict with *Beaty*, we decline to follow them. *See United States v. Hayes*, 231 F.3d 1132, 1139–40 (9th Cir. 2000).

Moreover, these cases are distinguishable because they do not address Rule 60(b) motions or apply *Gonzalez*.[8] In *Santarelli* and *Ching*, after the

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[8] The Second Circuit issued its decisions in *Ching* and *Whab* before the Supreme Court's decision in *Gonzalez*. In *Santarelli*, the Third Circuit distinguished *Gonzalez* because the petitioner's motion to file a second or successive petition was not a Rule 60(b) motion. 929 F.3d at 105.

appellate courts reversed and remanded the denial of the petitioners' initial habeas petitions, the initial and second petitions were before the district courts simultaneously. *Santarelli*, 929 F.3d at 107; *Ching*, 298 F.3d at 176. Therefore, the district courts could apply Rule 15 and consider the petitioners' second petitions as motions to amend the initial petitions.[9] *Santarelli*, 929 F.3d at 105; *Ching*, 298 F.3d at 179–80.

In *Whab*, the court of appeals denied a certificate of appealability for the petitioner's initial habeas petition and transferred his motion seeking leave to file a second petition to the district court, concluding that the subsequent petition was not second or successive.[10] 408 F.3d at 118, 120. However, the court distinguished *Ching* because, after it denied the certificate of appealability, "the district court

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[9] The courts explained that when the denial of a habeas petition is pending on appeal, the district court lacks jurisdiction to consider a subsequent petition as a motion to amend. *Santarelli*, 929 F.3d at 106 (citing *Griggs v Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)); *Ching*, 298 F.3d at 180, n.5 (same). The Third Circuit concluded that, given these "jurisdictional dynamics," a motion to file a subsequent habeas petition, filed when the denial of an initial petition is pending on appeal, should be construed as a motion to amend and stayed in the district court pending the resolution of the appeal. *Santarelli*, 929 F.3d at 105-06. Both courts, however, concluded that if the district court's denial of an initial petition is affirmed, the petitioner must satisfy the requirements applicable to second or successive petitions. *Id.* at 106; *Ching*, 298 F.3d at 180 n.5.

[10] *Whab* involved a petition under 28 U.S.C. § 2255, but § 2244(a)(3)(A) also applies to second or successive § 2255 petitions.

never had [*Whab*'s] two petitions before it simultaneously." *Id.* at 119. The court explained that it could "see no reason in these circumstances to instruct the district court to treat the new petition as a motion to amend the initial petition." *Id.* Thus, the court apparently concluded that Rule 15 would not apply on remand, but it did not address Rule 60 or any other potentially applicable rules or procedures.

Here, we entered a limited remand under Federal Rule of Appellate Procedure 12.1(b) for the district court to consider Balbuena's Rule 60(b) motion, but we retained jurisdiction over the denial of his habeas petition. Unlike *Ching* and *Santarelli*, the district court could not apply Rule 15; instead, it could only consider Balbuena's new claim if it set aside its earlier judgment under Rule 60(b). *See Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996) ("[O]nce judgment has been entered in a case, a motion to amend the complaint can only be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60."). But, as we explain next, *Gonzalez* establishes that Balbuena's Rule 60(b) motion was a disguised habeas petition, and the district court properly denied it as an unauthorized second or successive petition.

C.

Under Rule 60(b), a party may seek relief from a final judgment under limited circumstances, including fraud, mistake, newly discovered evidence, or any other reason that justifies relief. Fed. R. Civ. P. 60(b). In *Gonzalez*, the Supreme Court explained that "Rule 60(b), like the rest of the Rules of Civil

Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254, only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules." 545 U.S. at 529 (alteration in original) (footnote omitted) (quoting 28 U.S.C. § 2254). Therefore, the Court considered "whether, in a habeas case, [Rule 60(b)] motions are subject to the additional restrictions that apply to 'second or successive' habeas corpus petitions under the provisions of [AEDPA], codified at 28 U.S.C. § 2244(b)." *Id.* at 526.

To answer this question, the Court first considered "whether a Rule 60(b) motion filed by a habeas petitioner is a 'habeas corpus application' as the statute uses that term," *id.* at 530 (quoting 28 U.S.C. § 2244(b)), and determined that "an 'application' for habeas relief is a filing that contains one or more 'claims,'" *id.* The Court then defined a "claim" as "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* Thus, a Rule 60(b) motion asserts a claim if it "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim on the merits." *Id.* at 532.

Furthermore, a Rule 60(b) motion that asserts a previously omitted claim based on excusable neglect, or argues newly discovered evidence supports a previously denied claim, or argues a change in substantive law justifies relief from the previous denial of a claim, "is in substance a successive habeas petition and should be treated accordingly." *Id.* at 531; *see also Jones*, 733 F.3d at 834 ("[A] motion that . . . 'in effect asks for a second chance to have the merits determined favorably' raises a claim that takes it outside the bounds of Rule 60(b) and

within the scope of AEDPA's limitations on second or successive habeas corpus petitions." (quoting *Gonzalez*, 545 U.S. at 532 n.5)).

The Court explained that "[a] habeas petitioner's filing that seeks vindication of such a claim 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' the statute." *Gonzalez*, 545 U.S. at 531 (quoting 28 U.S.C. § 2254 Rule 11)). Therefore, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* Using Rule 60(b) to present such claims would also "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." *Id.* at 532. Therefore, a Rule 60(b) motion that asserts a new claim is in effect a habeas corpus petition that is subject to the requirements of § 2244(b). *See id.* at 531–32.

But if no claim is presented, then a Rule 60(b) motion should not be treated like a habeas corpus petition. *Id.* at 533. A Rule 60(b) motion is not a subsequent habeas petition when it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the habeas proceedings." *Id.* at 532; *see also Jones*, 733 F.3d at 836 ("*Gonzalez* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion, and instead Rule 60(b) is properly applied when there is some problem going

to the integrity of the court process on the claims that were previously asserted.”).

Balbuena distinguishes *Gonzalez* by characterizing it as holding that “an applicant’s Rule 60(b) motion may be, not must be, a successive habeas application.” This argument is technically correct; *Gonzalez* explained that not all Rule 60(b) motions are disguised habeas petitions. *See* 545 U.S. at 533 (“When no ‘claim’ is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application.”). But this argument does not explain why Balbuena’s Rule 60(b) motion is not a disguised habeas petition. Balbuena acknowledges that the *Miranda* claim he asserts in his Rule 60(b) motion is a new claim.[11] Therefore, Balbuena’s Rule 60(b) motion “seeks to add a new ground for relief,” and we must conclude that it is a disguised habeas petition. *See id.* at 532.

D.

But does our conclusion that Balbuena’s Rule 60(b) motion is a disguised habeas petition mean that it is a second or successive petition and subject to the requirements of § 2244(b)? Balbuena states

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[11] Balbuena argued to the district court that he should receive relief under Rule 60(b) because his state court counsel failed to raise his *Miranda* claim. But “an attack based on the movant’s own conduct, or his habeas counsel’s omissions . . . ordinarily does not go to the integrity of the proceedings.” *Gonzalez*, 545 U.S. at 532 n.5. Therefore, the district court correctly concluded that Balbuena was not alleging a defect in the federal habeas proceedings but was instead asking to amend his petition to add a new claim.

that *Gonzalez* "did not address when a second-in-time application constitutes a 'successive' petition under the statute nor when a petition is 'finally' adjudicated." Thus, he appears to argue that even if his Rule 60(b) motion is a disguised habeas petition, it is not a second or successive petition under § 2244(b) because the denial of his initial petition was pending on appeal. But, as we set forth next, neither the Supreme Court's reasoning in *Gonzalez*, nor its further explanation of Rule 60(b) motions in *Banister v. Davis*, ___ U.S. ___, 140 S. Ct. 1698 (2020), support this argument. And we have not identified any court that has adopted it.

