Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues

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I. INTRODUCTION

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "Act"). One focus of the AEDPA was to restrict habeas corpus relief available in the federal courts. In addition to restricting such relief by mandating further federal court deference to state court adjudications, imposing a one-year period of limitation on filings, and establishing for


I would like to thank my fellow law clerks who clerked with me at the Staff Attorney's Office, as well as the Office staff, where many of the issues raised in this Article were discussed. I would also like to thank James S. Liebman and Randy Hertz, whose essential treatise, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (3d ed. 1998 & Supp. 1999), has been invaluable both for my learning federal habeas corpus law in general and for purposes of this Article in particular. In addition, I would like to thank the editors and staff of the Marquette Law Review for their work in publishing this article. Finally, I would like to thank Kerry McArthur for her continued support during the writing of this Article.


5. Section 101 of the AEDPA added subsection (d) to 28 U.S.C. § 2244, which established a one-year "period of limitation" for § 2254 petitions; this period begins running from the latest of the following four dates: (1) when "the judgment became final"; (2) when "the impediment to filing an application [which prevented the applicant from filing] created by State action in violation of the Constitution or laws of the United States is removed"; (3) when "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"; and (4) when "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. §
the first time special procedures for death penalty cases in qualified jurisdictions, the AEDPA dramatically changed both the procedural and substantive law governing second and successive ("successive")

2244(d) (Supp. II 1997). In addition "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" tolls the period of limitation while it is pending. Id.

Similarly, § 105 of the AEDPA amended 28 U.S.C. § 2255 to add a para. 6. This established a one-year "period of limitation" for § 2255 motions that begins running from the latest of the following four dates: (1) when "the judgment of conviction becomes final"; (2) when "the impediment to making a motion [which prevented the movant from filing] created by governmental action in violation of the Constitution or laws of the United States is removed"; (3) when "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; and (4) when "the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255 para. 6.

The AEDPA made two other significant changes to habeas law. The Act changed the name of the document required to appeal a district court's decision from a "certificate of probable cause" to a "certificate of appealability" and extend the "certificate of appealability" requirement to the § 2255 context. See Pub. L. No. 104-132 § 102 (amending 28 U.S.C. § 2253). The Act also allows a court to deny a petition on the merits even if not all of the claims raised are exhausted. See id. § 104 (amending 28 U.S.C. § 2254(b)(2)).


7. Prior to the AEDPA, the Supreme Court had distinguished "abusive" applications from "successive" applications as follows:

A "'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." An "abusive petition" occurs "where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in conduct that 'disentitle[s] him to the relief he seeks.'" Schlup v. Delo, 513 U.S. 298, 319n.34 (1995) (citations omitted). The AEDPA collapses these two types of applications under the general label "second or successive." See United States v. Barrett, 178 F.3d 34, 43 n.4 (1st Cir. 1999); Esposito v. United States, 135 F.3d 111, 113 n.3 (2d Cir. 1997) (per curiam). However, as under the law prior to the enactment of the AEDPA, at least in the § 2254 context the AEDPA treats same claims differently from new claims. See
applications. As to procedures, the AEDPA assigned the circuit courts a unique "gatekeeping" function under which they must grant authorization before a petitioner can even file a successive application in a district court. As to the substantive law, most significantly the AEDPA: limited to only two the diverse reasons constituting "cause" excusing a petitioner's failure to bring a claim in a prior application; heightened the degree of prejudice that a petitioner must establish to obtain relief based on a claim relying on newly discovered evidence; and eliminated the miscarriage of justice exception for petitioners who fail to demonstrate both cause for failing to raise a claim in a prior petition and prejudice from the failure to address the claim.

With the AEDPA now only a few years old, a number of issues have emerged regarding both the procedures which the Act established and how the Act changed the substantive standards governing successive applications. This Article identifies these issues, surveys whether and how courts have addressed them, comments on any such court decisions, and suggests how these issues should be resolved. In surveying the case law, this Article focuses on circuit court decisions, as these are the courts that the Act charges with either granting or denying authorization to file successive applications in the first instance. Furthermore, because of the breadth of this topic, this Article does not attempt to explore each issue in depth, but rather aims to highlight the range of issues and explore only some of them in further detail.

infra Parts IV. B & C.

8. This Article uses the term "application" exclusively to describe both § 2254 habeas corpus petitions filed by persons in custody pursuant to a state court conviction and § 2255 motions to vacate, set aside, or correct a sentence filed by persons in custody pursuant to a federal court conviction. This Article distinguishes these applications from § 2241 habeas corpus petitions and other procedural vehicles that persons may use to challenge a judgment of conviction; this Article refers to non-application vehicles as "actions." See infra Part II (introductory text).

9. Although the AEDPA does not use either the term "gatekeeper" or "gatekeeping," courts and commentators have often used these terms to refer to the Act's circuit court authorization provisions. See, e.g., Felker v. Turpin, 518 U.S. 651, 657 (1996).

10. See infra Part III.

11. This Article uses the term "petitioner" to refer to both § 2254 petitioners and § 2255 movants. See Pratt v. United States, 129 F.3d 54, 56 n.1 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998).

12. See infra Part IV.

13. By establishing the gatekeeping function, the AEDPA has forced circuit courts to immediately confront a whole range of issues that district courts previously often avoided when the claims in an application were meritless and could be denied on that basis. Thus, these issues—such as the issue of which applications are successive—have become more prominent.
A number of interrelated themes that run throughout this Article merit highlighting up front. It also bears mention that all of these themes are connected by an overarching theme, namely the importance of statutory interpretation. The changes that the AEDPA has brought to successive application law are, after all, statutory. In this context, two rules of statutory construction are particularly important. First, although habeas law may not be criminal law, a similar "rule of lenity" should apply when interpreting the AEDPA.14 Under this rule, statutory ambiguity should be resolved in favor of the defendant or petitioner.15 This rule is based on the proposition that "legislatures and not courts should define criminal activity."16 A second rule of statutory construction is that a court need not strictly construe language that would lead to a "patently absurd consequence[]."17 These two rules provide some boundaries for interpreting the AEDPA's successive application provisions.

One theme of this Article is that judicial interpretations of the AEDPA's successive application provisions should be informed by the law of habeas corpus as it existed prior to the enactment of AEDPA. Although the AEDPA was enacted in order to restrict the availability of habeas relief in federal courts, it also was enacted against the background of already established successive application law. To the extent that the AEDPA does not explicitly change successive application law, or when the Act is ambiguous, the old law should be preserved.18

A second theme is that while on its face the AEDPA places relatively simple and straightforward restrictions on successive applications, in actuality the Act created a number of unanticipated and complex problems. Procedurally, for example, by providing circuit courts with a gatekeeping role for certain applications, the Act split the preliminary responsibility over applications between the district and


16. United States v. Bass, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").


18. See Woolley, supra note 4, at 426 (arguing against purely technical readings of the AEDPA).
SUCCESSIVE HABEAS CORPUS PETITIONS

A third theme of this Article is that the AEDPA must be interpreted against a background of several constitutional provisions that protect the rights of those incarcerated pursuant to criminal judgments and which may curtail certain restrictions on successive applications. Four provisions are particularly noteworthy: the Suspension of the Writ Clause specifically, and the Due Process, Equal Protection, and

19. See McCleskey v. Zant, 499 U.S. 467, 490 (1991) (noting that a federal court's ability to hear a claim in a successive application "derives from the court's equitable discretion") (citing Sanders v. United States, 373 U.S. 1, 17-18 (1963)).

