

ANOTHER BITE AT THE APPLE OR THE SAME BITE?
CHARACTERIZING HABEAS PETITIONS ON APPEAL AS
PENDING INSTEAD OF FULLY ADJUDICATED

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INTRODUCTION

Habeas corpus,¹ the “Great Writ of Liberty,”² has undergone considerable change over the course of history. From its initial introduction in English common law,³ to its inclusion in the American Constitution,⁴ to its fluctuating interpretation throughout the nineteenth and twentieth centuries,⁵ habeas corpus has remained a fundamental part of the American legal system. With its passage in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) became the primary federal statutory authority for the writ, and much case law has emerged at the district court, circuit court, and even Supreme Court levels interpreting the various changes the Act brought about.⁶ One of the Act’s most significant aspects is its restriction on the filing of successive habeas corpus petitions.⁷ Responding to this restriction, prisoners have attempted to circumvent the AEDPA through a number of different procedural routes with varying degrees of success.⁸

1. In Latin meaning “that you have the body,” habeas corpus is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal.” *Habeus Corpus*, BLACK’S LAW DICTIONARY (11th ed. 2019).

2. ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 1 (2001); see also *Fay v. Noia*, 372 U.S. 391, 399-400 (1963) (“We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence: ‘the most celebrated writ in the English law.’” (footnote omitted) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129)).

3. See DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 3-4, 7-9 (1966); Justin J. Wert, *With a Little Help from a Friend: Habeas Corpus and the Magna Carta After Runnymede*, 43 POL. SCI. & POL. 475, 475-76 (2010).

4. U.S. CONST. art. I, § 9, cl. 2.

5. See JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 1-2 (2011).

6. See CHARLES DOYLE, CONG. RSCH. SERV., RL33391, *FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW* 8 (2010).

7. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217-21 (1996) (codified as amended in scattered sections of 28 U.S.C.); see also DOYLE, *supra* note 6, at 11-12.

8. See, e.g., Stefan Ellis, Comment, *Gonzalez v. Crosby and the Use of Federal Rule of Civil Procedure 60(b) in Habeas Proceedings*, 13 J. CONST. L. 207, 208-09 (2010) (discussing the use of Federal Rule of Civil Procedure Rule 60(b) motions in habeas proceedings); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 89-91 (2012) (arguing that federal habeas petitions should focus on the criminal adjudication process as opposed to the resulting conviction); *Banister v. Davis*, 140 S. Ct.

This Note examines the circuit split that has emerged for one of those procedural attempts—motions to amend habeas petitions following adjudication on the merits and while on appeal in a circuit court.⁹ This Note argues that allowing amendment of habeas petitions on appeal is both consistent with the history of habeas corpus in the United States and allowable under even the restrictive approach of the AEDPA. Finally, this Note advocates for Supreme Court intervention on this issue despite the Court's reluctance up to this point.

Part I of this Note provides a background on the right of habeas corpus in American history and discusses the changes and developments accompanying the AEDPA since its passage in 1996. Part II discusses the Supreme Court's rulings in *Gonzalez v. Crosby* and *Banister v. Davis*, with particular focus placed on the Court's analysis of Rule 60(b) and 59(e) motions. Part III uses cases in the Second, Third, and Ninth Circuit Courts to illustrate federal courts' various approaches to appeals after trial courts have adjudicated the merits of initial habeas petitions. Part IV puts forth various arguments as to why these motions should be allowed and why the Supreme Court should intervene on this issue. It also proposes a test that the Supreme Court should utilize when coming to a decision, which utilizes the approaches currently used by the circuit courts as well as related approaches to other procedural obstacles of the AEDPA.

I. HABEAS CORPUS AND THE AEDPA

This Part briefly traces the development of the writ of habeas corpus in the American legal system. Section A explains the writ's origins in common law and its evolution through early American history. Section B covers the development and expansion of habeas corpus in the United States following World War II, as well as its contraction in the latter half of the twentieth century. Finally,

1698, 1702 (2020) (holding that Federal Rule of Civil Procedure Rule 59(e) motions to alter or amend a habeas court's judgment do not qualify as successive petitions).

9. See Andrew Hamm, *A Habeas Circuit Split and Ohio's Public-Sector Unions*, SCOTUSBLOG (Mar. 12, 2021, 6:25 PM), <https://www.scotusblog.com/2021/03/a-habeas-circuit-split-and-ohios-public-sector-unions/> [https://perma.cc/8R7Q-KKFP].

Section C explores the AEDPA and the significant changes brought about by its passing, focusing on several of the key changes it codified in federal law.

A. Origins of Habeas Corpus and Its Development in the United States

Habeas corpus, Latin for “that you have the body,”¹⁰ emerged around the thirteenth century in England but was not officially codified as a writ until the Habeas Corpus Act of 1679.¹¹ The writ of habeas corpus in English common law took two forms: *habeas corpus ad subjiciendum* and *habeas corpus ad prosequendum*.¹² *Habeas corpus ad subjiciendum*, known as the “Great Writ,” required that custodians of prisoners produce those prisoners in front of the court and establish a lawful basis for their continued imprisonment.¹³ The other writ, *habeas corpus ad prosequendum*, could compel someone to appear in court to serve as a witness or for other procedural purposes.¹⁴

William Blackstone described the writ of *habeas corpus ad subjiciendum* as “the most celebrated writ in the English law.”¹⁵ Both Blackstone’s *Commentaries* and Edward Coke’s *Institutes* had profound influences on the thinking and practices of the American colonists,¹⁶ and the Great Writ was enshrined to various degrees in the statutes and rules of the American colonies.¹⁷ After gaining independence, the United States solidified habeas corpus in what came to be called the Suspension Clause of the Constitution.¹⁸ Habeas relief was soon after extended to federal prisoners under the

10. *Habeas Corpus*, *supra* note 1.

11. See Wert, *supra* note 3, at 475-76; *Habeas Corpus*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/habeas-corpus> [<https://perma.cc/VZZ9-LV8X>].

12. WILLIAM H. ERICKSON & B.J. GEORGE, JR., 2 UNITED STATES SUPREME COURT CASES AND COMMENTS ¶ 5B.02 (2022).

13. *Id.*; see also *Habeas Corpus*, *supra* note 1.

