No. 20-1207

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

REPLY BRIEF FOR THE PETITIONER

DAVID A. O'NEIL
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 383-8000
daoneil@debevoise.com

MATTHEW SPECHT
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022

SCOTT A. SUGARMAN
Counsel of Record
SUGARMAN & CANNON
737 Tehama Street, No. 3
San Francisco, CA 94103
(415) 362-6252
scott@sugarmanandcannon.com

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INTRODUCTION

The State acknowledges the courts of appeals have adopted different positions on whether a 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"). Opp. 14. And the State does not deny that this Court has never decided when a prisoner's opportunity to seek collateral review ends and AEDPA's "second or successive" bar begins. Instead, the State rests its opposition to certiorari almost entirely on the basis of the label affixed to petitioner's filing. According to the State, the particular rule of civil procedure under which a prisoner seeks relief and other minute procedural differences explain the conflicting decisions in the courts of appeals.

The decision below squarely refutes the State's theory. The majority opinion below acknowledged a split of authority on the question, Pet. App. 33a, and the concurrence "encourage[d] the Supreme Court to resolve the conflict," Pet. App. 52a (Fletcher, J., concurring). The conflicting decisions of the seven courts of appeals to resolve this question reflect a fundamental disagreement about when a filing is subject to AEDPA's "second and successive" bar, not a focus on labels. That comports with this Court's instruction that the characterization of a filing under AEDPA "depends on the substance of the motion, not the label that is affixed to it." *Banister v. Davis*, 140 S. Ct. 1698, 1719 (2020) (Alito, J. dissenting); *id.* at 1709 (majority opinion) (analysis goes "far beyond their labels").

The State is also mistaken in its assertion that the decision below follows from *Gonzalez v. Crosby* and *Banister*. *See* Opp. 14–17. *Gonzalez* 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. 545 U.S. 524, 532 (2005); Pet. App. 31–32. *Gonzalez* thus requires that petitioner's Rule 60(b) motion be treated as "a disguised habeas petition." Pet. App. 35a. *Banister* held that a Rule 59(e) motion is not a second or successive petition, 140 S. Ct. at 1711, and therefore "has little relevance for [this] case," *see* Pet. App. 22, Pet. App. 51a (Fletcher, J., concurring). Neither *Gonzalez* nor *Banister* resolves the question presented.

Finally, the State fails in its effort (relegated to the opposition's closing paragraph) to attack the merits of petitioner's underlying *Miranda* claim. *See* Opp. 22. That argument is not only incorrect—the taped *Miranda* warning failed adequately to inform petitioner of his constitutional rights—but also irrelevant. Because the district court has not applied the correct rule to determine whether petitioner may present that claim, much less adjudicated its merits, the State's speculation has little bearing on the question presented here. A decision from this Court that petitioner's request to amend is not "second or successive" would permit the district court to consider the request to amend under the proper legal standard.

A. There is a Deep and Entrenched Circuit Split on the Question Presented.

Seven courts of appeals have squarely addressed and disagreed about whether a filing that seeks to

amend a habeas petition currently pending on appeal is a "second or successive" petition under AEDPA. The State dismisses this conflict, arguing that the courts have merely adopted "a somewhat different analytical approach" and reached different outcomes based on the label affixed to the filings. *See* Opp. 14. This argument mischaracterizes these decisions.

a. The conflicting outcomes reflect a fundamental disagreement about the meaning of AEDPA.

In five courts of appeals, a prisoner who seeks to amend a habeas petition that is pending on appeal is subject to AEDPA's "second or successive" bar.

The Eighth Circuit expressly rejected the "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." *Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006). The Tenth and Seventh Circuits have adopted the same rule. Those courts reasoned 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), *see Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007), because "[n]othing in the language of § 2244 or § 2255 suggests that the time-and-number limits are irrelevant as long as a prisoner keeps his initial request alive through motions, appeals, and petitions," *Philips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012). The Sixth Circuit has similarly concluded 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." *Moreland v. Robinson*, 813 F.3d 315, 325 (6th Cir.

2016). The Ninth Circuit reached the same result in the decision below.

Two courts of appeals have adopted a different interpretation of AEDPA. In the Second Circuit, then-Judge Sotomayor explained that "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." *Ching v. United States*, 298 F.3d 174, 178 (2d Cir. 2002). That is because "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,'" and no final decision has been reached while the first petition is still on appeal. *Id.* at 177 (quoting *Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001)).

The Third Circuit adopted the same rule in 2019. *See United States v. Santarelli*, 929 F.3d 95 (3d Cir. 2019). That court, expressly aligning itself with the Second Circuit, held 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, 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. The Third Circuit's conclusion rests on its understanding that a petition is "second or successive" only if filed after AEDPA's "one full opportunity to seek collateral review"—including appellate review—has been exhausted. *Id.*; *see also United States v. Folk*, 954 F.3d 597, 609 (3d Cir. 2020) ("A federal prisoner has ex-

pended his opportunity for collateral review if he 'has exhausted all of [his] appellate remedies with respect to [his] initial habeas petition.' . . . But if a federal prisoner's first § 2255 motion has not been resolved, then a motion to expand the scope of his § 2255 motion is a motion to amend.") (internal citation omitted) (quoting *Santarelli*, 929 F.3d at 105–06).

