NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

ALFONSO PONTON,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender

JANICE L. BERGMANN
Counsel of Record
Assistant Federal Public Defender
One E. Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a district court's recharacterization of a prior *pro se* pleading as a 28 U.S.C. § 2254 habeas corpus petition without the warnings required by *Castro v. United States*, 540 U.S. 375 (2003), requires the equitable tolling of the statute of limitations applicable to such petitions until the *Castro* error is corrected?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Alfonso Ponton v. Sec'y, Fla. Dept. of Corr.,
No. 16-20059-CV-Williams (Sept. 30, 2021)

United States Court of Appeals (11th Cir.):

Alfonso Ponton v. Sec'y, Fla. Dept. of Corr.,
No. 21-13780 (June 13, 2022)

Alfonso Ponton v. Sec'y, Fla. Dep't of Corr.,
891 F.3d 950 (June 4, 2018)

Ponton v. Morphonios,
No. 90-5592 (June 28, 1991)

Ponton v. Morphonios,
No. 88-5534 (Mar. 24, 1989)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

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Alfonso Ponton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-13780 in that court.

OPINIONS BELOW

The Eleventh Circuit's order denying a certificate of appealability is unreported and contained in Appendix A-1. The district court's order dismissing Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus as untimely is unreported and contained in Appendix A-2. The Eleventh Circuit's prior opinion

vacating and remanding the district court's order dismissing the petition as an unauthorized successive § 2254 petition is published at 891 F.3d 950 and is reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On June 13, 2022, the court of appeals affirmed the district court's grant of Petitioner's habeas corpus petition. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory provisions:

28 U.S.C. § 2244(d)

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(b)(3)(A)

Before the second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2253(c)

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

In 1982, Petitioner Alfonso Ponton was charged and tried seriatim in Miami-Dade County, Florida in three separate criminal cases that charged him with numerous counts of robbery and armed robbery, aggravated assault, and aggravated battery. App. A-3 at 2. Juries found him guilty on nearly all counts, the trial court sentenced him to hundreds of years of imprisonment, and his convictions and sentences were mostly affirmed by the state appellate courts. *Id.*

After his convictions became final, Mr. Ponton filed dozens of *pro se* postconviction pleadings, including more than a dozen in federal district court. *Id.* Mr. Ponton's "first four federal pleadings – a mixed habeas corpus petition and civil rights action filed in 1984, a civil rights action filed that same year, a 28 U.S.C. § 2254 petition filed in 1986, and another civil rights action filed in 1986 – were all dismissed without prejudice." *Id.* at 2-3.

In 1988, Mr. Ponton filed a fifth *pro se* federal pleading, a 42 U.S.C. § 1983 complaint. *Id.* at 3. The district court dismissed that pleading as containing exhausted and unexhausted claims. *Id.* Mr. Ponton appealed, and the Eleventh Circuit reversed "because it appeared that he may have exhausted all of his claims." *Id.* (citing *Ponton v. Morphonios*, No. 88-5534 (11th Cir. Mar. 24, 1989) (unpublished)). On remand, after the State conceded Mr. Ponton had exhausted an ineffective assistance of counsel claim, Mr. Ponton amended his complaint to withdraw his other claims, and asked the district court to proceed on his ineffective

assistance claim. *Id.* The district court treated the amended complaint as a § 2254 habeas corpus petition, and then dismissed the "petition" on its merits without first notifying Mr. Ponton that his pleading had been recharacterized, nor warning him that this recharacterization could limit future federal habeas filings. *Id.* Mr. Ponton appealed, and the Eleventh Circuit affirmed. *Id.* at 3-4; *Ponton v. Morphonios*, No. 90-5592 (11th Cir. June 28, 1991) (unpublished).

Between 1992 and 2013, Mr. Ponton filed six *pro se* § 2254 petitions in the district court, all of which were dismissed as successive under the standards governing at the time. App. A-3 at 4. The first three were filed before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and therefore before a statute of limitations governing § 2254 petitions existed. *Id.* The latter three petitions were filed after the AEDPA, and therefore governed by its one-year statute of limitations, 28 U.S.C. § 2244(d). *See id.*

Relevant here, Mr. Ponton filed his fourth § 2254 petition – his first filed post-AEDPA – two days short of the one-year anniversary of this Court's decision in *Castro v. United States*, 540 U.S. 375 (2003). In *Castro*, this Court held that if a district court recharacterizes a *pro se* litigant's pleading as a 28 U.S.C. § 2255 motion,[1] but does not provide the litigant with specific warnings, that motion does