14. ERICKSON & GEORGE, JR., *supra* note 12; see also *Habeas Corpus*, *supra* note 1.

15. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

16. See MEADOR, *supra* note 3, at 21-30.

17. See *id.* at 30-32; NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY 6 (2011).

18. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

First Judiciary Act of 1789.¹⁹ The next major expansion of the writ of habeas corpus occurred following the Civil War, when Congress passed the Habeas Corpus Act of 1867.²⁰ This act granted federal courts the power to issue writs of habeas corpus “in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.”²¹ This language was understood to extend the benefits of the writ of habeas corpus to prisoners in state custody.²² Despite this statutory extension, the Supreme Court typically rejected fundamental constitutional challenges through habeas, choosing to focus on only the most outrageous violations of due process over the course of the eighty years following the Act’s passage.²³ The governing statutory language, as well as the Court’s actions, remained relatively consistent until the period immediately following World War II.²⁴

B. Post-World War II Habeas Corpus Developments

In 1948, Congress added major habeas corpus revisions to federal law, which notably included the splitting of habeas petition processes for state and federal prisoners.²⁵ 28 U.S.C. § 2255 allowed federal prisoners to seek habeas relief and provided a more streamlined process for review.²⁶ 28 U.S.C. § 2254 focused on rules pertaining to prisoners in state custody,²⁷ updating the provision of review set forth in the Habeas Corpus Act of 1867.²⁸ Even though state and federal prisoners’ procedures for habeas corpus were separated as a result of the provisions, the Supreme Court has

19. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

20. KING & HOFFMAN, *supra* note 17, at 50-52.

21. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 305, 385-86.

22. See MEADOR, *supra* note 3, at 56-57 (“Thus, for the first time, the federal writ was extended generally to all persons held by state authority in violation of federal law. No longer would the federal writ be confined to reviewing detention in the federal sphere.”); see also KING & HOFFMAN, *supra* note 17, at 50-52 (discussing the extent and limits of the Act).

23. See WERT, *supra* note 5, at 117-18, 120-23.

24. See KING & HOFFMAN, *supra* note 17, at 9-10.

25. 28 U.S.C. §§ 2254-2255.

26. *Id.* § 2255; see also KING & HOFFMAN, *supra* note 17, at 54.

27. 28 U.S.C. § 2254.

28. See KING & HOFFMAN, *supra* note 17, at 54.

typically applied similar rulings to both sections.²⁹ Section 2241, an additional update of the Act, served mainly as a general codification of American judge-made law up to that point and provided access to habeas for anyone not challenging a criminal judgment.³⁰

Following these codifications, the Supreme Court expanded the writ of habeas corpus through a series of cases in the mid- to late-twentieth century.³¹ In *Brown v. Allen*, the Supreme Court held that for federal habeas petitions filed by state prisoners, the federal court should treat a state court's decision on the merits as persuasive—but not binding—authority.³² The case also served to solidify federal courts' authority over habeas petitions filed by state prisoners that alleged federal constitutional violations.³³

Five years later, the Court further expanded the writ of habeas corpus in the "1963 trilogy" of cases.³⁴ This trilogy consisted of *Townsend v. Sain*,³⁵ *Sanders v. United States*,³⁶ and *Fay v. Noia*.³⁷ In *Townsend*, the Court articulated the instances in which a federal habeas court must grant a hearing:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any

29. *See id.* at 57 ("*Sanders* was actually a Section 2255 case involving a federal prisoner, although as in many such situations the Court applied the same rule to Section 2254 habeas corpus cases." (citing *Sanders v. United States*, 373 U.S. 1 (1963))).

30. 28 U.S.C. § 2241; *see also* KING & HOFFMAN, *supra* note 17, at 10.

31. *See* WERT, *supra* note 5, at 141-42; MEADOR, *supra* note 3, at 65-70; KING & HOFFMAN, *supra* note 17, at 54-60.

32. 344 U.S. 443, 458-60 (1953).

33. DOYLE, *supra* note 6, at 6 ("After *Brown v. Allen*, there was little doubt that the federal habeas corpus statute afforded relief to state prisoners whose convictions were tainted by constitutional violations, both those violations that would void state court jurisdiction and those that would not." (footnote and internal citation omitted)).

34. *See* WERT, *supra* note 5, at 151; *see also* Robert Baynes, Richard Dailey & DeWitt McCotter, Note, *Criminal Law—Habeas Corpus—the 1963 Trilogy*, 42 N.C. L. REV. 352, 352-53 (1964).

35. 372 U.S. 293 (1963).

36. 373 U.S. 1 (1963).

37. 372 U.S. 391 (1963).

reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.³⁸

In *Sanders v. United States*, the Supreme Court asserted that there was no limit to the number of successive federal habeas petitions that could be made by a prisoner, provided that a different ground was provided in each subsequent petition.³⁹ *Fay v. Noia*, seen as the most important of the “trilogy,”⁴⁰ turned on the issue of state procedural defaults in the context of habeas petitions, as the petitioner had allowed the time for appeal to elapse in state court but sought federal review of his conviction.⁴¹ The Court held that federal court jurisdiction would not be overridden by a state court’s refusal to review a federal claim due to a state procedural deficiency on the part of the defendant.⁴² *Townsend, Sanders, and Noia* resulted in a push for states to reform their own judicial processes and for state court judges to enforce the expanded habeas rights articulated by the Court.⁴³

Following these momentous changes and reforms, subsequent decisions by the Supreme Court restricted inmates’ ability to bring habeas petitions to the federal courts.⁴⁴ In 1976, the Court in *Stone v. Powell* held that a state prisoner is unable to obtain relief for a federal habeas claim alleging an unconstitutional search or seizure under the Fourth Amendment when the state already provided a full and fair litigation.⁴⁵ A year after that decision, the Court narrowed the standard set forth in *Fay v. Noia* for state prisoners who failed to bring a federal claim during trial.⁴⁶ Then, in the 1984 case *Reed v. Ross*, the Court stated, “[w]hen a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing

38. 372 U.S. at 313.

39. 373 U.S. at 16-17; see also WERT, *supra* note 5, at 153.

40. KING & HOFFMAN, *supra* note 17, at 57-59.

41. 372 U.S. at 395-98.

42. *Id.* at 398-99; see also MEADOR, *supra* note 3, at 69-70.

43. KING & HOFFMAN, *supra* note 17, at 60.

44. See Kenneth Williams, Commentary, *The Antiterrorism and Effective Death Penalty Act: What’s Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 921-22 (2001).

45. 428 U.S. 465, 494-95 (1976).

46. *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

of ‘cause and actual prejudice.’”⁴⁷ Finally, in 1989, in *Teague v. Lane*, the Court held that with limited exceptions, “new constitutional rules of criminal procedure w[ould] not be applicable to those cases which have become final before the new rules are announced.”⁴⁸ Despite these substantial limitations, the public, in part due to the high rate of federal court reversals of death sentences, clamored for even more sweeping habeas corpus change, which subsequently led to the adoption of the AEDPA.⁴⁹

C. Adoption of the AEDPA

Signed into law on April 24, 1996, the AEDPA⁵⁰ brought about significant criminal procedural changes.⁵¹ Passed following the Oklahoma City terrorist bombing, the bill had at least the partial purpose of reducing domestic terrorism.⁵² In addition to this stated goal, the legislation also brought about substantial habeas corpus reform. As a threshold matter, the AEDPA empowers federal courts to deny a habeas corpus application “on the merits,”⁵³ which is a substantial hurdle that applicants must constantly keep in mind. The AEDPA also brought about several important procedural and substantive restrictions outlined below.