1.

First, the petitioner in *Gonzalez* filed his Rule 60(b) motion after the conclusion of his appeal from his initial habeas petition, 545 U.S. at 527, but the Court's analysis did not turn on, or even address, the timing of the Rule 60(b) motion, *id.* at 530–32. Instead, the Court focused on the nature of the motion, concluding that a Rule 60(b) motion that asserts a claim on the merits is a disguised habeas petition and "in substance a successive habeas petition [that] should be treated accordingly." *Id.* at 531. However, a Rule 60(b) motion that does not assert a claim, but instead attacks the integrity of the proceedings, is a proper Rule 60(b) motion not subject to § 2244(b). *Id.* at 532–33. In contrast to Balbuena's contention, *Gonzalez* does not suggest that a Rule 60(b) motion advancing a new claim is not a successive petition if it is filed during the appeal of the initial petition.

2.

Second, the Supreme Court's recent decision in *Banister* further supports the conclusion that Rule 60(b) motions asserting new claims, regardless of when they are filed, are successive habeas petitions subject to the requirements of § 2244(b). *See* 140 S. Ct. at 1709–10. In *Banister*, the Court held that Rule 59(e) motions to alter or amend a judgment are not successive habeas petitions. *Id.* at 1702. In reaching that conclusion, the Court distinguished *Gonzalez* and its holding that a Rule 60(b) motion asserting a claim is a habeas petition. *Id.* at 1709 (explaining that a Rule 60(b) motion "counts as a second or successive habeas application . . . so long as the motion 'attacks the federal court's previous resolution of a claim on the merits'" (citations omitted)).

The Court began with the history of Rule 59(e) and Rule 60(b) motions, explaining that "Rule 59(e) derives from a common-law court's plenary power to revise its judgment during a single term of court, before anyone could appeal." *Id.* But Rule 60(b), in contrast,

> codifies various writs used to seek relief from a judgment at any time after the term's expiration—even after an appeal had (long since) concluded. Those mechanisms did not (as the term rule did) aid the trial court to get its decision right in the first instance; rather they served to collaterally attack its already completed judgment.

Id. (emphasis added). The Court further explained that while pre-AEDPA cases seldom denied Rule 59(e) motions for raising repetitive claims, they regularly denied Rule 60(b) motions on that basis. *Id.* This difference was because pre-AEDPA "courts recognized Rule 60(b)—as contrasted to Rule 59(e)—as threatening an already final judgment with successive litigation." *Id.*

In addition, the Court explained that "Rule 60(b) motions can arise long after the denial of a prisoner's initial petition—depending on the reason given for relief, within either a year or a more open-ended 'reasonable time.'" *Id.* at 1710 (quoting Fed. R. Civ. P. 60(c)(1)). The Court noted that in Gonzalez the petitioner filed his Rule 60(b) motion more than a year after his appeal from his initial petition ended. *Id.* (citing *Gonzalez*, 545 U.S. at 527). But, as the Court explained, "[g]iven that extended timespan, Rule 60(b) inevitably elicits motions that go beyond Rule 59(e)'s mission of pointing out the alleged errors in the habeas court's decision." *Id.* And the Court pointed out that "the appeal of a Rule 60(b) denial is independent of the appeal of the original petition," and "does not bring up the underlying judgment for review." *Id.* (citation omitted).

Finally, the Court summarized why a motion to set aside a judgment under Rule 60(b) motion, if it asserts claims, is a successive petition, while a motion to set aside a judgment under Rule 59(e) is not:

> In short, a Rule 60(b) motion differs from a Rule 59(e) motion in its remove from the initial habeas proceeding. A Rule 60(b) motion—often distant in time and scope and always giving rise to a

> separate appeal—attacks an already completed judgment. Its availability threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly.

Id. None of these reasons for distinguishing Rule 59(e) motions from Rule 60(b) motions—and concluding that Rule 60(b) motions that assert claims are disguised habeas petitions, while Rule 59(e) motions are not—is in any way affected by or related to the timing of when a Rule 60(b) motion is filed.

The Court's analysis of Rule 60(b) motions as removed from the initial habeas proceeding, collaterally attacking the judgment, and threatening serial habeas litigation, applies with equal force to Rule 60(b) motions filed during the appeal of an initial habeas proceeding and to such motions filed after the appeal is completed. Therefore, the Court's explication of Rule 60(b) motions in *Banister* undermines Balbuena's arguments to distinguish *Gonzalez*.

3.

Third, Balbuena does not cite, and we have not identified, any case that distinguishes *Gonzalez* on the basis Balbuena suggests: A Rule 60(b) motion, although a disguised habeas petition, is not a second or successive petition if it was filed during the appeal of an earlier petition. To the contrary, the Seventh Circuit has rejected this argument. *See Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012). In *Phillips*, while the petitioner's appeal from the denial

of his § 2255 motion was pending, he filed a Rule 60(b) motion for relief from the judgment. *Id.* at 434. Applying *Gonzalez*, the court concluded that the Rule 60(b) motion sought relief on the merits and was an application for collateral review. *Id.* at 435. The court also concluded that the Rule 60(b) motion was a second application for habeas relief, stating that to hold otherwise "would drain most force from the time-and-number limits in § 2244 and § 2255." *Id.*[12]

Similarly, in *Santarelli* the Third Circuit distinguished *Gonzalez* because the petitioner's motion to file a second or successive petition was not a Rule 60(b) motion and because of "the inherent nature of Rule 60(b) motions." 929 F.3d at 105. The Third Circuit stated that its precedent was consistent with the Seventh Circuit's holding in *Phillips* that a Rule 60(b) motion, addressed to the merits, is a second or successive petition, even if filed while an appeal from an initial petition is pending. *Id.* The court explained that under its precedent a Rule 60(b) motion is a second or successive petition: "[A] Rule 60(b) motion that raises a claim attacking the underlying criminal judgment must be a second or successive petition because, the judgment having become final, the petitioner has expended the one full opportunity to seek collateral review that

[12] Because it had not been invoked, the court rejected any reliance on Seventh Circuit Rule 57, which allows a district judge to request a remand to "correct errors that affect[ed] the proceedings." *See Phillips*, 668 F.3d at 436. The court explained the steps to invoke Rule 57, which require the district court to indicate that it is inclined to grant the Rule 60(b) motion, and stated that "[o]nly this combination of steps renders the judgment non-final and allows a modification while the appeal is pending." *Id.*

AEDPA ensures." *Id.* (alteration in original) (quoting *Blystone v. Horn*, 664 F.3d 397, 413 (3d Cir. 2011)). Therefore, although Balbuena argues that we should follow the reasoning of *Santarelli*, as it turns out, the Third Circuit's application of *Gonzalez* does not support his position that his Rule 60(b) motion was not a successive petition.