20. A number of courts have taken note of the AEDPA's poor draftsmanship. See, e.g., Lindh v. Murphy, 521 U.S. 320, 336 (1997) ("All we can say is that in a world of silk purses and pigs' ears, the [AEDPA] . . . is not a silk purse of the art of statutory drafting."); Houchin v. Zavaras, 924 F. Supp. 115, 117 (D. Colo. 1996) ("In view of the apparent contradiction in the AEDPA, it is unlikely that contemplation played any role at all in its drafting."). As an example of poor drafting in the non-successive application context, the AEDPA appears to be internally inconsistent on the issue of whether a district court may grant a certificate of appealability. Compare Pub. L. No. 104-132 § 102 ("Unless a circuit justice or judge issues a certificate of appealability . . .") (amending 28 U.S.C. § 2253(c)(1)); see id. § 103 ("The district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue.") (amending FED. R. APP. P. 22(b)). See, e.g., United States v. Eyer, 113 F.3d 470, 472-73 (3d Cir. 1997) (noting the ambiguity); Lozada v. United States, 107 F.3d 1011, 1015-16 (2d Cir. 1997) (same); Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1067-68 (6th Cir.) (same), cert. denied, 520 U.S. 1224 (1997); Hunter v. United States, 101 F.3d 1565, 1574-75 (11th Cir. 1996) (en banc) (same), cert. denied, 520 U.S. 1133 (1997).

21. See infra Part IV.E.2 (discussing how the AEDPA fails to mandate that district courts enforce the substantive restrictions once a successive § 2255 motion is filed).

22. 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.").

23. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

24. U.S. CONST. amend. XIV § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Supreme Court has applied Equal
Cruel and Unusual Punishment Clauses more generally. Certain provisions of the AEDPA, as well as certain interpretations of the AEDPA, may run afoul of these provisions. Certain attempts to limit judicial authority to grant the writ may implicate separation of power principles as well. While this Article does not explore whether particular sections of the AEDPA violate any of these constitutional provisions, it does recognize that the AEDPA should be interpreted so as to avoid constitutional problems.

A fourth theme is that both the AEDPA and the courts have tended to simplify or ignore the very substantial differences between § 2254 petitions and § 2255 motions. Initially, the AEDPA's provisions, by simply imposing restrictions similar to the § 2254 successive petition restrictions on successive § 2255 motions, ignore the well-established availability of § 2255 to raise claims based on a change in federal law and therefore restrict claims which arguably should still be available. The AEDPA's provisions also treat successive § 2255 motions substantially differently from § 2254 petitions. In particular, § 2255 incorporates certain authorization procedures applicable to § 2254 petitions without specifying which ones, fails to mandate that district


26. In addition, one court has held that applying the AEDPA's successive application provisions to a petition filed after the enactment of the Act does not violate the Ex Post Facto Clause. See Hatch v. Oklahoma, 92 F.3d 1012, 1014 (10th Cir. 1996) (per curiam); U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

27. Provisions of the AEDPA are also subject to challenge under Article III of the Constitution, which establishes the Supreme Court's authority. See U.S. CONST. art. III, §§ 1, 2. For example, the Act's restriction on petitions for writs of certiorari was challenged in Felker v. Turpin, 518 U.S. 651 (1996), on this ground. See infra Part I.A.

28. See, e.g., DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); see also Triestman, 124 F.3d at 377 ("It is both taken for granted and yet profoundly sound that we must 'construe a federal statute to avoid constitutional questions where such a construction is reasonably possible.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 162 (1974), and citing Cheek v. United States, 498 U.S. 192, 203 (1991) and Johnson v. Robison, 415 U.S. 361, 366-67 (1974)).

29. See infra Part IV.C.1.a.

30. See infra Part III.A.
courts enforce the substantive restrictions once an authorized successive § 2255 motion is filed, and fails to restrict same claims any more severely than new claims. This Article addresses these distinctions.

A fifth theme of this Article is that the changes that the AEDPA brought to successive application law are all interconnected. For example, how one provision of the Act is interpreted can and does affect how other provisions can and should be interpreted. In addition, although this Article discusses the procedural and substantive changes separately, the new procedural requirements and substantive restrictions ultimately cannot be separated. Thus, this Article has frequent internal cross-references when the issue at hand touches on other issues.

A final note is that while this Article focuses on circuit court decisions, the Supreme Court will ultimately decide many of the issues engendered by the AEDPA in general, and its successive application provisions in particular. What the Supreme Court has to say in these decisions will influence how lower courts resolve issues in a variety of contexts. So far, the Supreme Court has issued several significant opinions concerning the habeas amendments of the AEDPA. All of these decisions affect the procedure and substance of successive applications and warrant discussion before continuing with the bulk of this Article.

A. Felker v. Turpin

In Felker v. Turpin, the Supreme Court held that the AEDPA did not revoke the Court's jurisdiction to review a circuit court decision denying a motion for authorization to file a successive application. Although the Court acknowledged that the AEDPA did prohibit its review through the usual certiorari process, the Court held that review through a habeas petition directly filed in the Court remained available. While under this procedure a petitioner who files a habeas

31. See infra Part IV.E.2.
32. See infra Part IV.B.2.
33. Although the AEDPA prohibits the Supreme Court from reviewing authorization decisions by writ of certiorari, the Court can review such decisions through petitions filed directly in the Court. See infra Parts I.A & III.1.2.
35. Id. at 661.
36. See id. at 657 (citing 28 U.S.C. § 2244(b)(3)(E)).
37. See id. at 660; see also id. at 666 (Stevens, J., concurring) (stating that the Supreme Court retained jurisdiction to review circuit court authorization decisions through 28 U.S.C. § 1254(2) (review of interlocutory orders), 28 U.S.C. § 1651 (the All Writs Act), and 28 U.S.C. §
petition in the Court is not directly appealing an authorization decision, such a petitioner is able to obtain Supreme Court review of the authorization decision in this manner.\textsuperscript{38} This aspect of the \textit{Felker} decision is significant because the Court declined to read past the literal language of the Act to find an implied revocation of its original jurisdiction, an approach suggested by both the respondent and an amicus.\textsuperscript{39}

The Court in \textit{Felker} further held that, at least as applied to petitions brought by state prisoners, the AEDPA's substantive restrictions on successive applications do not violate the Suspension of the Writ Clause.\textsuperscript{40} In reaching this conclusion, the Court provided some guidance to lower courts addressing successive application issues. In particular, the Court quoted \textit{McCleskey v. Zant},\textsuperscript{41} a leading pre-AEDPA successive application case, which described abuse of the writ law as an "evolving [doctrine] . . . controlled by historical usage, statutory developments, and judicial decisions," and found that the Act's restrictions were "well within the compass of this evolutionary process."\textsuperscript{42}

This second aspect of the Court's decision is significant because it sanctioned certain AEDPA restrictions on successive applications. Perhaps more importantly, however, the Court situated the AEDPA

\textsuperscript{2241} (original writ of habeas corpus); \textit{id.} at 666-67 (Souter, J., concurring) (same).

38. \textit{See id.} at 666 (Stevens, J., concurring) (stating that "in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review.").


40. \textit{See Felker, 518 U.S. at 664}.