[1] Most circuits to consider the question, including the Eleventh Circuit below, have concluded *Castro*'s logic extends to habeas corpus petitions under § 2254. *See, e.g., Thurston v. Maryland*, 611 F. App'x 112, 113 (4th Cir. 2015) (*per curiam*); *Foster v. Martin v. Overton*, 391 F.3d 710, 713 (6th Cir. 2004); *Smith v. Hobbs*, 490 F. App'x 833, 834 (8th Cir. 2012) (*per curiam*); *Davis v. Roberts*, 425 F.3d 830, 835 (10th Cir.

not court as the litigant's "first" motion when determining whether a subsequent pleading is a "second or successive" under the AEDPA. *Id.* at 383-84. Despite *Castro*, the district court dismissed Mr. Ponton's fourth § 2254 petition as yet another successive petition.

In 2016, Mr. Ponton filed his seventh *pro se* 28 U.S.C. § 2254 petition. *Id.* As with the six previous petitions, the district court dismissed this 2016 petition as successive. *Id.* The Eleventh Circuit, however, vacated and remanded. *Id.* at 8-9. The court of appeals held that because the district court did not give Mr. Ponton the notice and warnings required by *Castro* prior to recharacterizing his 1988 civil rights complaint as a § 2254 petition, that 1988 petition did not "count" as a first § 2254 petition, and the district court therefore erred in dismissing the 2016 petition (and all of the petitions in between) as successive. *Id.*

On remand, the district court allowed Mr. Ponton to file an amended petition. In response, the State argued the petition was untimely. In reply, Mr. Ponton conceded that his petition was filed outside the one-year limitations period, but argued that the untimeliness of his petition was excused by equitable tolling. Specifically, Mr. Ponton argued that he was entitled to equitable tolling because he relied to his detriment on the district court's dismissal of his six prior federal petitions as second or successive, and all of those dismissals were incorrect in light of

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2005); *Ponton v. Secretary, Fla. Dep't of Corr.*, 891 F.3d 950, 953 n.3 (11th Cir. 2018); *accord Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 281–82 (2d Cir. 2003) (imposing notice-and-warning requirement in § 2254 cases pre-*Castro*).

Castro.

On September 30, 2021, the district court dismissed the petition as untimely. App. A-2. The district court relied heavily on the Eleventh Circuit's decision in *Outler v. United States*, 485 F.3d 1273 (11th Cir. 2007) (*per curiam*), to reject Mr. Ponton's argument that he was entitled to equitable tolling because he relied to his detriment on the district court's dismissals of his prior § 2254 petitions as successive, and those dismissals were improper under *Castro*. *Id*. at 10. The district court also denied a certificate of appealability. *Id*. at 16.

Mr. Ponton timely appealed, but the Eleventh Circuit denied a certificate of appealability in an unexplained order. App. A-1.

REASONS FOR GRANTING THE WRIT

I. The courts of appeal are intractably divided over the question presented.

There is a conflict in the circuits regarding whether equitable tolling of the AEDPA's statute of limitations is required where a petitioner was prevented from presenting his claims in a timely manner by the district court's recharacterization of a *pro se* pleading as a § 2254 petition or a § 2255 motion without the warnings required by *Castro*.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89,

96 (1990)). This Court and the lower courts have consistently held that equitable tolling might be appropriate if a court has affirmatively misled the litigant. *See, e.g., Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding to Ninth Circuit to consider whether the "Court of Appeals' concern that respondent had been affirmatively misled" by magistrate judge provides justification for equitable tolling of statute of limitations); *id.* at 235 (O'Connor, J., concurring) ("if the petitioner is affirmatively misled . . . by the court . . ., equitable tolling might well be appropriate"); *McMonagle v. Meyer*, 802 F.3d 1093, 1095, 1099-1100 (9th Cir. 2015) (*en banc*) (granting equitable tolling because petitioner relied on court decision which was later overruled); *Sherwood v. Prelesnik*, 579 F.3d 581, 588-89 (6th Cir. 2009) (same); *Streu v. Dormire*, 557 F.3d 960, 967-68 (8th Cir. 2009) (same); *Spottsville v. Terry*, 476 F.3d 1241, 1245-46 (11th Cir. 2007) (granting equitable tolling because prisoner was "affirmatively misled" by state postconviction court to file notice of appeal in wrong court). *Cf. Carmago v. Ryan*, 684 F. App'x 607, 610 (9th Cir. 2017) (granting equitable tolling because of, *inter alia*, "Arizona state courts' repeated, incorrect determinations that Camargo's post-conviction review petitions were untimely").