We conclude that the district court correctly applied *Beaty* and *Gonzalez* and denied Balbuena's Rule 60(b) motion as an unauthorized second or successive habeas petition. In addition, we have identified no authority from our sister circuits that supports Balbuena's argument that his Rule 60(b) motion, even if considered a disguised habeas petition, was not a successive petition. Accordingly, we affirm the district court's order denying the motion.

V.

Applying the deferential standards of federal habeas review, we conclude that the state court reasonably concluded that Balbuena's confession was voluntary, and we affirm the district court's denial of the habeas petition. Because Balbuena's Rule 60(b) motion sought to add a new claim after the district court adjudicated his habeas petition on the merits, we conclude that the district court correctly denied the motion, and we affirm.

AFFIRMED.

W. FLETCHER, Circuit judge, concurring in the result:

I agree with my colleagues that the state court did not unreasonably conclude that Balbuena's confession was voluntary. I also agree that *Beaty v. Schriro*, 554 F.3d 780, 783 n.1 (9th Cir. 2009), requires us to hold that Balbuena's Rule 60(b) motion was a second or successive habeas petition, even though it was filed while an appeal on his initial habeas petition was awaiting adjudication in our court. I write separately to register my disagreement with *Beaty* and to urge the Supreme Court to recognize the circuit split and to adopt the rule stated in *Ching v. United States*, 298 F.3d 174, 178 (2d Cir. 2002), and *United States v. Santarelli*, 929 F.3d 95, 104–05 (3d Cir. 2019).

"AEDPA places strict limitations on the ability of a petitioner held pursuant to a state judgment to file a second or successive federal petition for writ of habeas corpus." *Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017); see 28 U.S.C. § 2244(b); *see also Goodrum v. Busby*, 824 F.3d 1188, 1193 (9th Cir. 2016) (providing background). The phrase "second or successive" is undefined by AEDPA. It is a "term of art" and "does not simply refer to all [habeas] applications filed second or successively in time." *Magwood v. Patterson*, 561 U.S. 320, 331–32 (2010) (internal quotation marks, alterations, and citation omitted). Over time, "the rule that emerged is that a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." *Goodrum*, 824 F.3d at 1194. The question before us is whether an initial

habeas petition has been "finally adjudicated" when the petition still awaits adjudication on appeal.

In *Ching*, the Second Circuit held that a habeas petition still pending on appeal has not been finally adjudicated within the meaning of the limitation on second or successive petitions. The petitioner in *Ching* filed a motion under 28 U.S.C. § 2255, attacking his conviction in federal district court. The district court denied the motion, and *Ching* appealed. While his appeal was pending before the Second Circuit (which eventually vacated and remanded the district court's denial), Ching filed a habeas petition under 28 U.S.C. § 2241 in district court. The district court treated the § 2241 petition as a motion under § 2255, concluded that it was second or successive, and denied it. The Second Circuit agreed that the § 2241 petition should have been treated as a motion under § 2255 but disagreed that it was a second or successive motion. The court held that "the district court should [have] construe[d] the second § 2255 motion as a motion to amend the pending § 2255 motion." 298 F.3d at 177. The court wrote:

> We find that adjudication of Ching's initial motion was not yet complete at the time he submitted his second § 2255 motion. The denial of [his first motion] was still pending on appeal before this Court and no final decision had been reached with respect to the merits of Ching's claim.

Id. at 178; *see also Grullon v. Ashcroft*, 374 F.3d 137, 140 (2d Cir. 2004) (extending *Ching*'s holding to cover successive petitions filed under § 2241); *Whab v. United States*, 408 F.3d 116, 118–19 (2d Cir. 2005)

(applying *Ching*'s holding where the district court did not have the earlier- and later-filed petitions before it simultaneously).

We followed *Ching* in *Woods v. Carey*, 525 F.3d 886 (9th Cir. 2008). Woods filed a pro se habeas petition under 28 U.S.C. § 2254 in federal district court. Before that petition was denied, Woods filed another pro se habeas petition in the district court under § 2254. The district court dismissed Woods's petition as second or successive. We reversed, writing, "[W]e follow the persuasive reasoning of the Second Circuit." *Id.* at 890. We held that the district court "should have construed Woods's [second-in-time] pro se habeas petition as a motion to amend his pending habeas petition," after which the district court would have had "the discretion to decide whether the motion to amend should be granted." *Id.* (italicization omitted).

We reversed course in *Beaty*. *Beaty* filed a habeas petition under § 2254 in federal district court, which denied the petition. *Beaty* sought a certificate of appealability from us. We denied a certificate of appealability on everything except a claim as to the voluntariness of his confession; we remanded that claim to the district court for an evidentiary hearing. On remand, the district court denied the claim. *Beaty* requested that the district court permit him to amend his original habeas petition "to include a plethora of other claims." *Beaty*, 554 F.3d at 782. The district court denied permission to amend, and *Beaty* appealed. While *Beaty*'s second appeal was pending before us, *Beaty* sought to add still more claims. We held *Beaty*'s additional claims were second or successive.

In a footnote, we wrote that while we had "quoted extensively from *Ching*" in *Woods*, the facts in *Woods* did not pose the same question as in *Ching*. *Id.* at 783 n.1. The question in *Woods* was whether a new petition was second or successive when the first petition was still pending in the district court. The question in *Ching* was whether a new petition was second or successive when a denial of the first petition had been appealed and that appeal was still pending in the court of appeal. While not disagreeing with the result we had reached in *Woods*, we disagreed with the holding of *Ching*. We wrote, "Today, we decide that *Beaty* cannot use *Woods* to amend his petition after the district court has ruled and proceedings have begun in this court . . . ." *Id.*

The Sixth, Seventh, and Tenth Circuits have agreed with our ruling in *Beaty*. *See Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007). Meanwhile the Third Circuit has agreed with Ching, similarly concluding that adjudication is final for the purposes of § 2244(b) only once an appeal has been finally adjudicated. *See Santarelli*, 929 F.3d at 104 (holding that "a subsequent habeas petition is not 'second or successive' under AEDPA when a petitioner files such a petition prior to her exhaustion of appellate remedies with respect to the denial of her initial habeas petition") (emphasis added).

We made a mistake in *Beaty*. First, as a matter of ordinary language, it is hard to conclude that an initial habeas petition has been "finally adjudicated" when, in fact, it has not been. If a district court

denies a habeas petition and the petitioner appeals, there is no final adjudication until the appeal has been finally adjudicated.

Second, as a practical matter, the rule followed by the Second and Third Circuits in *Ching* and *Santarelli* will not result in a flood of late and procedurally abusive claims. Any new claim that is deemed an amendment to the original petition must satisfy the demanding relation-back requirement of Federal Rule of Civil Procedure 15(c)(2), as interpreted by the Supreme Court in *Mayle v. Felix*, 545 U.S. 644 (2005).

Third, nothing in the decisions of the Supreme Court compels our interpretation of "final adjudication" in *Beaty*. As the Second Circuit observed in *Ching*, 298 F.3d at 178, and as discussed by the Supreme Court in *Magwood*, 561 U.S. at 331–33, at least three cases decided by the Supreme Court suggest that *Ching* and *Santarelli* got it right. In the words of then-Judge Sotomayor, "These cases instruct that a prior district court judgment dismissing a habeas petition does not conclusively establish that there has been a final adjudication of that claim." *Ching*, 298 F.3d at 178.