One of the major additions by the AEDPA was the imposition of a “1-year period of limitation” for writ of habeas corpus applications.⁵⁴ Although this may seem rather short, this period actually runs from the latest of the following: (1) the date on which the judgment became final,⁵⁵ (2) the date on which a state-imposed impediment to filing a habeas application is removed,⁵⁶ (3) the date

47. 468 U.S. 1, 11 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)).

48. 489 U.S. 288, 310 (1989) (plurality opinion).

49. See Williams, *supra* note 44, at 923.

50. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended at 28 U.S.C. §§ 2241-2266 (1996)).

51. See Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399, 399 (1997).

52. See AEDPA, 110 Stat. at 1214 (stating that the purpose of the Act is “to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes”).

53. 28 U.S.C. § 2254(b)(2).

54. *Id.* § 2244(d)(1).

55. *Id.* § 2244(d)(1)(A).

56. *Id.* § 2244(d)(1)(B).

on which a constitutional right applicable to a petitioner is recognized by the Supreme Court,⁵⁷ or (4) the date on which due diligence would have led to the discovery of the facts underlying the proposed claim or claims.⁵⁸

Another significant statutory element of the AEDPA is the requirement that state prisoners exhaust all remedies available in state court before their habeas corpus application can be granted.⁵⁹ The AEDPA provides two exceptions to circumvent this requirement: (1) if the state corrective process is unavailable, or (2) the process is ineffective due to the circumstances of the potential petitioner's situation.⁶⁰ Furthermore, the exhaustion requirement can only be expressly waived by a state through its counsel.⁶¹

In direct opposition to the expansion of federal habeas review by the Supreme Court in the 1960s,⁶² the AEDPA restricted federal courts' ability to review state court judgments.⁶³ A state court judgment is presumed to be correct and can be rebutted only by clear and convincing evidence presented by the habeas applicant.⁶⁴ Additionally, if there was no factual basis developed by the habeas applicant in state court, a federal court can only hold an evidentiary hearing if: (1) there is a claim relying on a new rule of constitutional law; (2) there were certain new facts that could not have been previously discovered; or (3) under the facts, no reasonable fact-finder would have found the applicant guilty but for constitutional error.⁶⁵

The AEDPA severely curtailed "second or successive" petitions.⁶⁶ Under the Act, a federal court must dismiss claims already presented in a prior habeas application if they are brought in a "second or successive" application.⁶⁷ For a claim not brought in a previous habeas petition, an applicant must show *either* that: (1) the claim

57. *Id.* § 2244(d)(1)(C).

58. *Id.* § 2244(d)(1)(D).

59. *Id.* § 2254(b)(1)(A).

60. *Id.* § 2254(b)(1)(B)(i)-(ii).

61. *Id.* § 2254(b)(3).

62. *See supra* Part I.B.

63. *See* 28 U.S.C. § 2254(e).

64. *Id.* § 2254(e)(1).

65. *Id.* § 2254(e)(2)(A)-(B).

66. *See id.* § 2244(b)(1)-(3); *see also* Kochan, *supra* note 51, at 416 ("The Act's new standards impose more rigid requirements than under previous Supreme Court jurisprudence.").

67. 28 U.S.C. § 2244(b)(1).

relies on a new rule of law from the Supreme Court,⁶⁸ or (2) the factual basis for the claim was not previously discoverable through due diligence *and* the applicant establishes through clear and convincing evidence that he or she would not have been found guilty but for constitutional error.⁶⁹ An applicant must move in the appropriate court of appeals for authorization before filing a “second or successive” habeas application in the district court, and this application must also make “a prima facie showing that the application satisfies the requirements of th[e] subsection.”⁷⁰ Although the language regarding “second or successive” petitions is rather strict, it is important to note that “second or successive” petitions are not expressly defined by the Act or by § 2244.⁷¹ This lack of definition has played an important role in subsequent court decisions, as illustrated by Part II.

II. THE AEDPA, THE SUPREME COURT, AND RULE 59(E) AND 60(B) MOTIONS

While the AEDPA made several significant changes to the statutory framework governing habeas petitions, the issue of what constitutes a “second or successive” petition has become a key issue considered by all levels of the federal court system.⁷² To illustrate the significance of this pertinent issue, this Part highlights two Supreme Court cases, *Gonzalez v. Crosby*⁷³ and *Banister v. Davis*.⁷⁴ These cases are significant to this Note’s discussion, as both involved analyses of motions brought after an initial habeas petition was adjudicated on the merits.⁷⁵ Although the Supreme Court came

68. *Id.* § 2244(b)(2)(A).

69. *Id.* § 2244(b)(2)(B)(i)-(ii).

70. *Id.* § 2244(b)(3)(A), (C).

71. *See* *Magwood v. Patterson*, 561 U.S. 320, 331-32 (2010) (“Congress did not define the phrase ‘second or successive’.... We have described the phrase ... as a ‘term of art.’”).

72. *See, e.g.*, Ellis, *supra* note 8, at 215-18 (tracing the development of court approaches to Rule 60(b) motions); Cory Wilson, Note, *Rishor v. Ferguson: The Ninth Circuit Erred in Holding that Rule 59(e) Motions Are Not Subject to the Restrictions of AEDPA When Those Motions Do Not Present Entirely New Claims for Habeas Corpus Relief*, 51 CREIGHTON L. REV. 641, 658-65 (2018) (noting the different court frameworks regarding Rule 59(e) motions in habeas proceedings).

73. 545 U.S. 524 (2005).

74. 140 S. Ct. 1698 (2020).

75. *See Gonzalez*, 545 U.S. at 526; *Banister*, 140 S. Ct. at 1702.

to opposite conclusions as to whether the motions at issue in both cases were “second or successive,” the Court’s holdings were ultimately in line with the restrictive approach set forth under the AEDPA.