The State seeks to obscure this split by observing that the Second and Third Circuits "did not consider the application of Section 2244 to a Rule 60(b) motion." Opp. 7–8. That contention is irrelevant for three reasons.

First, the disparate decisions interpreting Section 2244 do not turn on the rules of civil procedure but instead reflect a fundamental disagreement about when a prisoner's opportunity to seek collateral review ends and AEDPA's "second or successive" bar is triggered. In five circuits, a prisoner has exhausted AEDPA's one opportunity to seek collateral review when the district court has rendered a decision, even if an appeal is still pending, meaning any subsequent filing is barred as "second or successive." In two circuits, a prisoner has not completed AEDPA's one opportunity to seek collateral review until *appellate* review has been exhausted or the time for such review has lapsed. Only *then* is a subsequent filing "second or successive."

Second, as this Court has held, a Rule 60(b) motion that advances one or more claims or a new ground for relief—like the one at issue in this case—is actually a habeas application, not a Rule 60(b) motion. *Gonzalez*, 545 U.S. at 534. The label attached to the filing in this case thus offers no basis upon which to distinguish the decisions of the Second and Third Circuits.

Third, the decision below applied to petitioner's purported Rule 60(b) motion the Ninth Circuit's prior decision in *Beaty v. Schriro*, 554 F.3d 780 (9th Cir. 2009). *See* Pet. App. 32a. *Beaty*'s second-in-time filing was not a Rule 60(b) motion; it was instead entitled "Application for Certificate of Appealability to Expand the Record and/or Application to File Second and Successive 2254 Petition for Writ of Habeas Corpus (28 U.S.C. § 2244(b)) and Appointment of Counsel." 554 F.3d at 782. That the decision below applied *Beaty* without regard to the label affixed to petitioner's filing (and without regard for how that filing compared to the filing in *Beaty*) confirms that the State cannot harmonize the decisions here on the basis of labels.

b. The State's assertion that there is no split worthy of review is further refuted by the decision below. The majority opinion acknowledged a split of authority on the question and "decline[d] to follow" the 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. Further, Judge Fletcher "wr[o]te separately to register his disagreement" with the majority rule, "to urge the Supreme Court to recognize the circuit split," and to emphasize the need for "resol[ution of] the conflict in the circuits." Pet. App. 45a (Fletcher, J., concurring). The Third and Tenth Circuits have also acknowledged this conflict. *Ochoa*, 485 F.3d at 540 ("No other circuit has followed *Whab* [*v. United States*, 408 F.3d 116 (2d Cir. 2005)], and we decline to do so."); *Santarelli*, 929 F.3d at 105 ("join[ing] the Second Circuit").

c. The State's hypothesis that the Second Circuit could jettison its precedent and "opt to align itself" with the majority approach, *see* Opp. 15, finds no support in any cited authority. The State identifies no case in which the Second Circuit has even hinted at revisiting its approach. Instead, the Second Circuit has reaffirmed—more than a decade after *Gonzalez*—that "[a] § 2255 motion does not become 'final until the petitioner's opportunity to seek review in the Supreme Court has expired.'" *Fuller v. United States*, 815 F.3d 112, 113 (2d Cir. 2016) (per curiam) (*quoting Whab*, 408 F.3d at 120); *see also Folk*, 954 F.3d at 609 (applying *Santarelli*).

B. The Decision Below is Incorrect.

a. The State defends the decision below on the ground that *Gonzalez* and *Banister* "support the view that all Rule 60(b) motions presenting new claims qualify as second or successive petitions." Opp. 17. But neither *Gonzalez* nor *Banister* imply, much less compel, that conclusion. Pet. App. 50a (Fletcher, J., concurring) ("Finally, neither *Gonzalez* nor *Banister* pose the barrier that today's opinion suggests."); *Santarelli*, 929 F.3d at 105 ("The Supreme Court's holding in *Gonzalez* . . . does not compel a different result.").

In *Gonzalez*, this 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. . . . Accordingly, *Gonzalez* requires [the conclusion] that Balbuena's Rule 60(b) motion is, in fact, a disguised habeas application." Pet. App. 50a (Fletcher, J., concurring). *Gonzalez* simply did not address the very different question presented here: whether that

application is "second or successive" within the meaning of Section 2244.

At least two post-*Gonzalez* decisions confirm that it does not resolve this case. Judge Easterbrook's opinion in *Philips* explained that *Gonzalez* "holds that a Rule 60(b) motion in a collateral proceeding under § 2254 or § 2255 that attacks a district court's decision 'on the merits' must be treated as a new 'application' for collateral review," but it does not answer the question of whether a filing "was . . . a second application[.]" *See* 668 F.3d at 435. And the Third Circuit's decision in *Santarelli* confirms that interpretation. As Judge Restrepo explained, *Gonzalez* merely "held that a Rule 60(b) motion for relief from a district court's final judgment or order is in fact a habeas petition if the motion . . . 'seeks to add a new claim for relief.'" *See* 929 F.3d at 105.