In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642–44 (1998), the Supreme Court treated a later-filed habeas petition as part of an earlier application where the later-filed petition was premised on a newly ripened claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* claim had been previously dismissed as premature by the district court. In *Panetti v. Quarterman*, 551 U.S. 930, 937, 942–45 (2007), the Court addressed a related but distinct circumstance where a habeas petition raised a *Ford* claim that had not been presented in an initial

petition. The Court permitted the second petition—even though the initial petition had been adjudicated by the district court and Fifth Circuit Court of Appeals, and a petition for certiorari had been denied by the Supreme Court—because the *Ford* claim would have been unripe had the petitioner sought to present it in his first petition. In *Slack v. McDaniel*, 529 U.S. 473, 488 (2000), the Court declined to find a habeas petition second or successive where the district court had dismissed the first petition for failure to exhaust state remedies and where the new petition raised claims that had not been included in the first petition.

Finally, neither *Gonzalez v. Crosby*, 545 U.S. 524 (2005), nor *Banister v. Davis*, 590 U.S. ___, 140 S. Ct. 1698 (2020), pose the barrier that today's opinion suggests. In *Gonzalez*, the Supreme Court considered whether a Rule 60(b) motion that adds a claim, such as Balbuena's, is a "'habeas corpus application' as the statute uses that term." *Id.* at 530 (quoting 28 U.S.C. § 2244(b)). The Court held that if a Rule 60(b) motion advances one or more "claims," such as a new ground for relief, it is not a true Rule 60(b) motion. Rather, it is "in substance" a habeas corpus application within the meaning of § 2244(b). *Id.* at 531. Accordingly, *Gonzalez* requires us to hold that Balbuena's Rule 60(b) motion is, in fact, a disguised habeas application.

The question in *Banister* was whether a Rule 59(e) motion is a second or successive application within the meaning of § 2244(b). The Court held that it is not. The Court distinguished a Rule 59(e) motion from a Rule 60(b) motion. It wrote, in language quoted by my colleagues, *supra* p. 38:

> In short, a Rule 60(b) motion differs from a Rule 59(e) motion in its remove from the initial habeas proceeding. A Rule 60(b) motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already completed judgment. Its availability threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly.

Banister, 590 U.S ___, 140 S. Ct. at 1711. Just so. For that reason, and as the Court explained in *Gonzalez*, a Rule 60(b) motion that seeks to add a claim to a previously filed habeas application is not, in fact, a Rule 60(b) motion. It is, instead, a disguised habeas application subject to the bar on "second or successive" applications. Thus, *Banister* distinguishes between Rule 59(e) and Rule 60(b) motions based on the analysis in *Gonzalez*. *Banister* otherwise has little relevance for Balbuena's case.

Ching, *Whab*, and *Santarelli* are consistent with *Gonzalez* and *Banister*. *Gonzalez* answers the question whether a Rule 60(b) motion seeking to add a claim to a habeas application is a true Rule 60(b) motion or is a disguised habeas application. Under *Gonzalez*, such a motion clearly is a habeas application. But *Gonzalez* does not answer the question whether it is a "second or successive" habeas application under § 2244(b). *See Phillips*, 668 F.3d at 435 ("Under *Gonzalez*, the motion was an 'application' for collateral relief. But was it a second application?"). That question is answered by *Ching*, *Whab*, and *Santarelli*. In my view, it is their answer to that question—not ours in *Beaty*—that is correct.

I write separately to encourage the Supreme Court to resolve the conflict in the circuits. I am optimistic, if the Court takes this or a similar case, that it will agree with the Second and Third Circuits rather than ours.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER BALBUENA,

Petitioner,

v.

DAVID DAVEY,

Respondent.

Case No. 11-cv-00228-RS (PR)

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

This suit is on limited remand from the Ninth Circuit so that this Court can consider petitioner's motion for reconsideration under Federal Rule of Civil Procedure 60(b). His motion is DENIED because it is in truth a request to file an unauthorized second or successive habeas petition. This Court can consider second or successive petitions only when authorized to do so by the appropriate federal appellate court. Petitioner has not shown that he has received such authorization from the Ninth Circuit Court of Appeals.

BACKGROUND

In 2008, a Contra Costa County Superior Court jury convicted petitioner of first degree murder, attempted murder, and street terrorism. Consequent to these convictions, petitioner was sentenced to 82 years to life in state prison. On appeal, his sentence was reduced to 72 years to life. In 2011, after he was denied further relief on state judicial review, he filed a federal habeas petition here. In 2012, this Court denied his petition on the merits and entered judgment in favor of respondents. Petitioner appealed.

In 2013, the Ninth Circuit Court of Appeals appointed counsel and issued a Certificate of Appealability on the sole issue whether the state trial court violated petitioner's right to due process by denying his motion to suppress his confession on grounds that it was an involuntary product of police coercion. Petitioner, with the assistance of counsel, later filed a motion to stay the appellate proceedings and remand the matter to this Court to permit him to file an amended habeas petition to include a new and unexhausted *Miranda* claim. The Ninth Circuit denied the motion "without prejudice to filing a renewed motion accompanied by a written indication that the district court is willing to entertain the motion." (Dkt. No. 26 at 3.) Petitioner complied with these instructions and obtained a written indication from this Court that it would entertain further proceedings while noting that it was not making a comment on the merits. (Dkt. No. 27.) He filed in the appellate court a renewed motion for a stay and remand, which the Ninth Circuit granted. In January 2014, the action was reopened here in district court. (Dkt. No. 29.) In November 2014, the action was

stayed at the request of petitioner so that he could exhaust his claims. (Dkt. No. 51.) In January 2017, the action was reopened at petitioner's request. (Dkt. No. 57.) Petitioner then filed a renewed motion under Rule 60(b), which is the subject of this order. (Dkt. No. 59.) Respondent filed an opposition to the motion and petitioner filed a reply. (Dkt. Nos. 61 and 63.)

STANDARD OF REVIEW

Rule 60(b) provides for reconsideration where one or more of the following is shown: (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 by the adverse party; (4) voiding of the judgment; (5) satisfaction of the judgment; (6) any other reason justifying relief. *See* Fed. R. Civ. P. 60(b); *School Dist. 1J v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Although couched in broad terms, subparagraph (6) requires a showing that the grounds justifying relief are extraordinary. *See Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981).

AEDPA, the Anti-Terrorism and Effective Death Penalty Act of 1996, generally bars second or successive petitions. In order to file a second or successive petition, a federal habeas petitioner must obtain an order from the Court of Appeals authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b)(3)(A).

DISCUSSION

The Court must question first whether petitioner's filing is a Rule 60(b) motion or a request to file a second or successive petition. "Habeas corpus petitioners cannot 'utilize a Rule 60(b) motion to make an end-run around the requirements of AEDPA' or to otherwise circumvent that statute's restrictions on second or successive habeas corpus petitions." *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013) (quoting *Calderon v. Thompson*, 523 U.S. 538, 547 (1998)). A legitimate Rule 60(b) motion "attacks . . . some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). A second or successive petition is a filing that contains one or more claims asserted as the basis for relief from a state court's judgment of conviction. *Id.* "[A] motion that does not attack 'the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably' raises a claim that takes it outside the bounds of Rule 60(b) and within the scope of AEDPA's limitations on second or successive habeas corpus petitions." *Jones*, 733 F.3d at 834 (quoting *Gonzalez*, 545 U.S. at 532 n.5). Such a motion "although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531. In sum, "new claims cannot be asserted under the format of a Rule 60(b) motion, and instead Rule 60(b) is properly applied when there is some problem going to the integrity of the court process *on the claims that were previously asserted*." *Jones*, 733 F.3d at 836 (emphasis added).