42. \textit{Felker, 518 U.S. at 664} (quoting \textit{McCleskey}, 499 U.S. at 489). The Court's full description of the successive application restrictions was as follows:

\begin{quote}

The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In \textit{McCleskey v. Zant}, 499 U.S. 467 (1991), we said that 'the evolving doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.' \textit{Id.} at 489. The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a "suspension" of the writ contrary to Article I, § 9. \\

\textit{Felker, 518 U.S. at 664} (quoting \textit{McCleskey}, 499 U.S. at 489).
\end{quote}

Many circuit court decisions have quoted or cited \textit{Felker's} language describing the AEDPA. \textit{See}, e.g., United States v. Scott, 124 F.3d 1328, 1329 (10th Cir. 1997); Reeves v. Little, 120 F.3d 1136, 1139 (10th Cir. 1997) (per curiam); \textit{In re Sims}, 111 F.3d 45, 46 (6th Cir. 1997) (per curiam); \textit{Camarano v. Irvin}, 98 F.3d 44, 45 (2d Cir. 1996).
within a larger evolutionary process in which history, statute, and judicial decisions all play a role. This implies that any interpretation of the AEDPA's successive application provisions should take the two other aspects of habeas law, history, and judicial decisions, into account.

B. Lindh v. Murphy

In *Lindh v. Murphy*, the Supreme Court held that the non-death penalty provisions of the AEDPA do not apply to applications filed before the enactment of the Act. The Court reached this decision by applying its retroactivity analysis laid down in *Landgraf v. USI Film Products*. The court found that since the death penalty provisions of the Act explicitly apply to pending applications, by negative implication Congress did not intend for the non-death penalty provisions to apply to then-pending applications. This decision essentially divided the world of habeas applications into those filed before the Act, which are governed completely by pre-AEDPA law, and those filed after the Act, which are generally governed by post-AEDPA law. At this point, it should be noted that this Article only explores the AEDPA's provisions as applied to applications which are completely governed by post-AEDPA law.

44. Id. at 336-37.
45. 511 U.S. 244 (1994).
47. Under the *Landgraf* analysis, certain provisions of the AEDPA may be inapplicable to some applications filed after the AEDPA was enacted. See 511 U.S. 244. Most notably, a number of circuits have held that the Act's one-year period of limitation does not apply to applications filed within one year of the enactment of the Act. See *Brown v. Angelone*, 150 F.3d 370, 374 (4th Cir. 1998); *United States v. Flores*, 135 F.3d 1000, 1004-05 (5th Cir. 1998); *Burns v. Morton*, 134 F.3d 109, 110-12 (3d Cir. 1998); *Calderon v. United States Dist. Court*, 128 F.3d 109, 1287 (9th Cir. 1997); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320 (1997).

48. Thus, this article does not address the issue of whether the AEDPA's successive application provisions should apply to cases in which the prior application or applications were either adjudicated or filed before the AEDPA was enacted. For instance, the dissenting judges in the Fourth Circuit's decision in *In re Vial*, 115 F.3d 1192, 1200 (4th Cir. 1997) (Hall, J., dissenting), subscribed to the view that, under *Landgraf*, the successive application provisions of the AEDPA should not apply when a first § 2255 motion was filed before the enactment of the AEDPA. Similarly, the Third and Sixth Circuits have held that the successive application provisions do not apply when a petitioner filed a first application prior to the enactment of the AEDPA and applying the Act's provisions to the current application would preclude the petitioner from obtaining relief that would be available under pre-AEDPA law. See *In re Minarik*, 166 F.3d 591, 599-602 (3rd Cir. 1999) (limiting this holding to the substantive, not the procedural, requirements of the AEDPA); *In re Hanserd*, 123 F.3d
Lindh is significant in two respects. First, this case illustrates that in the rapidly changing area of post-AEDPA habeas law, the Supreme Court may resolve an issue in a manner completely contrary to how the lower courts had addressed the issue. Thus, the myriad of issues discussed below remain open to some extent until the Supreme Court definitely resolves them. Second, by holding that Congress did not intend for the non-death penalty provisions of the AEDPA to apply to pending applications, the Supreme Court avoided the issue of whether the AEDPA's successive application substantive restrictions in the § 2254 context are merely jurisdictional restrictions.

C. Stewart v. Martinez-Villareal

In Stewart v. Martinez-Villareal, the Supreme Court held that a petitioner's competency claim raised in a fifth petition was not successive when the petitioner's first three petitions were dismissed for failure to exhaust state court remedies and the court declined to rule on the competency claim when presented in the petitioner's fourth petition because the claim was not yet ripe. The Court reached this conclusion as the petitioner had properly raised the competency claim in his fourth petition, and the district court should have ruled on that claim when it became ripe, namely after the other claims in that petition were adjudicated. In addition, the Court held that it had jurisdiction to review the circuit court's decision that authorization was unnecessary because the underlying petition was not successive. The Court reasoned that, in such situations, the AEDPA's restrictions on review of circuit court authorization decisions were inapplicable because when the

922, 933-34 (6th Cir. 1997); cf. United States v. Barrett, 178 F.3d 34, 48-49 (1st Cir. 1999) (considering but not deciding this argument); Burris v. Parke, 95 F.3d 465, 468-69 (7th Cir. 1996) (holding that the AEDPA does not apply to an application filed after the enactment of the AEDPA and the first application was filed prior to the AEDPA when this would "mousetrap" the petitioner). But see Mancuso v. Herbert, 166 F.3d 97, 101 (2d Cir. 1999) ("We conclude that the AEDPA applies to a habeas petition filed after the AEDPA's effective date, regardless of when the petitioner filed his or her initial habeas petition and regardless of the grounds for dismissal of such earlier petition.").

49. Prior to the Court's Lindh decision, many circuit courts had rejected the negative implication reasoning that the Supreme Court accepted. See, e.g., Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1067 (6th Cir.), cert. denied, 520 U.S. 1224 (1997); Lindh, 96 F.3d at 861-63, rev'd, 521 U.S. 320 (1997); Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996) amended by 118 F.3d 136 (2d Cir. 1997).


51. See id. at 645-60.

52. See id. at 643-60.

53. See id.
underlying petition is not successive, then the restrictions do not apply.\textsuperscript{54}

Initially, the Court's decision in \textit{Stewart} is important because it recognizes that the AEDPA's use of "second or successive" is not to be read literally.\textsuperscript{55} Instead, the Court considered, in determining whether an application is successive, the more flexible considerations of whether the prior application was dismissed "for technical procedural reasons" and whether the petitioner failed to "receive an adjudication of his claim."\textsuperscript{56} In addition, the Court established that it could review a circuit court's decision that an application is not successive if the application is in fact not successive.

\textbf{D. Williams v. Taylor}

In \textit{Williams v. Taylor},\textsuperscript{57} the Supreme Court held that the AEDPA's bar on evidentiary hearings, when the petitioner has "failed to develop the factual basis of [his] claim[s] in State court proceedings," requires that a petitioner be at fault for not developing the claim through some lack of diligence.\textsuperscript{58} This case is important for interpreting the AEDPA because the Court looked both to pre-AEDPA law, as well as to consistency with other provisions of the AEDPA, in interpreting the Act's "failed to develop" standard.\textsuperscript{59}

\textbf{E. Williams v. Taylor}

On the same day that it issued its first \textit{Williams} decision, the Supreme Court issued a second \textit{Williams v. Taylor}\textsuperscript{60} decision concerning the AEDPA. In this second decision, the Court interpreted the AEDPA's provision that prohibits federal courts from granting habeas corpus relief on a claim previously adjudicated on the merits by a state court, unless the state court adjudication "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."\textsuperscript{61} The Court held that, under this standard, a federal court can grant relief on a claim if the state court, while identifying the proper legal principal applicable to the claim,

\textsuperscript{54} See id.
\textsuperscript{55} But see id. at 646-650 (Scalia, J., dissenting); id. at 650 (Thomas, J., dissenting).
\textsuperscript{56} Id. at 645.
\textsuperscript{57} 120 S. Ct. 1479 (2000).
\textsuperscript{58} Id. at 1487-89 (quoting 28 U.S.C. § 2254(e)(2)).
\textsuperscript{59} See id. at 1488-89.
\textsuperscript{60} 120 S. Ct. 1495 (2000).
"unreasonably applies that principle to the facts of the prisoner's case."