More specifically, the Second, Third, and Tenth Circuits have granted equitable tolling where the district court's unilateral recharacterization of a *pro se* pleading as a 28 U.S.C. § 2255 motion without giving the warnings this Court required in *Castro v. United States*, prevented the petitioner from presenting his claims in a timely manner. *See United States v. Kelly*, 235 F.3d 1238, 1242-43 (10th

Cir. 2000); *United States v. Miller*, 197 F.3d 644, 653 (3d Cir. 1999); *Adams v. United States*, 155 F.3d 582, 584 n.2 (2d Cir. 1998). Although *Adams*, *Miller*, and *Kelly* predate this Court's decision in *Castro*, they all arose in circuits which, unlike the Eleventh Circuit, already required district courts to provide the same pre-recharacterization notice and warnings that this Court later mandated in *Castro*. *See Castro*, 540 U.S. at 383.

In *Kelly*, although the petitioner failed to file a timely petition, "it was the court's unilateral [recharacterization] action that essentially prevented him from doing so." *Kelly*, 235 F.3d at 1243. "[O]ut of concern for fairness," the Tenth Circuit held that the limitations period was equitably tolled from the date the district court improperly recharacterized Kelly's decision until the date that decision was overruled. *Id.* Similarly, in *Adams*, the Second Circuit held that "because the district court's [incorrect recharacterization] ruling came at a time when Adams still had several months in which to file a § 2255 motion, but had serious reason to doubt that he could satisfy AEDPA's stringent limitations on successive motions, fairness demands that the statute of limitations be [equitably] tolled." *Adams*, 155 F.3d at 584 n.2. And in *Miller*, the Third Circuit followed *Adams* to similarly toll the one-year statute of limitations in light of the district court's recharacterization of Miller's postconviction motions without the appropriate notice and warnings. *Miller*, 197 F.3d at 652-53.

The Eleventh Circuit, however, in a 2-1 decision, expressly distinguished

Adams, Miller, and *Kelly* to reject the argument that the limitations period was equitably tolled by a district court's improper recharacterization decision until the date that decision was overruled. *Outler v. United States*, 485 F.3d 1273, 1284 (11th Cir. 2007), *cert. denied*, 552 U.S. 1232 (2008). Judge Rosemary Barkett dissented, arguing that the majority's decision conflicted directly with *Kelly*, *Miller*, and *Adams*. *Outler*, 485 F.3d at 1289 (Barkett, J., dissenting) ("Many of our sister circuits have considered this very problem, both before and after *Castro*, and concluded that it demands the application of equitable tolling) (citing, *inter alia*, *Kelly*, *Miller*, and *Adams*).

Judge Barkett found neither of the two grounds on which the majority attempted to distinguish *Kelly*, *Miller*, and *Adams* persuasive. First, although "the majority distinguishe[d] these cases on the grounds that they involve petitioners who were planning to assert additional claims when their motions were first recharacterized," Judge Barkett found "that fact was not central to the holding of any of these cases." *Id.* at 1291. "Nor is it fair," Judge Barkett wrote, "to distinguish *Kelly*, as the majority does," on the ground that Kelly challenged the recharacterization of his claims in the very proceeding in which they were recharacterized, whereas Outler did not. *Id.* As Judge Barkett noted, *Adams*, *Miller*, and *Kelly* arose in circuits which, like "'almost every Court of Appeals'" except the Eleventh Circuit, already required the warnings later mandated by *Castro*. *Id.* (quoting *Castro*, 540 U.S. at 383). Accordingly, the litigants in those cases were on

notice that controlling law required the district court to give warnings prior to a recharacterization, and therefore had reason to challenge a recharacterization on appeal. *See id*. The Eleventh Circuit, however, required no such warnings pre-*Castro*. *Id*. Therefore, in Judge Barkett's view, the fact that the district court's flawed recharacterization ruling "occurred in 1998, and was not corrected until 2005" after *Castro* changed Eleventh Circuit law, "is no fault of Outler's." *Id*.

Finally, Judge Barkett noted, "if petitioners like Outler (or indeed Castro himself) were to be time-barred from the filing of § 2255 habeas petitions which were forbidden before *Castro*, then *Castro* was a hollow holding indeed: Nearly all of the petitions which the Supreme Court clearly meant to allow as non-successive would now be time-barred." *Id*. Such a holding, Judge Barkett asserted, "effectively undermines *Castro*'s retroactive effect." *Id*. (citing *Castro*, 540 U.S. at 376).