Petitioner's Rule 60(b) motion is in truth a disguised request to file a second or successive petition, and consequently is DENIED. None of his arguments amounts to an allegation of a "defect in the

integrity of the federal habeas proceedings" that constitutes legitimate grounds for a Rule 60(b) motion.[1] *Gonzalez*, 545 U.S. at 530. Rather, he asks to amend his petition to include a new claim, a claim he admits has never been raised before. His motion, then, must be treated as request to file a second or successive petition that has not been authorized by the Ninth Circuit Court of Appeals.

Case law supports this conclusion. In *Beaty*, a habeas petitioner appealed to the Ninth Circuit the district court's denial of his habeas petition. *Beaty v.*

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[1] Petitioner contends that the failure of state counsel to raise his *Miranda* claim in the state proceedings constitutes a defect in his federal district court proceedings sufficient to invoke relief under Rule 60(b). (Mot. for Recons., Dkt. No 59 at 26-27.) The Court does not agree. The adequacy of his state representation is unrelated to the integrity of the proceedings here in federal district court. Petitioner cites to cases in which the Ninth Circuit granted relief under Rule 60(b) because of an attorney's negligent representation *in the federal district court proceedings*. He also invokes the principle that a state attorney's errors in state proceedings may be cause to excuse procedural default in a later related federal action. (Reply at 33.) While this is true, the principle applies only to the issue of procedural default, as the cases petitioner cites make clear. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Martinez v. Ryan*, 566 U.S. 1 (2012). His citation to *Gibbs v. Legrand*, 767 F.3d 879 (9th Cir. 2014) is also unavailing. In that case, the Ninth Circuit granted equitable tolling to a federal habeas petitioner whose state counsel's failure to inform him that the state supreme court had ruled on his petition caused his client to miss the federal habeas filing deadline. Whether to grant equitable tolling is a case-specific, discretionary decision taken after weighing various factors. Here, the Court's discretion is firmly limited by AEDPA's bar against second or successive petitions, and *Jones*'s clear direction that habeas corpus petitioners cannot use a "60(b) motion to make an end-run around the requirements of AEDPA." *Jones*, 733 F.3d at 833 (quoting *Thompson*, 523 U.S. at 547).

Schriro, 554 F.3d 780 (9th Cir. 2009). The appellate court denied a certificate of appealability on all claims with one exception, and remanded the action to the district court for an evidentiary hearing on that one claim. *Id.* at 782. The district court ruled against petitioner on that claim after holding a hearing. *Id.* After his claim had been denied, petitioner asked the district court for leave to amend his original petition to include new claims. *Id.* The court denied the request and petitioner appealed. *Id.*

The district court's denial was upheld by the Ninth Circuit because Beaty's request clashed with the rule against second petitions. Petitioner had filed his request to amend after the district court had adjudicated his claims and after the appellate court had rejected all but one claim. To "allow the filing of new claims this late in the process would essentially nullify the rules about second and successive petitions." *Id.* at 783.

In making this point, the Ninth circuit specifically rejected Beaty's assertion that another case, *Woods*, on which petitioner Balbuena relies, allowed him to amend. In *Woods*, a habeas petitioner filed an amended petition before the district court had ruled on his original petition. *Woods v. Carey*, 525 F.3d 886, 887-888 (9th Cir. 2008). The district court denied his original petition on the merits, and dismissed the amended petition as second or successive. *Id.* On appeal, the Ninth Circuit reversed. The crucial fact was that petitioner filed his amended petition before the first petition had been adjudicated by

the district court.[2] Under such circumstances, the district court should have allowed a pro se petitioner to amend. *Id.* at 889-890. The *Beaty* court emphasized this difference between *Woods* and *Beaty*. *Beaty*, 554 F.3d at 783. Another Ninth Circuit panel summarized the holding of *Woods*: "when a pro se petitioner files a new petition in the district court while an earlier-filed petition is still pending, the district court must construe the new petition as a motion to amend the pending petition rather than as an unauthorized second or successive petition." *Goodrum v. Busby*, 824 F.3d 1188, 1192 (9th Cir. 2016) (italicization removed).[3] The instant matter falls under *Beaty*, not *Woods*.

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[2] Petitioner contends that *Woods* applies because his habeas action is not final, the Ninth Circuit not having ruled on his petition. (Mot. of Recons., Dkt. No. 59 at 32-34.) The Court does not agree. *Woods*, on its facts, applies when a district court, not an appellate court, decision is final. Petitioner cites to a Second Circuit case (*Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005)) to support his contrary position. Such a case is not binding on this Court.

[3] Petitioner contends *Goodrum* supports his assertion that the habeas proceedings are not final because the Ninth Circuit has not ruled on the petition, and therefore this Court should allow him to amend his petition. (Mot. for Recons., Dkt. No. 59 at 33-34.) The Court does not read *Goodrum* this way. In that case when the Ninth Circuit remanded the habeas action to the district court, it deliberately placed the case in a posture in which the district court could not permissibly deny a motion to amend, that is, <u>before</u> the petition was ruled on. *Goodrum*, 824 F.3d at 1196.

CONCLUSION

Petitioner's motion for reconsideration (Dkt. No. 59) is DENIED. Insofar as it is a request to file a second or successive habeas petition, it is DENIED as not authorized by the Ninth Circuit Court of Appeals. The Clerk shall terminate Dkt. No. 59, send a copy of this order to the Ninth Circuit forthwith, and close the file.

IT IS SO ORDERED.

Dated: February 5, 2018

/s/ Richard Seeborg

RICHARD SEEBORG
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER BALBUENA,

FILED
DEC 30, 2013

Molly C. Dwyer,
Clerk
U.S. Court of
Appeals

Petitioner - Appellant,

No. 12-16414

D.C. No. 3:11-cv-00228-RS Northern District of California, San Francisco

ORDER

v.

MARTIN D. BITER and ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondents - Appellees.

Before: Peter L. Shaw, Appellate Commissioner

Appellant's renewed motion to stay appellate proceedings and for a limited remand is granted. *See* Fed. R. App. P. 12.1(b). This appeal is remanded to the district court for the limited purpose of enabling the district court to consider appellant's Federal Rule of Civil Procedure 60(b) motion. Within 60 days after the date of this order or within 7 days after the district court's ruling on the appellant's motion, whichever occurs first, appellant shall file: (1) a report on the status of district court proceedings and motion for appropriate relief; or (2) the opening brief. The filing of the opening brief or the failure to file a report will terminate the limited remand.

If the opening brief is filed, the answering and optional reply briefs shall be filed in accordance with the time limits set forth in Federal Rule of Appellate Procedure 31(a).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER BALBUENA,

FILED
MAY 23, 2013

Molly C. Dwyer,
Clerk
U.S. Court of
Appeals

Petitioner - Appellant,

No. 12-16414

D.C. No. 3:11-cv-00228-RS Northern District of California, San Francisco

ORDER

v.

MARTIN D. BITER and ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondents - Appellees.