This case resolved a major issue raised by the AEDPA, namely the standard of deference that state courts must provide to state court legal interpretations of federal law.

F. Slack v. McDaniel

Most recently, in *Slack v. McDaniel*, the Supreme Court decided two issues raised by the AEDPA. First, the Court held that the "certificate of appealability" requirement, which replaced the "certificate of probable cause" requirement for appealing a district court denial of a habeas petition, applies to appeals commenced after the enactment of the AEDPA, even if the application was filed prior to the enactment of the AEDPA. Second, the Court held that petitioners can obtain a certificate of appealability to appeal a district court's denial of a petition on procedural grounds upon a showing that reasonable jurists would find it debatable as to whether the petition stated a valid claim and whether the district court made a proper procedural ruling. The Court also held that, under pre-AEDPA law, a petition that follows a petition dismissed for failure to exhaust state court remedies is not considered successive, even if the subsequent petition raises claims not raised in the petition dismissed for failure to exhaust.

The Court's decision in *Slack* is important because the Court again looked to habeas corpus law in effect prior to the enactment of the AEDPA in interpreting the Act. In particular, the Court examined the standard for granting the pre-AEDPA certificate of probable cause in formulating the standard for granting the post-AEDPA certificate of appealability, rather than simply strictly adhering to the literal language of the certificate of appealability provision. In addition, in ruling that the certificate of appealability requirement applies to applications appealed after the enactment of the AEDPA, even when the application was filed in district court prior to the enactment of the AEDPA, the Court again demonstrated a willingness in this area of the law to reach a decision contrary to the majority of the circuit courts.

62. *Williams*, 120 S. Ct. at 1523.
63. 120 S. Ct. 1595 (2000).
64. See id. at 1602-03.
65. See id. at 1603-04.
66. See id. at 1604-06.
67. See id. at 1603.
68. See id. at 1607 (Stevens, J., concurring) (citing circuit court cases contrary to the Court's holding).
With the background of this Article presented, a brief summary of the remainder of the Article is in order. Part II of this Article focuses on the threshold question in successive application adjudication, namely whether the application at issue actually is a successive application. In order to answer this question, Part II first explores some procedural vehicles that may be used to challenge judgments of conviction but which are neither § 2254 petitions nor § 2255 motions. Part II then explores various procedural scenarios in which a petitioner has filed multiple actions, and for each scenario, asks whether the current action is actually a successive application. Next, Part II explores situations in which a petitioner has brought a prior § 2254 petition or § 2255 application, but that prior application should not count for successive application purposes. Finally, this Part notes the issue of what standard of review a circuit court should use to review a district court finding on whether an application is successive.

Part III explores an assortment of procedural issues which have arisen or will arise in federal court adjudication of successive applications under the AEDPA's successive application provisions. Specifically, Part III considers the following issues: (1) to what extent the § 2255 successive application provision incorporates the procedures governing the authorization of successive § 2254 petitions; (2) how district courts should dispose of successive applications which lack proper circuit court authorization; (3) whether the respondent must plead that an application is successive; (4) whether proper circuit court authorization is a jurisdictional prerequisite to filing a successive application in district court; (5) whether a respondent can consent to authorization; (6) whether a circuit court must rule within thirty days of filing a successive authorization motion; (7) whether a circuit court may authorize only certain claims or must authorize the entire application; (8) where a petitioner should file an application if it is unclear whether it is successive; and (9) what avenues are available, and their scope, for petitioners to challenge an authorization motion decision.

Part IV briefly focuses on the substantive standards governing how circuit courts should adjudicate authorization motions. Part IV first discusses what constitutes a *prima facie* showing necessary for a circuit court to grant authorization. Part IV explores the standards governing claims that have been previously raised in an application. This Part then explores the standards governing new claims, with particular emphasis on problems that have arisen in the § 2255 context. Part IV continues by addressing the issue of whether a circuit court should consider defenses not referenced in the AEDPA's successive application
provisions when adjudicating an authorization motion. Finally, Part IV touches on the standards governing a successive application in a district court if the circuit court does grant authorization.

II. WHAT IS A SUCCESSIVE APPLICATION?

Whether a § 2254 habeas corpus petition or a § 2255 motion to vacate, set aside, or correct a sentence is a "second or successive" application is the threshold and most important consideration in post-AEDPA successive application law. A petitioner may file a non-successive application directly in the appropriate district court without authorization and may raise in the application a full range of challenges to her or his conviction. However, a petitioner may only file a successive application in the district court after he or she has first obtained authorization from a circuit court to file the application, and may only obtain authorization under severely restricted circumstances. Thus, the question of whether an application is successive determines both the court in which the petitioner should first present his or her claims and, in most cases, whether a court will ever consider the merits of the claims.

Despite its importance, the AEDPA does not define "second or successive," or otherwise provide any indication as to its meaning. Furthermore, the legislative history of the Act does not reveal any intent of Congress for this phrase to have a particular meaning. Because the AEDPA does not offer any guidance, the question of what constitutes a successive application has fallen to the judiciary. Before addressing this

69. Although the issue of whether an application was abusive or successive was important under pre-AEDPA law, this was not necessarily the threshold issue. Under pre-AEDPA law courts could and did deny applications without conclusively resolving whether an application was abusive or successive in those cases in which the court could more easily deny the application for other reasons, such as a lack of merit. See infra Part II.B.

70. Of course, a district court may fail to reach the merits of a claim in a non-successive application when the claim is barred by certain procedural defenses. See infra Part II.B.7-9.

71. 28 U.S.C. §§ 2244(b) (passim), 2255 para. 8. Almost all of the circuit courts have noted that the AEDPA does not define "second or successive." See, e.g., United States v. Barrett, 178 F.3d 34, 42-43 (1st Cir. 1999); In re Taylor, 171 F.3d 185, 187 (4th Cir. 1999); Carlson v. Pitcher, 137 F.3d 416, 418 (6th Cir. 1998); In re Cain, 137 F.3d 234, 235 (5th Cir. 1998); Pratt v. United States, 129 F.3d 54, 60 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998); Galtieri v. United States, 128 F.3d 33, 37 (2d Cir. 1997); United States v. Scott, 124 F.3d 1328, 1329 (10th Cir. 1997) (per curiam); Reeves v. Little, 120 F.3d 1136, 1138 (10th Cir. 1997); Martinez-Villareal v. Stewart, 118 F.3d 628, 633-634 n.7 (9th Cir. 1997); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (per curiam); Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997); Chambers v. United States, 106 F.3d 472, 474 (2d Cir. 1997); Benton v. Washington, 106 F.3d 162, 163 (7th Cir. 1996); Camarano v. Irvin, 98 F.3d 44, 45-46 (2d Cir. 1996).
question, this Article will develop some useful terminology.