A. *Gonzalez v. Crosby and Rule 60(b) Motions*

In 2006, the Supreme Court considered the issue of whether a Federal Rule of Civil Procedure 60(b) motion was considered “second or successive” if it was filed after the federal courts had denied habeas corpus relief to the petitioner.⁷⁶ When making a Rule 60(b) motion, a party requests relief from a “final judgment, order, or proceeding.”⁷⁷ However, the Rule provides six instances in which the requested relief can be granted: (1) mistake, (2) newly discovered evidence, (3) fraud or misconduct by an opposing party, (4) void judgment, (5) judgment has been satisfied or is based on an earlier judgment that has been reversed, or (6) any other reason justifying relief.⁷⁸

In *Gonzalez*, the petitioner had been arrested and convicted of armed robbery before the passage of the AEDPA in 1996.⁷⁹ After a district court denied his habeas petition as time-barred under the AEDPA’s statute of limitations, the petitioner filed a Rule 60(b) motion, attempting to obtain relief from the final judgment.⁸⁰ After initially granting a certificate of appealability (COA) as required under § 2244(b)(3)(A), the Court of Appeals for the Eleventh Circuit⁸¹ subsequently quashed the COA and denied the petitioner’s motion.⁸² The Supreme Court then granted certiorari.⁸³

In its decision, the Court turned its focus to whether the provisions of § 2244 limited the application of Rule 60(b) and the

76. *Gonzalez*, 545 U.S. at 526.

77. FED. R. CIV. P. 60(b).

78. *Id.*

79. *See* 545 U.S. at 526-27.

80. *Id.* at 527.

81. *See supra* note 70 and accompanying text.

82. *Gonzalez*, 545 U.S. at 528 (“The en banc majority determined that petitioner’s motion—indeed, any postjudgment motion under Rule 60(b) save one alleging fraud on the court under Rule 60(b)(3)—was in substance a second or successive habeas corpus petition.” (citing *Gonzalez v. Sec’y for Dep’t of Corr.*, 366 F.3d 1253, 1278, 1281-82 (11th Cir. 2004) (en banc)).

83. *Id.*

plaintiff's motion under that rule.⁸⁴ The crux of the Court's holding was twofold. First, the Court stated that Rule 60(b) motions that seek to advance one or more claims qualify as "second or successive" and are barred by § 2244.⁸⁵ A motion can advance a claim in two ways: (1) the motion "seeks to add a new ground for relief," or (2) the motion "attacks the federal court's previous resolution of a claim *on the merits*."⁸⁶ Second, a motion that only attacks a defect in the integrity of the federal habeas proceeding does not advance a "claim" and is thus not considered to be a "second or successive" habeas petition.⁸⁷ This aspect of the Court's decision was found to be directly applicable to the petitioner's own motion, but the Eleventh Circuit's denial of the motion was nonetheless affirmed because relief under Rule 60(b) requires extraordinary circumstances, which were not found by the Court.⁸⁸ Although the Supreme Court did seem to draw a sharp distinction in *Gonzalez* for when Rule 60(b) motions would or would not be considered "second or successive," the case did not address the situation in which a motion is put forth while a habeas petition is on appeal.⁸⁹

B. *Banister v. Davis* and Rule 59(e) Motions

Under Federal Rule of Civil Procedure 59(e), a litigant may file a "motion to alter or amend a judgment," as long as that motion is brought within twenty-eight days from entry of that judgment.⁹⁰ In *Banister v. Davis*, the Supreme Court held Rule 59(e) motions do not qualify as "second or successive" under the AEDPA and are instead "part and parcel" of the initial habeas proceeding.⁹¹

The underlying case in *Banister* involved an automobile accident in which the petitioner, Banister, struck and killed a bicyclist in Texas.⁹² The petitioner was charged with aggravated assault with a deadly weapon, found guilty by a jury, and subsequently

84. *See id.* at 529-30.

85. *Id.* at 530-31.

86. *Id.* at 532.

87. *Id.* at 532-33.

88. *See id.* at 536.

89. *See id.*

90. FED. R. CIV. P. 59(e).

91. 140 S. Ct. 1698, 1702 (2020).

92. *Id.* at 1704.

sentenced to thirty years in prison.⁹³ After fully exhausting his state court appeals and collateral attacks, Banister brought a habeas petition in federal court in which he primarily argued that he received constitutionally ineffective assistance of counsel.⁹⁴ After the district court denied his application, Banister filed a Rule 59(e) motion within the appropriate twenty-eight-day period.⁹⁵ The district court stood by its decision, and Banister then appealed to the United States Court of Appeals for the Fifth Circuit.⁹⁶ The Fifth Circuit held that Banister's Rule 59(e) motion constituted a "second or successive" petition under the AEDPA and accordingly dismissed his appeal.⁹⁷

The Supreme Court based its opinion in *Banister* on both "historical habeas doctrine and practice" and the "AEDPA's own purposes."⁹⁸ The Court found that in almost all cases involving Rule 59(e) motions that predated the AEDPA, courts did not deem those motions as "second or successive."⁹⁹ The Court then stated, "the [AEDPA] did not redefine what qualifies as a successive petition, much less place Rule 59(e) motions in that category."¹⁰⁰ Focusing on the ability of the district courts to fix mistakes and the quick turnaround requirement for filing, the Court asserted that Rule 59(e) motions were consistent with the AEDPA's goal of streamlining habeas cases.¹⁰¹ Importantly, the Court distinguished Rule 59(e) motions from Rule 60(b) motions, reasoning that Rule 60(b) motions were too removed from the initial habeas judgment.¹⁰² Here again the Supreme Court failed to address cases involving motions to amend while the habeas petition was on appeal,¹⁰³ leaving the door open for circuit courts to formulate their own methods.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1705-06.

99. *See id.* at 1706-07.

100. *Id.* at 1707.

101. *Id.* at 1708.

102. *See id.* at 1710.

103. *See id.*

III. CIRCUIT COURT APPROACHES TO COLLATERAL REVIEW FILINGS OF HABEAS PETITIONS

As a result of the Supreme Court's inaction in this area, a circuit split has developed over when collateral review ends for purposes of subsequent motions and other filings. Several cases from the circuit courts, namely the Second, Third, and Ninth, are outlined in this Part to illustrate the present circuit split. Section A focuses on the similar approaches of the Second and Third Circuits and their allowance of motions to amend while the habeas petition is on appeal in their courts.¹⁰⁴ Section B examines the contrary approach of the Ninth Circuit, which does not allow these motions to amend following a district court's adjudication on the merits.¹⁰⁵

A. Second and Third Circuit Approach

In both the Second and Third Circuits, petitions filed during appellate proceedings are not considered "second or successive" and thus are allowable under the AEDPA.¹⁰⁶

In *Ching v. United States*, then-Circuit Judge Sonia Sotomayor wrote the opinion for the Second Circuit.¹⁰⁷ Petitioner Ching pleaded guilty to conspiracy to possess with intent to distribute cocaine in the United States District Court for the Eastern District of New York, and the Second Circuit affirmed his conviction on appeal.¹⁰⁸ Six years later, Ching filed a motion under § 2255 (as he was a federal prisoner), bringing claims of ineffective counsel and improper

104. See *Ching v. United States*, 298 F.3d 174, 175 (2d Cir. 2002); *United States v. Santarelli*, 929 F.3d 95, 98 (3d Cir. 2019).