Before: SILVERMAN and GRABER, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the trial court violated appellant's right to due process by denying his motion to suppress his confession on the ground that it was an involuntary product of police coercion. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

Appellant's motion for in forma pauperis status is granted. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

The court hereby appoints counsel for appellant for purposes of this appeal. Counsel will be appointed by separate order. If appellant does not wish to have appointed counsel, appellant shall file a motion asking to proceed pro se within 14 days of the date of this order.

The Clerk shall electronically serve this order on the appointing authority for the Northern District of California, who will locate appointed counsel. The appointing authority shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due August 5, 2013; the answering brief is due September 4, 2013; the optional reply brief is due within 14 days after service of the answering brief.

If Martin D. Biter is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute

party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c)

E-Filed 5/25/12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALEXANDER BALBUENA,

Petitioner,

No. C 11-0228 RS (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

v.

MARTIN BITER, Warden, and THE CALIFORNIA ATTORNEY GENERAL,

Respondents.

INTRODUCTION

This is a federal habeas corpus action filed by a pro se state prisoner pursuant to 28 U.S.C. § 2254 in order to challenge his state convictions. For the reasons set forth below, the petition is DENIED.

BACKGROUND

In 2008, a Contra Costa County Superior Court jury found petitioner, a 16 year-old who was tried as an adult, guilty of first degree murder, attempted murder, and street terrorism. Evidence presented at trial shows that in 2006 petitioner and co-conspirators shot and killed Jose Segura, an MS13 gang member, in revenge for Jose's killing of Gizmo, petitioner's friend and fellow RST[1] gang member, earlier that day.[2] Petitioner was sentenced to a term of eighty-two years-to-life in state prison, a sentence reduced on appeal to seventy-two years-to-life. Other than this sentence reduction, petitioner was denied relief on state judicial review. This federal habeas petition followed. As grounds for federal habeas relief, petitioner claims: (1) the trial court violated his right to due process by failing to exclude his coerced confession;[3] (2) the trial court failed to give proper jury instructions;[4] (3) defense counsel rendered ineffective assistance by failing to object to expert testimony; and (4) the trial court violated his

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[1] sc. Richmond Sur Trece. (Ans., Ex. 8 at 6.)

[2] Petitioner shot at Segura while he sat in his car with Oralia Giron, the mother of Segura's children, a three-year-old daughter and three-month-old son, who were also in the car at the time of the shooting. Oralia was wounded by gunfire, but the children were not. (Ans., Ex. 8 at

[3] The Order to Show Cause characterized petitioner's claim as an alleged violation of the Fifth Amendment's right against self-incrimination (Docket No. 3), but it is more commonly characterized as a due process claim.

[4] This is a consolidation of Claims 2 and 5 listed in the petition.

due process right to personal presence at all critical stages of the criminal proceeding.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its

independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

DISCUSSION

I. Admission of Confession

Petitioner claims the trial court violated his right to due process by failing to exclude his coerced confession. (Pet. at 6(a).) He contends the detectives who interrogated him after his arrest elicited his confession by offering leniency in his sentence in exchange for honesty, including directing petitioner as to what story would be viewed as honest. (Id. at 6(b)–(e).) Specifically, petitioner maintains the detectives gave him a "very clear impression" that if they believed he was "'honest' and told the 'truth,' he would not get 'twenty-five to life or life without' and 'die in prison,' but would instead see his baby 'in a few years.'" (*Id.* at 6(c).)

The state appellate court largely disagreed with petitioner's interpretation, and determined that several of the interrogators' statements were permissible:

> Several of the passages [petitioner] cites involve general exhortations for [petitioner] to tell the truth, sometimes combined with [the] suggestion that this might allow the officers to "help" him[,

> such as]: "This is where it's important for you to be honest with us so if there is some way to help yourself out this is the time to do it"; "Be honest. This is the only time we can help you out man" . . . These statements by the detectives did not promise any specific benefit to [petitioner], but only such benefits as "flow[] naturally from a truthful and honest course of conduct," which is permissible. Encouraging a suspect to tell the truth by suggesting this will be to his or her advantage is permissible.

(Ans., Ex. 8 at 21) (internal citation omitted).

The state appellate court determined that the police did make some improper statements, specifically offers of leniency in exchange for honesty, e.g., "the detectives told [petitioner] he would be tried as an adult and would soon be "fighting for [his] life," that he faced "twenty-five to life," and that if he did not show remorse, he would be "looking at . . . [¶][t]wenty-five to life or life without." (Ans., Ex. 8 at 22.) Yet, the state court concluded that such improper statements did not render the confession involuntary because (1) petitioner made critical admissions regarding the shooting "before improper tactics were employed," (2) the totality of the circumstances show that the crucial admissions were "voluntary and not coerced," the videotape showing that police interrogation "was not overtly harsh or threatening," and (3) any error was harmless:

> As explained, the crucial admissions that [petitioner] shot at the front window of the car with a .32 caliber were admissible. And even aside from [petitioner's] confession, the evidence against him was very strong. According to

> [Detective] Goldberg's description of [the statements of K.L., a witness to the shooting],[5] she saw [petitioner] get a gun from a van and [petitioner's coconspirator] Jujakas get a gun from a Chevy Tahoe, saw the van, [petitioner] and Jujakas leave the area, and minutes later heard nine gunshots. She then saw [petitioner] and Jujakas running back to the house, Jujakas getting into a vehicle and [petitioner] entering the house and apparently attempting to get rid of a gun. Later in the day, [petitioner] told her he had shot the victim in the forehead. In the taped interview that was played for the jury, K.L. told the police she saw [petitioner] get into a car that drove toward the scene of the shooting while Jujakas ran toward it with a gun, and after hearing the gun shots, saw [petitioner] return to the house and attempt to put what she believed to be a gun under the couch, then run and jump into the black Tahoe that Jujakas had already gotten

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[5] K.L, a fifteen-year-old female, had some connection with petitioner. When the police came to arrest petitioner, he was lying in bed with his girlfriend and with a child who was K.L.'s son. (Ans, Ex. 8 at 8.) Also, she rented a room from Juan Herrera (aka Willow) who was one of the shooters. (*Id.* at 5, 10 & 11.)

> into. Later, [petitioner] told her he shot the victim in the forehead.[6]

(Ans., Ex. 8 at 21–26.)

Involuntary confessions in state criminal cases are inadmissible under the Fourteenth Amendment. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). A court on direct review is required to determine, in light of the totality of the circumstances, "whether a confession [was] made freely, voluntarily and without compulsion or inducement of any sort." *Withrow v. Williams*, 507 U.S. 680, 689 (1993) (internal quotation marks and citation omitted). A federal habeas court must review de novo the state court's finding that a confession was voluntarily given. *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990). But a state court's subsidiary factual conclusions are entitled to the presumption of correctness. *Rupe v. Wood*, 93 F.3d 1434, 1444 (9th Cir. 1996) (deferring to state appellate court's conclusion that challenged statement did not constitute threat or promise).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). The

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[6] At trial, K.L. recanted her statements inculpating petitioner. The state appellate court found her recantation implausible: "K.L. testified that she did not know where [petitioner] lived and that she identified a random house when the police asked her to show them. Yet when the police went to precisely the apartment K.L. pointed out, they found not only [petitioner] but also K.L.'s own child. There is little chance the jury could have concluded K.L.'s trial testimony, rather than her prior statements to police, was truthful." (Ans, Ex. 8 at 25–26.)

interrogation techniques of the officer must be "the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." *Moran v. Burbine*, 475 U.S. 412, 433–34 (1986). Generally encouraging a petitioner to tell the truth does not amount to police coercion. *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997). Police deception alone "does not render [a] confession involuntary," *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993), nor is it coercive to recite potential penalties or sentences, including the potential penalties for lying to the interviewer, *United States v. Haswood*, 350 F.3d 1024, 1029 (9th Cir. 2003).