For purposes of this analysis this Article draws a distinction between "actions" and "applications." An "application" is defined narrowly as either a § 2254 petition or a § 2255 motion. An "action" is defined broadly as any challenge to a judgment of conviction; this includes § 2254 petitions, § 2255 motions, and any other procedural vehicles used to challenge a conviction. Under these definitions, actions in general can be divided into applications (§ 2254 petitions and § 2255 motions) and non-applications (all other procedural vehicles). Although these are not established definitions, this Article adopts them as a convenient way to discuss successive application law.

With these definitions in mind, there are two circumstances in which an action is not a successive application: (1) the present action is a "non-application"; and (2) every prior action either (a) was not, or should not have been treated as, an application, or (b) was an application, but for some other reason should not be counted for successive application purposes. The first section of this Part explores those situations in which either the present or every prior action is not an application. The second section explores those situations in which the prior application should not count for successive application purposes.

A. Whether Both the Present and the Prior Actions are Applications

The AEDPA's restrictions on successive actions, by their terms, only apply to "second or successive habeas corpus application[s]" and to "second or successive motion[s]."72 Thus, for these restrictions to apply to an action, the present action must be an application and the petitioner must have previously filed an application. This latter requirement follows from the ordinary definitions of "second" and "successive."73 Conversely, when the present action is not an application, or is the petitioner's first application because the previous actions were not or should not have been treated as applications, then the successive application provisions do not apply to the present action. While these may seem like simple propositions, in practice they can encompass quite complicated scenarios. Before exploring these scenarios, this Article first presents a number of alternate procedural vehicles which are not applications.

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72. 28 U.S.C. §§ 2244(b) (passim), 2255 para. 8.
I. Alternative Procedural Vehicles

This section discusses a number of actions which petitioners may file in an attempt to collaterally attack their convictions which are neither § 2254 petitions nor § 2255 motions. Almost all of these actions are used to challenge federal judgments of conviction. This is so because federal law authorizes a variety of post-conviction procedures to challenge a conviction, just as the laws of many states establish a variety of vehicles for making post-conviction challenges. However, federal law generally only authorizes one procedural vehicle for petitioners seeking to challenge a state court judgment of conviction in federal court, namely a § 2254 habeas corpus petition. With this consideration in mind, this section now briefly presents the alternative actions and describes their use and scope.

a. Rule 35 Motions

Federal Rule of Criminal Procedure 35 authorizes a district court to correct or reduce a sentence in three circumstances: (1) on remand from a court of appeals;74 (2) on the government's motion, if the defendant has provided substantial assistance in investigating or prosecuting another person;75 and (3) on the defendant's motion, if filed within seven

74. Rule 35(a) provides:

**CORRECTION OF A SENTENCE ON REMAND.** The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—
(1) for imposition of a sentence in accord with the findings of the court of appeals; or
(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.
FED. R. CRIM. P. 35(a).

75. Rule 35(b) provides:

**REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE.** If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum
SUCCESSIVE HABEAS CORPUS PETITIONS

Each section of Rule 35 has a specific and limited scope. A district court only has authority to correct a sentence pursuant to Rule 35(a) after a remand, and the authority may be limited to carrying out the mandate of the circuit court. Only the government, not a petitioner, can make a Rule 35(b) motion. Finally, while a Rule 35(c) motion authorizes a petitioner to seek relief, a petitioner must make such a motion within seven days of the imposition of the sentence and relief is limited to instances of clear error.

In addition, the former Rule 35, which applies to proceedings in which the offense was committed prior to November 1, 1987, authorizes courts to correct an illegal sentence at any time or a sentence imposed in an illegal manner within 120 days after the sentence becomes final, and authorizes defendants to move for the reduction of a sentence within 120 days after the sentence becomes final. Although the former Rule 35 is substantially broader than the present Rule 35, it

sentence.
FED. R. CRIM. P. 35(b).

76. Rule 35(c) provides that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(c).

77. See, e.g., United States v. Pimentel, 34 F.3d 799, 800 (9th Cir. 1994) (per curiam) (holding that, when a circuit court limits the scope of a remand, a district court only has authority to examine the limited issues), cert. denied, 513 U.S. 1102 (1995).


79. See, e.g., United States v. Abreu-Cabrera, 64 F.3d 67, 73 (2d Cir. 1995) (holding that the seven-day period is jurisdictional, and citing cases).

80. See, e.g., United States v. Colace, 126 F.3d 1229 (9th Cir. 1997).

81. See FED. R. CRIM. P. 35, advisory committee note; see also, e.g., United States v. Eaton, 902 F.2d 1383, 1384 (9th Cir. 1990).

82. The Former Rule 35(a) provided: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Id.

83. The Former Rule 35(b) provided:

REDUCTION OF SENTENCE. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmation of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Id.

84. See, e.g., United States v. Furman, 112 F.3d 435, 438 (10th Cir. 1997).
does not apply to those petitioners who committed offenses after November 1, 1987.

b. Rule 36 Motions

Federal Rule of Criminal Procedure 36 authorizes a district court to correct "[c]lerical mistakes" in a criminal judgment "at any time."85 This Rule is of extremely limited scope. It simply allows a court to modify the written judgment to truly reflect the oral judgment,86 as the oral judgment, rather than the written judgment, is legally binding on the defendant.87

c. Section 3582(c)(2) Motions

Section 3582(c)(2) of Title eighteen of the United States Code authorizes a court to modify a term of imprisonment which it previously imposed pursuant to the United States Sentencing Guidelines when the sentence is based on a guideline that was lowered after sentencing.88 Furthermore, the modification must be consistent with the policy statements of the guidelines.89 This means that the guidelines must

85. FED. R. CRIM. P. 36 states: "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Id.

86. See United States v. Werber, 51 F.3d 342, 348 (2d Cir. 1995) ("Rule 36 covers only minor, uncontroversial errors" and may not be employed to correct a defendant's sentence when "those corrections [are] aimed at remedying an error of law, not an error of transcription."); United States v. Daddino, 5 F.3d 262, 264-65 (7th Cir. 1993) (holding that Rule 36 does not apply when the oversight is by the district court itself); United States v. Ferguson, 918 F.2d 627, 630 (6th Cir. 1990) (holding that Rule 36 is limited to "correction of clerical errors, oversights, and omissions"); United States v. Guveremont, 829 F.2d 423, 426 (3d Cir. 1987) (holding that Rule 36 is limited to correcting clerical mistakes and does not apply to errors by the court); United States v. Kaye, 739 F.2d 488, 491 (9th Cir. 1984) (stating that Rule 36 applies only to clerical errors, not to judicial errors).

87. See, e.g., Werber, 51 F.3d at 347.

88. Section 3582(c) provides, in relevant part:

MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT. The court may not modify a term of imprisonment once it has been imposed except that ... (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.


89. See id.
specify that the relevant guideline is retroactively applicable, and the court that adjudicates the motion must consider certain specified factors before making a modification. Petitioners apparently may file an independent action for relief directly under this section.

d. Section 2241 Petitions

It is well established that federal prisoners may file habeas corpus petitions pursuant to 28 U.S.C. § 2241 to challenge a variety of circumstances relating to their conditions of confinement. For example, prisoners may bring § 2241 petitions to challenge the type of their detention, prison disciplinary actions, the denial of good time credits, computation of their sentence by prison officials, parole decisions, extradition orders, and deportation orders. These challenges to conditions of confinement do not, however, challenge judgments of convictions.