105. See *Balbuena v. Sullivan*, 980 F.3d 619, 636-38 (9th Cir. 2020); *Beaty v. Schriro*, 554 F.3d 780, 782-83 (9th Cir. 2009). The Sixth, Seventh, and Tenth Circuits have also taken similar approaches. 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). However, *Balbuena* provides the most recent and best representative articulation of the approach applied by this side of the circuit split, and as a result it warrants further exploration in this Note.

106. See *Ching*, 298 F.3d at 175; *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005); *Santarelli*, 929 F.3d at 98; see also *Hamm*, *supra* note 9 (discussing the Second Circuit's approach).

107. 298 F.3d at 175.

108. *Id.*

calculation of his conduct for sentencing.¹⁰⁹ The district court denied his motion as untimely, and Ching appealed the decision to the Second Circuit.¹¹⁰ Before a decision could be reached by the court, however, Ching filed a § 2241 habeas petition challenging the district court's jurisdiction over his criminal case, which the district court then found to be successive and thus barred.¹¹¹ Following an appeal of the district court's denial, the Second Circuit stated:

The AEDPA does not define what constitutes a “second or successive” § 2255 motion. Nonetheless, 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. A petition that has reached *final* decision counts for this purpose.”¹¹²

The court then went on to articulate its understanding that a prisoner has one full opportunity to seek collateral review under the AEDPA.¹¹³ The court also recognized the stringency of the restrictions the AEDPA placed on habeas petitions, further bolstering the need for full adjudication.¹¹⁴ Thus, the court concluded Ching's second habeas filing should be treated as a motion to amend, which falls under Federal Rule of Civil Procedure 15, and not a “second or successive” filing under § 2255.¹¹⁵ Although Rule 15 provides a rather liberal standard,¹¹⁶ the Second Circuit provided the district court with discretion in denying a subsequent habeas petition so as to prevent abuse of the writ of habeas corpus.¹¹⁷

The Third Circuit also considered a federal prisoner's habeas petition under § 2255 in *United States v. Santarelli*.¹¹⁸ The petitioner, Santarelli, was convicted in the United States District Court for the Middle District of Pennsylvania of mail fraud, wire fraud,

109. *Id.*

110. *Id.*

111. *Id.* at 176.

112. *Id.* at 177 (quoting *Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001) (per curiam)).

113. *Id.*

114. *See id.*

115. *See id.* at 179-81.

116. FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”); *see also* MARY KAY KANE, *CIVIL PROCEDURE IN A NUTSHELL* 111 (8th ed. 2018).

117. *Ching*, 298 F.3d at 180.

118. 929 F.3d 95, 98 (3d Cir. 2019).

and conspiracy to defraud the United States.¹¹⁹ Santarelli then timely filed a habeas petition alleging, among other things, that her counsel during the trial and appellate proceedings was ineffective in 130 different ways.¹²⁰ While her habeas motion was pending in district court, Santarelli filed a motion to amend under Federal Rule of Civil Procedure 15(c) to add in allegations of sentencing violations.¹²¹ The district court denied both motions, and Santarelli appealed to the Third Circuit.¹²²

The Third Circuit reversed the district court's decision and held that "the allegations contained in Santarelli's Motion to Amend 'relate back' to the date of her initial habeas petition pursuant to Federal Rule of Civil Procedure 15(c) and that her Subsequent Petition [was] not a 'second or successive' habeas petition within the meaning of 28 U.S.C. §§ 2244 and 2255(h)."¹²³ The court acknowledged that the AEDPA does not define "second or successive," and it thus relied on its own interpretation.¹²⁴ The court ultimately stated that a petition is "second or successive" if it is filed after the petitioner has expended his or her one full opportunity for collateral review, which the court determined to be after all appellate remedies had been exhausted or expired.¹²⁵ Acknowledging the Supreme Court's decision in *Gonzalez v. Crosby*, the court held that the case did not apply as the Motion to File Subsequent Petition at issue was not a Rule 60(b) motion.¹²⁶ Instead, the court deemed the motion to be a motion to amend the initial habeas petition, which was then to be decided upon by the district court if the case were remanded by the court of appeals.¹²⁷ The court did recognize the

119. *Id.*

120. *Id.* at 98-99.

121. *Id.* at 99.

122. *Id.* at 99-100.

123. *Id.* at 98.

124. *See id.* at 103-05.

125. *Id.* at 104-05.

126. *Id.* at 105.

127. *Id.* ("If, as we hold here, a subsequent habeas petition is not a 'second or successive' petition when it is filed during the pendency of an appeal of the district court's denial of the petitioner's initial habeas petition (the principal [sic] being that '[a] document filed *pro se* is 'to be liberally construed'), that subsequent petition should be construed as a motion to amend the initial habeas petition." (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*))).

AEDPA's aversion to "piecemeal" litigation,¹²⁸ but it notably concluded that the motion at issue was not a successive petition as the petitioner had not yet expended her one full opportunity to seek collateral review.¹²⁹ This recognition of the AEDPA is important because the court considered the potential restraints associated with the Act but still deemed it necessary to allow the motion to amend and provide the petitioner the opportunity to have all of her reasonable claims adjudicated.¹³⁰

B. Ninth Circuit Approach

The United States Court of Appeals for the Ninth Circuit considers motions to amend habeas petitions filed during appellate proceedings to be "second or successive," and thus barred by AEDPA.¹³¹ In the recent decision *Balbuena v. Sullivan*, the court considered two consolidated appeals by the petitioner, Balbuena, which challenged both the district court's denial of his habeas petition and its denial of his Rule 60(b) motion to set aside the judgment and amend his original petition to add a new claim.¹³² Balbuena's state criminal case revolved around his involvement in a gang-related shooting, and he was ultimately found guilty of first-degree murder, attempted murder, and street terrorism.¹³³

After exhausting his appeals in state court and timely filing a petition for a writ of habeas corpus, Balbuena primarily argued that his confession while in police custody "violated the Fourteenth Amendment's Due Process Clause because his statements were involuntary."¹³⁴ After the district court's denial of his habeas petitions, a series of remands, denials, and appeals followed in the district court and Ninth Circuit.¹³⁵ Finally, Balbuena's Rule 60(b)

128. *Id.* at 106.

129. *Id.* at 104-05 (citing *Blystone v. Horn*, 664 F.3d 397, 413 (3d Cir. 2011)).

130. *See id.*

131. *Balbuena v. Sullivan*, 980 F.3d 619, 636-38 (9th Cir. 2020); *Beaty v. Schriro*, 554 F.3d 780, 782-83 (9th Cir. 2009).

132. 980 F.3d at 624.

133. *Id.* at 627.