II. The circuit conflict is untenable given the importance of the question presented.

The conflict over the question presented merits this Court's attention. The issue can arise in any case in which the district court improperly recharacterizes a *pro se* pleading as a habeas corpus petition or § 2255 motion without giving the warnings required by *Castro*, and the flawed recharacterization is not corrected until after the one-year statute of limitations has run. Given *Castro*'s retroactive effect, such flaws can stand uncorrected for years. Indeed, the district court's error in recharacterizing Mr. Ponton's 1988 *pro se* pleading was not corrected until 20 years

later, when the Eleventh Circuit issued its decision so holding in 2018. *See* App. A-3. And it was only corrected due to Mr. Ponton's persistence – he had to return to the federal courts *seven* times after the district court's improper recharacterization, and *four* times after the enactment of the AEDPA before the correction occurred.

The importance of the conflict is heightened because it is outcome determinative. A dismissal of a habeas petition as untimely is a decision on the merits, and any petition filed thereafter is considered "second or successive," thereby requiring the authorization of the court of appeals before it may be filed in the district court. *See In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011); *Quezada v. Smith,* 624 F.3d 514, 519–20 (2d Cir. 2010); *In re Flowers,* 595 F.3d 204, 205 (5th Cir. 2009) (*per curiam*); *McNabb v. Yates,* 576 F.3d 1028, 1029 (9th Cir. 2009); *Murray v. Greiner,* 394 F.3d 78, 79 (2d Cir. 2005); *Altman v. Benik,* 337 F.3d 764, 765 (7th Cir. 2003) (*per curiam*).

III. The Eleventh Circuit's holding is wrong.

Certiorari is further warranted because the Eleventh Circuit erroneously denied of a certificate of appealability whether equitable tolling was warranted.

Here, the district court's first incorrect decision holding Mr. Ponton's federal petitions were successive was rendered in 1992 – at a time pre-AEDPA when no statute of limitations existed. Therefore that petition, and Mr. Ponton's two later pre-AEDPA petitions, were all timely filed. Moreover, under *Kelly*, *Adams*, and

Miller, Mr. Ponton's statute of limitations would have been tolled from the date of the district court's erroneous decision in 1992, until the date the Eleventh Circuit overruled that decision in 2018. And because Petitioner filed his petition in the instant matter in 2016, his petition would be timely in the Second, Third, and Tenth Circuits.

The district court, however, instead followed the Eleventh Circuit's decision in *Outler* to hold the 2016 petition untimely. *See* App. A-2 at 10-11. Specifically, the district court held Mr. Ponton's 2016 petition untimely because, like the petitioner in *Outler*, Mr. Ponton did not make any effort "to contest the 1988 recharacterization" of his *pro se* filing as a habeas corpus petition prior to the expiration of the statute of limitations. *Id*. But until *Castro*, the Eleventh Circuit did not require district courts within its jurisdiction to issue the warnings *Castro* later required. Thus, there was no legal basis for Mr. Ponton to challenge the district court's flawed recharacterization until *Castro*. Yet, even when Mr. Ponton attempted to do so by filing a federal petition within a year of *Castro*, the district court nonetheless incorrectly and improperly dismissed that petition as successive, notwithstanding its failure to give proper *Castro* warnings before it dismissed Mr. Ponton's 1988 petition. And the district court continued to improperly apply *Castro* until the Eleventh Circuit ultimately corrected that error in 2018. *See* App. A-3. Thus, just as Judge Barkett stated of the petitioner in *Outler*, the fact that the district court's flawed recharacterization ruling "occurred in [1988], and was not corrected until

[2018], is no fault of" Mr. Ponton's. *Outler*, 485 F.3d at 1291 (Barkett, J., dissenting). Equitable tolling was therefore required.

At the very least, the Eleventh Circuit clearly erred in failing to grant Mr. Ponton a certificate of appealability. A petitioner need not establish that he will win on the merits in order make the "substantial showing" required to obtain a certificate; he need only demonstrate that the questions he raises are debatable among reasonable jurists. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Given the conflict in the circuits on the question presented, and Judge Barkett's dissent in *Outler*, a certificate of appealability was warranted here.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Janice L. Bergmann*
JANICE L. BERGMANN
Assistant Federal Public Defender
Counsel of Record

Counsel for Petitioner

Fort Lauderdale, Florida
September 12, 2022