Federal prisoners may also use § 2241 to challenge their federal custody resulting from a conviction and sentence imposed by a federal court if a § 2255 motion is "inadequate or ineffective." However, a §

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90. See U.S.S.G. § 1B1.10.
92. See United States v. Ono, 72 F.3d 101, 102 (9th Cir. 1995) (describing a § 3582(c)(2) as "a step in the criminal case"); United States v. Argitakos, 862 F.2d 423, 424 (2d Cir. 1988) (per curiam) (noting that the defendants brought motions pursuant to § 3582(c)).
93. See, e.g., Boudin v. Thomas, 732 F.2d 1107, 1112 (2d Cir. 1984).
94. See, e.g., McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997).
95. See, e.g., id.
96. See, e.g., Mieles v. United States, 895 F.2d 424, 427 (1990) (noting that the defendants brought motions pursuant to § 3582(c)).
98. See, e.g., Then v. Melendez, 92 F.3d 851, 852 (9th Cir. 1996).
100. 28 U.S.C. § 2255 para. 5. Before § 2255 was enacted in 1948, federal prisoners could challenge their convictions under 28 U.S.C. § 2241. See, e.g., Hill v. United States, 368 U.S. 424, 427 (1962) (noting that § 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined"); United States v. Hayman, 342 U.S. 205 (1952) (discussing the relationship between § 2255 and § 2241). However, § 2255 supplanted § 2241 as the general method to challenge federal convictions, leaving § 2241 available only when the § 2255 motion is inadequate or ineffective:

An application for a writ of habeas corpus [pursuant to 28 U.S.C. § 2241] on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section,
2255 motion is not inadequate or ineffective simply because a court has denied such a motion.\textsuperscript{101} Furthermore, prior to the enactment of the AEDPA, § 2241 relief was rarely available to challenge a judgment of conviction, as a § 2255 motion was generally an adequate and effective remedy.\textsuperscript{102} The AEDPA, however, by substantially restricting relief available under § 2255 may engender a revival of § 2241. This type of relief is discussed in more detail below.\textsuperscript{103}

e. Alternative Writs

The All Writs Act, 28 U.S.C. § 1651,\textsuperscript{104} authorizes federal courts to entertain petitions for writs of \textit{error coram nobis} and, perhaps, petitions for writs of \textit{audita querela}. Under contemporary law, the writ of \textit{error coram nobis} is available for petitioners to challenge their convictions if they are no longer in custody,\textsuperscript{105} as neither § 2255 nor § 2241 relief is available to such persons.\textsuperscript{106} Petitioners may use this writ to challenge "errors 'of the most fundamental character.'"\textsuperscript{107} The writ of \textit{audita querela} traditionally was available to "remedy a legal defect in or defense to the underlying judgment."\textsuperscript{108} However, it is unclear whether this writ is still available to challenge a criminal judgment.\textsuperscript{109}

\textsuperscript{101} See, e.g., Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam); United States v. Barrett, 178 F.3d 34, 50 (1st Cir. 1999); \textit{In re Vial}, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997); Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996); Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988), cert. denied, 488 U.S. 982 (1988); McGhee v. Hanberry, 604 F.2d 9, 10-11 (5th Cir. 1979) (per curiam).

\textsuperscript{102} See \textit{Triestman v. United States}, 124 F.3d 361, 376-77 (2d Cir. 1997) (noting that courts had not defined "the scope and meaning" of when a § 2255 motion is inadequate or ineffective to test the legality of his detention).

\textsuperscript{103} See infra Part IV.C.1.a.

\textsuperscript{104} Section 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law." 28 U.S.C. § 1651(a).

\textsuperscript{105} See United States v. Morgan, 346 U.S. 502, 506-07 (1954) (holding that the All Writs Act authorizes courts to grant writs of \textit{error coram nobis} when a person is no longer in federal custody); \textit{see also}, e.g., Foont v. United States, 93 F.3d 76, 78-79 (2d Cir. 1996) (same).

\textsuperscript{106} See, e.g., Telink, Inc. v. United States, 24 F.3d 42, 45 (9th Cir. 1994).

\textsuperscript{107} \textit{Morgan}, 346 U.S. at 512 (quoting United States v. Mayer, 235 U.S. 55, 69 (1914)).

\textsuperscript{108} United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991).

\textsuperscript{109} \textit{See id.} at 865 (declining to decide whether a writ of \textit{audita querela} is ever available to challenge a criminal conviction); United States v. Holder, 936 F.2d 1, 2 (1st Cir. 1991) (declining to decide whether the writ of \textit{audita querela} is still available); United States v.
f. Section 1983

Section 1983 of Title forty-two of the United States Code provides a vehicle for those whose constitutional rights have been violated by state actors to seek legal redress.\(^{10}\) Although a prisoner may attempt to use § 1983 to challenge a state judgment of conviction, claiming that her or his incarceration is unconstitutional, the Supreme Court has held that § 1983 may not be so employed.\(^{11}\) Furthermore, a petitioner may not use § 1983 to challenge state action leading to his or her conviction if the success of the action would undermine the constitutionality of the conviction.\(^{12}\) Thus, § 1983 is unavailable to petitioners to challenge a criminal judgment of conviction.

g. Section 2106 Appellate Review

Section 2106 of Title twenty-eight of the United States Code authorizes an appellate court to "affirm, modify, vacate, set aside or reverse" a judgment "lawfully brought before it for review."\(^{13}\) The

\(^{10}\) Ayala, 894 F.2d 425, 429 (D.C. Cir. 1990) (declining to decide whether a writ of audita querela is ever available to vacate a criminal conviction); United States v. Kimberlin, 675 F.2d 866, 869 (7th Cir. 1982) (assuming that the writ of audita querela would be available if "necessary to plug a gap in the system of postconviction remedies," but casting doubt that such a gap exists).


Supreme Court has held that this provision provides it with the appellate authority to vacate and remand to lower federal courts cases properly before it. The Second Circuit has further held that § 2106 authorizes a circuit court to remand an appeal properly before it, even if the district court lacked jurisdiction over the original action which was properly appealed to the circuit court.

The Second Circuit's reading of § 2106 opens up the possibility that this provision may provide petitioners with an expansive equitable remedy to challenge illegal judgments of conviction. Specifically, a petitioner may file in district court an action under which relief is not available, such as a Rule 35 or 36 motion, appeal the denial of the motion, and then on appeal press the circuit court to exercise its authority under § 2106 to vacate the illegal criminal judgment and remand for further proceedings. It cannot be assumed, however, that the Second Circuit or other courts would countenance such procedures in the future.

### h. Rule 60(b) Motions

Rule 60(b) of the Federal Rules of Civil Procedure authorizes district courts, upon a motion by a party, to relieve the party from a previously entered judgment under certain circumstances, including newly discovered evidence and "any other reason justifying relief from the operation of the judgment." Thus, Rule 60(b) is a potential mechanism for petitioners whose first application is denied to seek to raise additional issues without filing a second application. In addressing this issue, the Ninth Circuit has held that, generally, a Rule 60(b) motion seeking relief from a judgment denying an application must be treated as a successive application. However, the court left open the possibility that a Rule 60(b) motion seeking relief from the denial of an application might be proper in some circumstances.

114. See Lawrence v. Chater, 516 U.S. 163, 166 (1996) ("[W]e believe that this Court has the power to remand to a lower federal court any case raising a federal issue that is properly before us in our appellate capacity." (emphasis added)).