134. *Id.*

135. *Id.*

motion to amend his habeas petition to add a new claim came before the Ninth Circuit.¹³⁶

In its decision, the court acknowledged established circuit precedent that these types of motions should be denied as successive petitions under § 2244(b).¹³⁷ The Ninth Circuit then addressed the decisions in *Ching v. United States* and *United States v. Santarelli*, but was ultimately unpersuaded by the respective reasonings of those courts.¹³⁸ The Ninth Circuit distinguished the two cases by arguing that neither addressed Rule 60(b) motions or applied the Supreme Court's ruling in *Gonzalez v. Crosby*.¹³⁹ Instead, the court stated:

In *Santarelli* and *Ching*, after the appellate courts reversed and remanded the denial of the petitioners' initial habeas petitions, the initial and second petitions were before the district courts simultaneously. Therefore, the district courts could apply Rule 15 and consider the petitioners' second petitions as motions to amend the initial petitions.¹⁴⁰

Additionally, the court pointed to the Supreme Court's decision in *Gonzalez* as preventing Rule 60(b) motions from being considered anything but a "disguised habeas petition."¹⁴¹ Using this reasoning, Rule 60(b) motions would thus be subject to the stringent "second and successive" requirements of § 2244(b).¹⁴² In addressing whether the motion should be characterized as "second or successive," the Ninth Circuit chose to emphasize the nature—and not the timing—of the petitioner's motion, which it believed was in accordance with the Supreme Court's ruling in *Gonzalez*.¹⁴³ In doing so, the court's interpretation only viewed Balbuena's Rule 60(b) motion as advancing a new claim and thus was "second or successive," regardless of the timing of its filing.¹⁴⁴

136. *Id.* at 627-28. Balbuena sought to add a claim that his confession while in police custody violated his *Miranda* rights. *Id.* at 628.

137. *See id.* at 636-37 (citing *Beaty v. Schriro*, 554 F.3d 780, 782-83 (9th Cir. 2009)).

138. *Id.* at 637-38.

139. *Id.* at 637.

140. *Id.* (internal citations omitted).

141. *Id.* at 639.

142. *See id.*

143. *Id.* at 639-40 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005)).

144. *See id.* at 640.

Judge Fletcher, concurring in *Balbuena*, agreed with the court's decision and recognized that it was bound by its earlier ruling in *Beaty v. Schriro*, but expressed his disagreement with the precedent and advocated for Supreme Court intervention in opposition to the Ninth Circuit's ruling.¹⁴⁵ He wrote, "If a district court denies a habeas petition and the petitioner appeals, there is no final adjudication until the appeal has been finally adjudicated."¹⁴⁶ Judge Fletcher also believed that *Gonzalez*, while establishing that Rule 60(b) motions that seek to add a new claim are disguised habeas petitions, did not answer whether such motions qualify as "second or successive" under § 2244(b).¹⁴⁷ Thus, Judge Fletcher argued that the Second and Third Circuit approaches should be followed by the Supreme Court in the event it decides to intervene to resolve the circuit split.¹⁴⁸

Following the Ninth Circuit's decision, *Balbuena* sought a grant of certiorari from the Supreme Court.¹⁴⁹ However, the Supreme Court denied this petition on June 14, 2021, so the circuit split over this issue persists.¹⁵⁰

IV. ENSURING FULL ADJUDICATION: THE NEED FOR BROAD INTERPRETATION

To resolve the present circuit split, this Part advocates for the characterization of a motion to amend while on appeal as *still* part of the initial habeas petition as opposed to a "second or successive" filing. Section A puts forth several arguments that support this assertion and why the Supreme Court must intervene on this issue. Section B proposes a potential solution for the circuit split in the form of a test that should be applied by the Supreme Court in a case involving motions to amend while on appeal, the central issue in this Note.

145. *See id.* at 642 (Fletcher, J., concurring).

146. *Id.* at 644.

147. *Id.* at 645.

148. *Id.*

149. Petition for Writ of Certiorari at 2, *Balbuena v. Cates*, 141 S. Ct. 2755 (2021) (mem.) (No. 20-1207), 2021 WL 809352 at *2 (U.S. 2021).

150. *See Balbuena v. Cates*, 141 S. Ct. 2755 (No. 20-1207). No comment or explanation was provided for the court's decision. *See id.*

*A. Arguments for Allowing Motions to Amend Habeas Petitions
While Cases Are on Appeal*

While the Supreme Court recently denied certiorari in *Balbuena*,¹⁵¹ that case was not the best representative of this issue. The Ninth Circuit, despite denying *Balbuena* the ability to amend his petition to add his *Miranda* violation claim to his original habeas petition, still considered and denied the applicability of his claims.¹⁵² Thus, a case involving a claim with more merit could be the difference in the Supreme Court's decision to grant certiorari.

Contrary to the Ninth Circuit's opinion in *Balbuena* and the Supreme Court's subsequent decision not to grant certiorari, there are several arguments that can be advanced to support allowing motions to amend while on appeal in a circuit court. These arguments center on the litigants themselves and the effects that a more restrictive approach has—and will continue to have—on these individuals, who already face considerable opposition under the AEDPA.

1. Protecting Litigants from Unfair Outcomes

Like with many circuit splits, affected parties in the habeas context can suffer ill effects based solely on the jurisdiction in which they bring their claims.¹⁵³ For prisoners who have already been convicted and most likely are serving prison time, this negative impact is particularly acute as they are extremely limited in the federal courts available to them for habeas review.¹⁵⁴ Thus, as the law currently stands, a habeas petitioner in California will be unable to successfully bring a motion to amend while his or her case

151. *Id.*

152. *See Balbuena*, 980 F.3d at 631-32.

153. *See, e.g.*, Lauren Casale, Note, *Back to the Future: Permitting Habeas Petitions Based on Intervening Retroactive Case Law to Alter Convictions and Sentences*, 87 FORDHAM L. REV. 1577, 1581-82 (2019) (using an example of two brothers imprisoned in different prisons for the same crime who then found themselves on different sides of a circuit split); Ashley Alexander, Online Contribution, *One Strike and You're Out: The Post-Hueso State of Habeas Corpus Petitions Under the Savings Clause*, 57 AM. CRIM. L. REV. ONLINE 84, 92, 96 (2020) (arguing that the Sixth Circuit's narrow interpretation of § 2255(e) leads to the reduction of habeas rights and unnecessarily prolonged detention).