In *Banister*, this Court considered whether a Rule 59(e) motion filed after denial of a habeas petition was "second or successive" and held it was not. 140 S. Ct. at 1711. *Banister* confirmed that 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, but "otherwise has little relevance for [this] case." Pet. App. 51a (Fletcher, J., concurring). *Banister* did not address, much less resolve, the question presented.

b. The State's remaining points underscore the urgent need for this Court's review.

First, the State contends that a petitioner's right to "seek review of the claims in his initial petition at every level of the federal court system . . . does not suggest that an applicant must be allowed to add new claims even after the district court enters a final judgment denying the initial petition." Opp. 18. But

the State is wrong, and the Second and Third Circuits correctly allow a prisoner to do exactly that—if the prisoner can satisfy the requirements for amendment. The split of authority on such a fundamental question about AEDPA warrants this Court's review.

Second, the need for this Court's review is similarly evident in the State's struggle to distinguish this Court's decisions holding that a filing is not necessarily "second or successive" merely because it is filed after an initial petition, *see* Opp. 17, and decisions stating that finality in the context of collateral review encompasses appellate proceedings, *see* Opp. 19–20. Because this Court has never decided when AEDPA's "second or successive" bar is triggered, lower courts have been forced to fashion a rule without adequate guidance, drawing on different threads of this Court's decisions about AEDPA and finality. As a result, the courts of appeals have adopted conflicting positions on an essential question about federal post-conviction practice.

Third, the State is incorrect in dismissing the undeniable fact that the Ninth Circuit's interpretation "deprive[s] [petitioners] of an opportunity to have a well-justified grievance adjudicated in federal habeas." *See* Opp. 21. Part "of every civil case[] is an entitlement to add or drop issues while the litigation proceeds." *Ching*, 298 F.3d at 177 (quoting *Littlejohn*, 271 F.3d at 363). "The general concern that civil plaintiffs have an opportunity for a full adjudication of their claims is particularly acute in the AEDPA context, where the gatekeeping provisions of the statute stringently limit a petitioner's ability to raise further issues in a subsequent action." *Id.* It is precisely because of that strict gatekeeping function

that habeas petitioners must have an opportunity to amend their claims, especially in cases like this one, where the petitioner initially proceeded *pro se*.[1] As amici correctly observe, where, as here (and is common), counsel is not appointed until after an appeal is filed, "preventing appellate court-appointed counsel from pursuing remands is inconsistent with the purpose of appointing counsel in the first place"; "there's nothing abusive about an attorney pursuing a remand to correct the mistake and ensure the petitioner receives adequate merits review." Fed. Public Defenders Br. 15–16.

C. This Case Presents an Ideal Vehicle.

The State does not dispute that this case cleanly presents the issue that has divided the courts of appeals. Instead, it surmises that the petitioner's underlying *Miranda* claim lacks merit. *See* Opp. 22. This argument is irrelevant and incorrect.

Because the district court did not address the merits of petitioner's *Miranda* claim, the State's speculation does not impact the suitability of this case for certiorari. A decision from this Court that petitioner's request to amend is not "second or successive" would permit the district court to consider

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[1] For this reason, the State's characterization that petitioner's Rule 60(b) motion was filed "[n]early two years after the district court entered a final judgment," Opp. 7, is highly misleading. Counsel below moved to stay proceedings two months after being appointed by the Ninth Circuit.

the request to amend under the correct legal standard.[2]

In any event, petitioner has a compelling claim. As petitioner has argued throughout the proceedings below, the *Miranda* warning given to him prior to his interrogation on the day of his arrest—which produced the statement that was the key evidence against him—was deficient because it failed to inform him of his right to have a lawyer present during his interrogation. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (the warning that a suspect "has the right to consult with a lawyer and have the lawyer with him during interrogation . . . is an absolute prerequisite to interrogation"); *Florida v. Powell*, 559 U.S. 50, 62 (2010) (*Miranda* satisfied where suspect informed "he had 'the right to talk to a lawyer before answering any of [the officers'] questions' and 'the right to use any of his rights at any time he wanted during the interview'") (cleaned up); *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989) (*Miranda* requires "the suspect be informed . . . that he has the right to an attorney before and during questioning").

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[2] The State implies that California courts rejected petitioner's *Miranda* claim on collateral review, *see* Opp. 5 n.2, but those decisions neither addressed petitioner's *Miranda* claim nor held it was barred.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

DAVID A. O'NEIL
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 383-8000
daoneil@debevoise.com

MATTHEW SPECHT
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022

SCOTT A. SUGARMAN
Counsel of record
SUGARMAN & CANNON
737 Tehama Street, No. 3
San Francisco, CA 94103
(415) 362-6252
scott@sugarmanandcannon.com

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