The suspect's age may be taken into account in determining whether a confession was voluntary. *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir. 2011) (en banc). Even in the case of a juvenile, indicating that a cooperative attitude would be to the benefit of an accused does not render a confession involuntary unless such remarks rise to the level of being "threatening or coercive." *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (quoting *Fare v. Michael C.*, 442 U.S. 707, 727 (1979)). Again, the pivotal question in cases involving psychological coercion, "is whether [, in light of the totality of the circumstances,] the defendant's will was overborne when the defendant confessed." *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir.1993).

Petitioner has not shown that his confession was involuntary. After a careful review of the videotape of Detectives Goldberg and Pate interrogating petitioner (Ans., Ex. 11), this Court agrees with the state trial court's finding that the totality of the circumstances do not show coercive interrogation

tactics, but instead indicate a "[r]emarkably . . . non-threatening atmosphere for a police interrogation." (Ans., Ex. 3, Vol. 1 at 147.) Although petitioner was a juvenile at the time of the interrogation, the trial court found he was "relatively mature for his age," "was in strong degree of control of his own emotions and the conversation occurring," and there was no indication "he felt intimidated or afraid of the officers, either physically or psychologically." (*Id.* at 144.) To the extent petitioner relies on these general assertions of encouragement, his claim must fail.

Even where the detectives did link truthfulness with a specific sentence,[7] petitioner has not shown that such an interrogation tactic was so coercive that it caused his will to be overborne. First, it is not coercive to recite potential penalties or sentences, including the potential penalties for lying to the interviewer. *Haswood*, 350 F.3d at 1029. Second, though the police lied to petitioner about some of the evidence they had (Ans., Ex. 8 at 9 & 18–19), such deceptions do not render the confession involuntary either when taken on their own or seen in the totality of the circumstances. Third, even assuming such statements were improper, there is no basis for

[7] (*See*, *e.g.*, Ans., Ex. 1, Vol. 1 at 37 ("You need to get out in front of this case by saying look detectives, this is what happened[,] . . . all of it or nothing my friend, otherwise . . . [you're] looking at . . . [t]wenty-five to life or life without. . . . It's gonna be one of those two different things.")). Although petitioner claims the detectives actually linked his cooperation with being able to see his baby "in a few years" (Pet. at 6(c)), the state appellate court properly agreed with the trial court's characterization that the detectives were "'indicating life without possibility of parole without cooperation, as opposed to 25 to life with cooperation,'" (Ex. 8 at 23 n.8).

concluding that the confession was involuntary unless there is a causal relation between the police misconduct and the confession. *Connelly*, 479 U.S. at 164. As the state appellate court noted, several critical admissions were made before any improper tactics were employed, including his statements that he was in front of the car, that he had the .32 caliber gun, and that he shot three or four rounds at the front window of the car. (Ans., Ex. 8 at 22–23.) For this same reason, petitioner has not shown how any potentially involuntary admissions following these voluntary statements had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Accordingly, petitioner's claim is DENIED.

II. Failure to Give Instructions

A. "Caution" Instruction

Petitioner claims the trial court violated his rights to due process and to present a defense by instructing the jury it should view unrecorded statements with caution.[8] (Pet. at 6(e).) Petitioner maintains this instruction left the jury with the impression that they need not view recorded statements with the same caution.[9] (*Id.* at 6(h).) Petitioner argues this presents a unique concern given the defense depended on convincing the jury

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[8] References to unrecorded statements pertain to evidence that petitioner told K.L. he shot Jose Segura.

[9] References to recorded statements pertain to petitioner's videotaped confession.

that his recorded confession was involuntary and should be viewed with caution. (*Id.* at 6(h).)

> The state appellate court rejected petitioner's claim because:
>
> For the jurors to have inferred from the challenged instruction that they were not permitted to view recorded admissions and confessions with caution, they would have had to believe that the trial court permitted the defense to present a theory of the case that was entirely irrelevant.
>
> Moreover, the prosecutor never asked the jury to draw the inference [petitioner] suggests . . . [Though] [h]e did argue that the jury should believe [petitioner's] confession to the police, for reasons including that "people are not likely to say something bad about themselves unless it's true," that [petitioner] gave many details about the shooting that he would only have known by being there, and that the confession was corroborated by other evidence. It was never suggested that the confession should be taken as truth because it was recorded.

(Ans., Ex. 8 at 29–31) (footnote omitted).

A state trial court's failure to give an instruction does not alone raise a ground cognizable in a federal habeas corpus proceeding. *See Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988). The error must so infect the trial that the defendant was deprived of the fair trial guaranteed by the Fourteenth Amendment. *Id.* Furthermore, the omission of an instruction is less likely to be prejudicial than a misstatement of the law. *Walker v. Endell*, 850 F.2d

470, 475 (9th Cir. 1987) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)). Thus, a petitioner whose claim involves a failure to give a particular instruction, as opposed to an instruction that misstated the law, bears an "especially heavy burden." *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Henderson*, 431 U.S. at 155).

Petitioner's claim is without merit. First, he concedes that normally a cautionary instruction should only be given when the jury is presented with an unrecorded admission or confession. (Pet. at 6(g).) Thus, there is no dispute that the trial court correctly stated the law in its jury instruction. Second, as the state appellate court noted, the purpose of a cautionary instruction is to assist the jury in determining whether the statement was actually made (Ans., Ex. 8 at 27), not whether the jury should believe the statement was true. Because petitioner's confession was recorded, there is no question that the recorded statement was in fact made. Third, the defense was still able to present its theory that petitioner's recorded confession was a product of coercion, involuntarily made, and although spoken, was unreliable and should not be believed. (*See*, *e.g.*, Ans., Ex. 3, Vol. 3 at 624–31, 638, 642, 648–49.) The fact that a cautionary instruction was not given as to petitioner's recorded statements did not alter the jury's ability to evaluate whether petitioner made a false confession. Indeed, the prosecutor never asked the jury to view petitioner's recorded confession as true simply because it was recorded. Instead, the prosecutor argued the confession was reliable because petitioner gave many details about the shooting that he would have known only by being at the incident, and the confession was

substantially corroborated by other evidence. (*See, e.g.*, *id.* at 591–602.) Based on the above reasoning, the failure to instruct the jury to view recorded statements with caution did not deprive petitioner of a fair trial. Accordingly, petitioner's claim is DENIED.

B. Lesser-included Enhancement

Petitioner claims the trial court violated his right to a jury trial by giving the jury written instructions pursuant to California Penal Code § 12022.53(c) on the enhancement for personal discharge of a firearm in the commission of the murder and attempted murder counts while failing to give written instructions pursuant to § 12022.53(b) on the lesser-included enhancement for personal use (without discharge) of a firearm. (Pet. at 6(q)–r.) The state appellate court rejected petitioner's claim, concluding that California trial courts do not have a *sua sponte* duty to instruct on lesser-included enhancements. (Ans., Ex. 8 at 44.)