154. *See Casale, supra* note 153, at 1580-82.

is on appeal,¹⁵⁵ whereas a petitioner in New York or Pennsylvania will have a much greater chance of having his or her motion granted in an identical situation.¹⁵⁶ This difference is not only unfair but also provides an opportunity for the Supreme Court to intervene.¹⁵⁷

The heightened stringency imposed by the adoption of the AEDPA has also had a profound negative impact on pro se litigants.¹⁵⁸ While a great deal of concern for these pro se petitioners has been focused on the filing deadline following a final judgment in state court,¹⁵⁹ there should also be concern for differences in procedure that may affect the one opportunity available for habeas review. Additionally, pro se litigants, with limited access to legal help and resources, already struggle to bring all claims that are available to them.¹⁶⁰ Further restricting their ability to bring claims serves to essentially tie both hands behind the pro se litigants' backs.

Also, a standard of equity for pro se litigants can be found throughout federal courts' habeas decisions.¹⁶¹ Professor Eve Brensike Primus states: "When a federal court believes that a state prisoner has not had a full and fair opportunity to present his or her claims and have them fairly considered, it is more likely to bypass the procedural and substantive barriers to relief."¹⁶² Applying this reasoning, a court that uses the Ninth Circuit's restrictive approach in *Balbuena* may feel compelled to bypass that approach in the

155. See *supra* Part III.B.

156. See *supra* Part III.A.

157. See SUP. CT. R. 10(a) (stating that a compelling reason that may be considered by the Supreme Court in the granting of certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

158. See Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.- C.L. L. REV. 299, 307-09 (2006).

159. See *id.* at 328-31.

160. See *id.* at 324-28 (focusing on the difficulty posed by limited access to computers in prison as it relates to researching potential claims).

161. See Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 ARIZ. L. REV. 291, 304 (2019); see also *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (holding a document filed pro se must be liberally construed); *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005) ("Although the evidence of incompetence may not have been artfully presented, the district court must construe pro se habeas filings liberally."). *But see Johnson v. United States*, 544 U.S. 295, 311 (2005) ("[W]e have never accepted pro se representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness.").

162. Primus, *supra* note 161, at 304.

interest of providing an equitable adjudication of the applicant's case. Thus, the profile of a future habeas petitioner could and should prove particularly persuasive in a case involving a motion to amend while on appeal in the circuit court.

2. *Compliance with Gonzalez v. Crosby*

Although *Gonzalez v. Crosby* spent a considerable amount of time discussing and summarily rejecting Rule 60(b) motions that “present[] a claim,”¹⁶³ the Court did not place a complete bar on motions to amend that may qualify as disguised habeas petitions.¹⁶⁴ Notably, the Court also did not address the timing of the filing.¹⁶⁵ The Ninth Circuit in *Balbuena v. Sullivan* interpreted this omission as characterizing motions to amend that assert a claim as “second or successive.”¹⁶⁶ However, as pointed out in Judge Fletcher’s concurrence in *Balbuena*, this omission should not be treated as an affirmative answer to the question of whether the motions should be characterized as “second or successive.”¹⁶⁷ So, although the Ninth Circuit has seemingly placed a rather firm line on the issue, one can satisfy the requirements of *Gonzalez* and still allow a motion to amend while on appeal in the circuit court.

3. *Consistency with the Federal Rules of Civil Procedure*

In *Banister v. Davis*, the Supreme Court asserted, “[the AEDPA’s] restrictions, like all statutes and rules pertaining to habeas, trump any ‘inconsistent’ Federal Rule of Civil Procedure otherwise applicable to habeas proceedings.”¹⁶⁸ Although this may seem strict and inflexible, the Court went on in the same opinion to hold that Rule 59(e) motions, if timely filed, were not contrary to the AEDPA and thus permissible.¹⁶⁹ As a result, there appears to be at least slight deference from the Supreme Court to certain federal rules for

163. See 545 U.S. 524, 530 (2005).

164. See *id.*

165. See *Balbuena v. Sullivan*, 980 F.3d 619, 639-40 (9th Cir. 2020).

166. *Id.* at 640.

167. *Id.* at 645 (Fletcher, J., concurring).

168. 140 S. Ct. 1698, 1704 (2020).

169. *Id.* at 1710-11.

habeas petitions, which could provide an opening to motions to amend under another rule, Federal Rule of Civil Procedure 15.

Federal Rule of Civil Procedure 15(c) allows for amendments that “relate[] back” to the date of the original pleading.¹⁷⁰ Under the Second and Third Circuit approaches, the motions to amend were characterized as Rule 15 motions instead of Rule 60(b) motions, and were subsequently allowed to proceed by the courts under this characterization.¹⁷¹ Rule 15 motions have been treated favorably in the Ninth Circuit as well,¹⁷² indicating that even courts with restrictive approaches may be open to motions to amend depending on how they are framed in the court filing. With this in mind, petitioners who make motions to amend while on appeal should attempt to bring these under Rule 15 in order to bring attention to the associated favorable treatment.

4. *The Importance of “Full” and “Final” Adjudication*

A key element in the decisions of the Second and Third Circuit to allow the motions to amend at issue was the idea of full adjudication of a habeas petitioner’s claims.¹⁷³ Both courts asserted that full adjudication concluded when all appeals were completely resolved.¹⁷⁴ This understanding makes sense, as a habeas petition on appeal is incomplete while awaiting the decision of the respective court of appeals or even the Supreme Court. It still requires a final say as to the litigant’s case.

To determine what constitutes a “final” judgment, one can simply look to the language of the AEDPA itself. For the one-year limitation period to begin running for the purpose of filing a habeas petition, there are several dates that could qualify.¹⁷⁵ One of these is “the date on which the judgment became *final* by the conclusion of direct review or the expiration of the time for seeking such

170. FED. R. CIV. P. 15(c)(1).

171. *See Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002); *United States v. Santarelli*, 929 F.3d 95, 104-05 (3d Cir. 2019).

172. *See Balbuena*, 980 F.3d at 636 (discussing *Goodrum v. Busby*, 824 F.3d 1188, 1195 (9th Cir. 2016)).

173. *See Ching*, 298 F.3d at 177; *Santarelli*, 929 F.3d at 104-05.

174. *See Ching*, 298 F.3d at 177; *Santarelli*, 929 F.3d at 104-05.

175. *See* 28 U.S.C. § 2244(d)(1).

review.”¹⁷⁶ The finality of the judgment has been the subject of debate, particularly as it applies to filing a petition for certiorari for the Supreme Court.¹⁷⁷ What has not been debated, however, is the inclusion of the appeal process in the determination of a final judgment. Thus, district court habeas decisions, while on appeal in circuit court, should not be classified as final for the same reasoning. This would then allow for a motion to amend to not be seen as “second or successive,” as it is amending a petition that is still pending in the federal court system.