115. In United States v. Burd, on appeal from a district court grant of a Rule 36 motion, the Second Circuit held that the district court lacked jurisdiction to rule on the Rule 36 motion, but remanded under its § 2106 authority to the district court to enter a new sentence that was not illegal. 86 F.3d 285, 288-89 (2d Cir. 1996); see also United States v. Minor, 846 F.2d 1184, 1187 (9th Cir. 1988) (recognizing § 2106 as source of circuit court authority to remand to the district court for resentencing).

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

117. See Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998).

118. See id.
2. Various Procedural Scenarios

As discussed in the previous section, a petitioner may challenge a judgment of conviction by filing any number of actions which are neither § 2254 petitions nor § 2255 motions. This section discusses whether a current action is a successive application based upon whether the current and the prior actions are either applications or non-applications. This is accomplished by presenting a number of procedural scenarios which survey the variety of circumstances under which an action may come before a court.

It should be noted at this point that, as a practical matter, it is often unclear from an abbreviated record, which often accompanies an authorization motion, what prior relief a petitioner has sought. Although court orders and docket sheets may list an action as a § 2254 petition or a § 2255 motion, only the papers actually filed by the petitioner can truly reveal what relief the petitioner previously sought. Thus, in order for a court to properly determine whether an application is successive, the court must have before it a sufficient record of the petitioner's current and all prior actions.

a. The Current Action is not an Application and Seeks Non-Application Relief

The most obvious scenario in which the successive application provisions of the AEDPA should not apply to an action is when the petitioner is not bringing the present action as an application and the action seeks relief which falls within the scope of one of the alternate procedural vehicles discussed above. In such cases, the successive application provisions do not apply to the action, regardless of how many prior applications the petitioner might have brought, simply because the action is not an application and thus cannot be a successive application. Although the filing of successive non-application actions may burden both the respondents who must reply to these actions and the courts which must adjudicate them, the AEDPA simply did not address these available procedural vehicles.

119. See Gray-Bey v. United States, 209 F.3d 986, 990 (7th Cir. 2000) (per curiam) (holding that a petitioner does not need circuit court authorization to file a § 2241 petition); Valona v. United States, 138 F.3d 693, 694-95 (7th Cir. 1998) (holding that the AEDPA's successive application provisions do not apply to a petition brought pursuant to 28 U.S.C. § 2241); In re Cain, 137 F.3d 234, 236-37 (5th Cir. 1998) (holding that the AEDPA's successive application provisions do not apply to a petition challenging the administration of a sentence rather than the validity of the conviction or sentence).
Furthermore, the fact that these alternative procedural vehicles are available does not generally provide petitioners with a basis for avoiding the AEDPA's successive application restrictions, since most of these vehicles only provide relief in very specific and limited circumstances. Thus, a petitioner may only file a Rule 35 motion within seven days of the imposition of the sentence. A Rule 36 motion is only available to modify a written judgment to conform to the oral judgment. A petitioner may only get relief through a § 3582(c)(2) motion when her or his original sentence was based on Guideline which has been amended by a retroactively applicable Guidelines amendment. Finally, a petitioner may not even bring a § 1983 complaint to challenge a criminal conviction.

The other actions discussed above, while also of limited scope, may allow petitioners to obtain relief in some situations in which the petitioner would be otherwise precluded by the successive application provisions of the AEDPA. Section 2241, as touched on later, may be available to federal petitioners to raise certain fundamental claims otherwise precluded by the Act’s successive application provisions. The writs of *error coram nobis* and *audita querela* may play such a role as well. Section 2106, as employed by the Second Circuit, also has the potential to provide circuit courts broad authority to review criminal judgments when a petitioner is precluded from bringing a successive § 2255 motion. A Rule 60(b) motion also might provide a mechanism to raise claims after an initial application is denied. However, the AEDPA successive application restrictions simply do not apply to these actions, and they thus remain available to the full extent as before the enactment of the AEDPA.

*b. The Current Action is Filed as an Application but does not Seek Application Relief*

Another relatively obvious scenario occurs when a petitioner labels an action as a § 2254 petition or a § 2255 motion, but the action seeks

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120. See infra notes 336-38 and accompanying text.

121. See United States v. Barrett, 178 F.3d 34, 54-57 (1st Cir. 1999) (discussing a claim brought under the All Writs Act); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998) (stating, in dicta, that if relief is not available under § 2241, then relief is not available under the All Writs Act); Triestman v. United States, 124 F.3d 361, 380 n.24 (2d Cir. 1997) ("It is possible that these remedies might be deemed available if their existence were necessary to avoid serious questions as to the constitutional validity of both § 2255 and § 2244—if, for example, an actually innocent prisoner were barred from making a previously unavailable claim under § 2241 as well as § 2255.").
relief that is unavailable under those provisions. In such a situation, the court adjudicating the action should construe the action as what it actually is, for example a Rule 36 motion or a § 3582 Guidelines motion. Once the court properly construes the action as a non-application, then the action is no longer an application and the successive application provisions of the AEDPA do not apply.

c. The Current Action is not Filed as an Application but Seeks Application Relief

Prior to the AEDPA, when a petitioner filed an action under a provision other than § 2254 or § 2255, relief was unavailable to the petitioner under that provision, and relief was potentially available under § 2254 or § 2255, district courts routinely construed the petitioner's action as a § 2254 or a § 2255 application,122 often without notice to the petitioner. Courts construed these actions as applications to benefit petitioners—rather than denying an action because the petitioner used the wrong label in describing the action, these courts provided petitioners with the opportunity to properly present their claims in an application.123

While this procedure when followed without providing a petitioner notice and an opportunity to amend or withdraw the application was problematic prior to the enactment of the AEDPA, it is even more so now. First, if a court does construe an action as an application, then the petitioner will be completely precluded from subsequently raising any claim not in the application that the petitioner could have raised at the time that the court construed the action as an application.124 Second, given the AEDPA's restrictions on applications, a petitioner challenging his or her conviction may purposely file one of the non-application

122. See, e.g., United States v. Miller, 197 F.3d 644, 646, 648 (3d Cir. 1999); Adams v. United States, 155 F.3d 582, 583 (2d Cir. 1998) (per curiam); 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 591, at 425 (2d ed. 1982) ("Of course labels are not decisive, and a petition for habeas corpus filed in the sentencing court can and should be treated as if it were a motion under § 2255.").

123. See Miller, 197 F.3d at 648; Adams, 155 F.3d at 583 (noting that this procedure "harmlessly assisted the prisoner-movant in dealing with legal technicalities").

124. Prior to the enactment of the AEDPA, courts may have had some discretion to find that a prior court's erroneous construction of an action as an application constituted cause for the petitioner's failure to raise other claims at that time. See LIEBMAN & HERTZ, supra note 1, § 28.3c(4)(a), at 1189 (describing the following as a circumstance in which a petitioner may establish cause: "Unlawful, unfair, or dilatory actions... of the federal court(s) involved in the earlier petition... discouraged or prevented the petitioner from raising the claim in the earlier petition.").
procedural vehicles discussed above to avoid these restrictions. In such cases, the petitioner has intentionally labelled the action as a non-application, and is entitled to have the court rule on it as such.