Petitioner's claim is without merit. First, he has not shown that he has a federal constitutional right to have the jury instructed on a lesser-included sentencing enhancement. It is clear the failure of a state trial court to instruct on lesser-included offenses in a non-capital case does not present a federal constitutional claim. *See Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000).[10] However, "the

[10] Although Solis speaks only to a petitioner's right to a jury instruction of a criminal offense, if Solis holds there is no constitutional right to an instruction on a lesser-included offense, which relates to the substantive elements of a crime, it is reasonable to assume there is also no constitutional right to

defendant's right to adequate jury instructions on his or her theory of the case might, in some cases, constitute an exception to the general rule." *Id.* at 929 (citation omitted). *Solis* suggests there must be substantial evidence to warrant petitioner's desired instruction. *See id.* at 929–30. Petitioner has not shown in his petition that his theory of the case constituted an exception to the general rule.

Second, that the jury did not receive the sentencing provision under § 12022.53(b), a standard for the substantive offenses of murder and attempted murder consistent with that which the jury was properly instructed, does not raise the possibility that the jury's verdict would have been different. This is particularly so given the fact that a "not true" finding on the discharge allegation under section 12022.53(c) could also reflect a determination that petitioner had a firearm but did not discharge it, despite petitioner's belief otherwise, (*see* Pet. at 6r). Accordingly, petitioner's claim is DENIED.

III. Assistance of Counsel

Petitioner claims his defense counsel rendered ineffective assistance by failing to object to expert testimony that petitioner not only committed the shooting, but committed it with the specific intent to promote the RST gang. (Pet. at 6(h).) At trial, gang expert Detective Shawn Pate testified that a day before the instant shooting, members of the MS13 gang shot and killed Gizmo, a rival RST gang

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an instruction on a lesser-included enhancement, which only relates to sentencing.

member. (Ans., Ex. 3, Vol. 2 at 382–83.) Pate opined that petitioner and other RST gang members committed a "retaliatory shooting" against the victims, whose family members were MS13 gang members. (*Id.* at 382–83.) The state appellate court rejected petitioner's ineffective assistance of counsel claim because Pate's testimony "concerned the actions and motivations of gang members in general" rather than petitioner's "subjective intent with respect to the shooting." (*Id.*, Ex. 8 at 34.) The jury "still had to determine that [petitioner] participated in the shooting and subjectively acted to promote RST." (*Id.* at 35.)

Claims of ineffective assistance of counsel are examined under *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of counsel, a petitioner first must establish such counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.* at 687–88. Second, the petitioner must establish prejudice resulting from counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Where the petitioner is challenging the conviction, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. It is unnecessary for a federal habeas court considering an ineffective assistance claim to address the prejudice prong of the *Strickland* test "if the petitioner cannot even

establish incompetence under the first prong." *Siriprongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).

Applying these principles to the instant matter, the Court concludes petitioner is not entitled to habeas relief on this claim. Petitioner's characterization of Pate's testimony — that Pate opined petitioner committed the shootings with the specific intent to promote the RST gang (Pet. at 6(h)) — is not supported by the record. The state appellate court noted that in California, a party may offer expert testimony to show the motivation for a particular crime, including retaliation, and whether and how the crime was committed to benefit or promote a gang. (Ans., Ex. 8 at 33.) Here, Pate's testimony concerned only the actions and motivations of RST gang members in general.

Pate, however, does mention that he believes petitioner is an RST because he "gets engaged in a retaliatory shooting for a hard core RST who is killed allegedly by an [MS13]." (Ans., Ex. 3, Vol. 2 at 377–78.)[11] Pate's statement, however, did not purport to show petitioner in fact committed the offense or had the requisite state of mind. The prosecutor still had to prove these facts through other evidence. Thus, it is reasonable to assume that any objection to Pate's testimony in this respect would have been denied. It

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[11] Other factors that contributed to Pate's opinion included that petitioner lived in a known RST apartment within a neighborhood called the "RST compound," that he is able to socialize with others in the same area, specifically the "Green Store" which only RST members can occupy to sell narcotics, and that petitioner admitted he was an RST gang member. (Ans., Ex. 3, Vol. 2 at 376–78.)

is both reasonable and not prejudicial for an attorney to forego a meritless objection. *See Juan H.*, 408 F.3d at 1273. Accordingly, petitioner's claim is DENIED.

IV. Personal Presence

Petitioner claims the trial court violated his right to be present at all critical stages of a criminal trial. (Pet. at 6(l).) While the jury was deliberating, the court held a jurisdictional hearing to determine whether petitioner was a minor at least fourteen years of age at the time the offenses were committed, which would subject him to prosecution in superior court rather than juvenile court pursuant to California Welfare and Institutions Code § 707(d)(2)(A). (Ans., Ex. 4, Vol. 4 at 679.) Defense counsel expressly waived petitioner's presence for purposes of this inquiry. (*Id.* at 679–80.) Petitioner contends the hearing was evidentiary in nature, requiring proof of petitioner's age and fitness to be tried as an adult, and therefore his presence was necessary to the extent that petitioner could have refuted or resolved any conflicting evidence of his age. (Pet. at 6(n).)

The state appellate court rejected petitioner's claim because there was substantial proof that petitioner was over the age of 14, no matter how the evidence was viewed:

> The magistrate at the preliminary hearing had found [petitioner] to be "at least 14 years of age" at the time of the offenses and, specifically, "at least 16 years of age." No question on this point was ever raised at trial and [petitioner] suggests

> nothing he could have offered to demonstrate he was not over 14 years old. As the only conflict in the evidence [petitioner] points to is whether he was 15 or 16 years old, and the allegation was supported by uncontradicted proof he was over 14 years old, he has shown no prejudice from having the court determine the truth of the Welfare and Institutions Code section 707, subdivision (d)(2)(A) allegation in his absence. There is no reasonable possibility the outcome of the hearing would have been different if [petitioner] had been present.

(Ans., Ex. 8 at 38–39) (footnote omitted).

Due process protects a defendant's right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (en banc). However, the Supreme Court has never held that exclusion of a defendant from a critical stage of the trial is a structural error. *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005). The right to be present at all critical stages, like most constitutional rights, is subject to harmless error analysis "'unless the deprivation, by its very nature, cannot be harmless." *Id.* (quoting *Rushen v. Spain*, 464 U.S. 114, 117 n.2 (1983) (per curiam)).

Any error resulting from petitioner's exclusion from the jurisdictional hearing was not a structural error but was, instead, trial error subject to harmless error review under *Brecht*, 507 U.S. at 637. Petitioner has not demonstrated that he was adversely affected by his exclusion from the hearing. As the state appellate court noted, the only conflict

in the evidence was whether petitioner was fifteen or sixteen years old. (Ans., Ex. 8 at 39.) Thus, it was reasonable to conclude that petitioner was at least fourteen years old. Because this satisfies the age element under California Welfare and Institutions Code § 707(d)(2)(A), any potential error was harmless. Accordingly, petitioner's claim is DENIED.

CONCLUSION

The state court's adjudication of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED. A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Court of Appeals. The Clerk shall enter judgment in favor of respondents and close the file.

IT IS SO ORDERED.

DATED: May 25, 2012

/s/ Richard Seeborg

Richard Seeborg

United States District
Judge