5. *Quelling Fears as to Judicial Efficiency*

One of the AEDPA’s purposes, as stated by scholars and the Supreme Court, was to act as a gatekeeper in preventing excessive habeas petitions, expediting and streamlining the habeas process.¹⁷⁸ However, allowing these motions to amend will not lead to further complications or roadblocks to the habeas process because they allow petitioners to truly exhaust *all* of their claims within in the confines of the adjudication. Unlike the Rule 60(b) motion considered in *Gonzalez v. Crosby*, motions to amend while on appeal could only be brought while the appeal was being considered, as opposed to being brought long after the courts have decided on the petition.¹⁷⁹

Additionally, some scholars have argued that federal courts are already burdened with extensive habeas cases.¹⁸⁰ However, a study analyzing habeas petition data found that amended petitions were filed in 35.2 percent of capital cases and only 11.8 percent of noncapital cases,¹⁸¹ which are arguably low percentages considering the

176. *Id.* § 2244(d)(1)(A) (emphasis added).

177. See Benjamin R. Orye III, Note, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 443 (2002).

178. See Wilson, *supra* note 72, at 666; Larry Yackle, *Federal Habeas Corpus in a Nutshell*, 28 HUM. RTS. 7, 8 (2001); Banister v. Davis, 140 S. Ct. 1698, 1708 (2020).

179. See 545 U.S. 524, 527 (2005).

180. See generally Marc D. Falkoff, *The Hidden Costs of Habeas Delay*, 83 U. COLO. L. REV. 339, 342-43 (2012) (utilizing district court data from 1996 to 2008).

181. See NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, OFF. JUST. PROGRAMS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 1, 34 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/PKJ4-R65W>].

thousands of habeas cases filed each year.¹⁸² The amendment of petitions thus does not appear to be that widespread of an issue and should not be a significant habeas corpus concern for courts.

Habeas petitioners are still very much encouraged to include all possible claims with their original habeas petition so as to not have to jump through the procedural hurdles associated with filing a motion to amend while also being on appeal in a separate court.¹⁸³ So, courts would likely not have to worry about the number of petitions rising dramatically as a result of a potential Supreme Court decision favorable to amending petitions while on appeal.

B. Resolving the Circuit Split: The Test That Should Be Applied by the Supreme Court

The Supreme Court must intervene on this issue. This Section lays out the test that should be applied by the Court in order to best take into account the concerns and arguments of habeas applicants, the courts, and the legislature.¹⁸⁴

First, the Court must determine when the motion to amend was filed. For motions to amend while the action was pending in the district court, courts are in relative agreement that these do not qualify as “second or successive.”¹⁸⁵ If this does not apply and the motion was filed while on appeal in the *circuit court*, the analysis will move on to the next step.

Second, the Court must apply an analysis according to its decision in *Gonzalez v. Crosby* and parse out whether the motion to amend makes a new “claim.”¹⁸⁶ A finding of a new claim then leads to the classification of the motion as a “disguised habeas petition” and must be evaluated as “second or successive.”¹⁸⁷ If a new claim is not

182. In 2006, over 18,000 habeas petitions were filed in federal district courts by state prisoners seeking habeas relief. *Id.* at 9-10. In 2021, over 13,500 habeas petitions were filed. *Statistical Tables for the Federal Judiciary—December 2021: Table C-2*, U.S. CTS. (Dec. 31, 2021), <https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2021/12/31> [<https://perma.cc/64CN-57DW>]. Additionally, habeas petitions only make up a small portion of total civil cases commenced in federal courts, which was 327,863 in 2021. *See id.*

183. *See* Randy Hertz & James S. Liebman, 2 Fed. Habeas Corpus Prac. & Proc. 7th (MB) § 28.1 (Dec. 2021).

184. *See supra* Part IV.A.

185. *See* Balbuena v. Sullivan, 980 F.3d 619, 637 (9th Cir. 2020).

186. *See* 545 U.S. 524, 529-31 (2005).

187. *Balbuena*, 980 F.3d at 638; *see also Gonzalez*, 545 U.S. at 529-31.

found by the reviewing court, then the motion may proceed forward in the court's analysis.

Next, the Court will look to the Federal Rule of Civil Procedure under which the motion was brought. As mentioned in the previous Section, Rule 15 motions to amend have garnered much more favorable treatment in federal court for habeas cases.¹⁸⁸ Under Rule 15, courts should look to whether the motion to amend "relates back" to the date of the original proceeding and if it does, it should be granted.¹⁸⁹ Additionally, a motion brought under Rule 15 may avoid the pitfalls of the Supreme Court's precedent in *Gonzalez v. Crosby*, which restricted motions to amend under Rule 60 to cases involving extraordinary circumstances.¹⁹⁰ A court dealing with a motion to amend under Rule 15 would thus have supporting precedent and would be less likely to face later reversal.

Finally, it may be helpful for the Court to look to the circumstances surrounding the habeas petitioner's claims. Particularly, more deference should be given to pro se petitioners. These individuals typically do not have the same resources as petitioners represented by counsel and as a result are usually provided more favorable treatment by courts when it comes to procedural issues.¹⁹¹ Although this element is not dispositive and will vary with each particular case, keeping the particular circumstances of a petitioner in mind will allow courts to strive for more equitable adjudications of habeas petitions, especially considering that those courts may represent the last shot for applicants to have their cases reviewed. All of the above considerations together will allow the Supreme Court to properly assess whether a motion to amend while a habeas petition is on appeal should be allowed.

CONCLUSION

Since the imposition of the express restrictions of the AEDPA,¹⁹² prisoners have sought many different avenues in order to have an

188. *See supra* Part IV.A.3.

189. *See supra* Part IV.A.3.

190. 545 U.S. at 538.

191. *See supra* Part IV.A.1.

192. *See supra* Part I.C.

opportunity to bring all of their available habeas claims.¹⁹³ This Note has addressed one of those avenues in depth, motions to amend while the habeas petition is on appeal in a circuit court of appeals, and has argued that these motions should be allowed because the judgment of the case is not fully final.¹⁹⁴ As a habeas petitioner really only has one true opportunity to litigate his or her claims in federal court under the AEDPA regime, this distinction could be critical to the success of his or her claims, especially when facing an initial denial and appeal. Accordingly, the Supreme Court should intervene on this issue and utilize the approaches of the Second and Third Circuits¹⁹⁵ as well as the test outlined above.¹⁹⁶ Although certiorari was recently denied in *Balbuena*,¹⁹⁷ this issue is clearly relevant to the current habeas climate and will likely come up again for consideration in the near future. Hopefully, we will soon see a favorable court decision or a change in law which will alleviate some of the significant burdens bearing down on habeas petitioners and allow them to have at least a fair and full bite at the habeas corpus apple.

*Gregory Winder**

193. See *supra* note 8 and accompanying text. See generally Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171 (2003).

194. See *supra* Parts III.A, IV.A.

195. See *supra* Part III.A.

196. See *supra* Part IV.B.

197. *Balbuena v. Cates*, 141 S. Ct. 2755 (2021) (mem.) (No. 20-1207).

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