The Second Circuit was the first circuit court to recognize the potential prejudice to petitioners that occurs when a district court construes an action not filed as an application, as an application. In order to avoid this prejudice, the court adopted a rule that, when a non-$\$2255$ action is filed, a district court should not construe the action as a $\$2255$ motion unless either the petitioner agrees to this construction or the petitioner is offered an opportunity to withdraw the action instead of having it so construed.\textsuperscript{125} The Third Circuit subsequently followed the lead of the Second Circuit.\textsuperscript{126} This approach is entirely reasonable, as it prevents a petitioner from being denied the opportunity to file an application simply because a court construed an action not filed as an application, as an application.\textsuperscript{127}

\textit{d. The Current Action is an Application}

Finally, the current action may be labeled as an application and seek relief available as an application. Once it is established that the present action in an application, the next step is to resolve whether it is a \textit{successive} application. This means that the petitioner has filed at least one prior action which was properly considered as an application. For matters of simplicity, this discussion will be limited to cases in which a petitioner has filed only one prior action. However, if the petitioner has filed a number of prior actions, this analysis can be applied to each of them.

3. \textit{The Prior Action was not an Application and Sought Non-Application Relief}

Another relatively straightforward procedural scenario occurs when the petitioner's prior action was not brought as an application and did not seek relief available only under $\$2254$ or $\$2255$. In other words,
the petitioner's prior action was a proper non-application action. In such cases, the present application is not successive because the petitioner did not bring a prior application.\textsuperscript{128}

4. The Prior Action was an Application but Sought Relief Unavailable Under § 2254 or § 2255

A variation of the above procedural scenario occurs when a petitioner's prior action was either filed as, or construed as, a § 2254 petition or § 2255 motion, but sought relief unavailable under either of those sections. In other words, either the petitioner erroneously filed the prior action as a § 2254 petition or a § 2255 motion, or a court erroneously construed the action as such an application. In this situation, the present petition is not successive because the prior action should not have been treated as an application.\textsuperscript{129} Given the confusion over the various available procedural vehicles, especially for prisoners who often proceed \textit{pro se}, a petitioner's label of the prior action should not be decisive as to whether the action actually was an application. Furthermore, ruling on the petitioner's present application when the prior application should not have been an application does not raise abuse of the writ concerns.

5. The Prior Action was not an Application but Sought Relief Unavailable Under the Action and Available Under § 2254 or § 2255

Another variation on this series of scenarios occurs when a petitioner filed her or his prior action as something other than an application, and the district court construed the action as a § 2254 petition or a § 2255 motion because relief was only available under one of those provisions. In such situations, the prior action should count for successive application purposes only if the petitioner was provided with notice and an opportunity to amend or withdraw the action before the

\textsuperscript{128} The Second Circuit, for example, has held that an application is not successive when the prior action or actions sought relief only available under 28 U.S.C. § 2241, reasoning that since § 2241 and § 2255 offer relief for distinct types of claims and a § 2255 motion can raise claims which could not be brought in prior § 2241 petitions, filing a § 2255 motion subsequent to a § 2241 petition does not raise abuse of the writ concerns. \textit{See} Chambers v. United States, 106 F.3d 472, 474 (2d Cir. 1997).

\textsuperscript{129} The Second Circuit, for example, has held that an action filed as a § 2255 motion but which sought relief available under § 2241 but not available under § 2255 should not count for successive application purposes even though the petitioner had labeled the action as a § 2255 motion, reasoning that it is routine for courts to construe prisoner actions based on the relief sought in the action rather than hold the prisoner to the label used. \textit{See id.} at 475.
court ruled on the action.

The Fifth Circuit has adopted a contrary approach. In one case, even though the petitioner claimed that the district court had construed his prior action raising a Bailey claim as § 2255 motion over his objections, the court held that the petitioner had "exercised his first § 2255 motion" such that any subsequent motion was successive. This approach, however, should not be followed.

Under this scenario, if the court which ruled on the prior action provided the petitioner with notice and an opportunity to withdraw the application prior to construing the application as an action, then the current application is successive. When provided with a choice, the petitioner opted to pursue the § 2244 petition or § 2255 motion. However, if the court failed to provide notice and an opportunity to withdraw before construing the action as an application, then the action should not count for successive application purposes. The petitioner may have filed the original action under a mistake of law as to the proper vehicle for relief, not realizing that the claim or claims raised sought relief available under § 2254 or § 2255, and that all claims not brought in the application probably would be forfeited. Because counting such an action would prejudice the petitioner by denying the petitioner the opportunity to raise all of his or her claims, such actions should not count as prior applications. This is simply a retroactive application of the rule announced by the Second and Third Circuits that non-applications actions should not be construed as applications with proper notice.

6. The Prior Action was an Application and Sought Relief Available Under § 2254 or § 2255

This final scenario occurs when both the present and the prior actions have been brought as applications and properly seek application relief. In such situations, the AEDPA's successive application provisions generally apply as the present action is an application and the prior action was also an application. However, the present application still may not be successive. Namely, it may be that the prior application

131. In re Tolliver, 97 F.3d 89, 90 (5th Cir. 1996) (by the court).
132. See supra Part II.A.2.c. While the Third Circuit held that it would not apply this rule retrospectively to actions filed prior to the enactment of the AEDPA, the court further noted that this would not prejudice petitioners because the court had previously held that the provisions of the AEDPA would not apply in such circumstances. See United States v. Miller, 197 F.3d 644, 652 (6th Cir. 1999).
was dismissed for procedural reasons unrelated to the merits of the application or that the petitioner did not have the opportunity to present all of her or his claims in the prior application such that the prior application should not count for successive application purposes. The next section considers under what circumstances a prior application should not count.

B. Whether the Prior Application Should Count for Successive Application Purposes

In addition to those situations where the previous action was not actually an application, there are several situations where an application is not successive, even when the prior action was an application. In other words, although the petitioner did previously file an application, the prior application should not count for successive application purposes. Ultimately, this Article concludes that a prior application should not count for successive application purposes if the petitioner did not have an opportunity to raise all of the then-available claims in the application.

In determining whether an application is successive there is some temptation to read the statute literally: an application is successive whenever a petitioner has attacked the same conviction in a prior application. However, as discussed below, such a literal reading fails to appreciate the established understanding of successive applications under pre-AEDPA law. There is no indication that Congress intended to supersede this established meaning rather than incorporate it into its undefined term "second or successive." Furthermore, the Supreme Court recognized that the literal reading of "second or successive" could not be correct in its Stewart decision, finding that the suggested literal reading would result in implications "far-reaching and seemingly perverse."

It may also be tempting to find that a prior application counts for successive application purposes only if the court adjudicating the prior application rendered a decision "on the merits" of the petitioners claims. Prior to the enactment of the AEDPA, both § 2244 and Rule

133. Even this modestly literal interpretation reads into the term "second or successive" the requirement that an application attack the same conviction as the prior application. See infra Part II.B.1.


135. See LIEBMAN & HERTZ, supra note 1, § 28.3b, at 1167.
9(b) of the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings stated that a court could dismiss a subsequent application if the prior application had been decided "on the merits." However, as discussed in the section on procedural defaults, it may be that a claim need not be disposed of on the merits for the application to count for successive application purposes. In addition, in the same claim context, the AEDPA replaced the "on the merits" language from § 2244 with the question of whether a claim was "presented" in a prior petition.

The Seventh Circuit is the only circuit so far which has attempted to establish a general rule for determining when a prior application should count for successive application purposes. The court initially found that a first application need not necessarily be decided on the merits for the subsequent application to be successive. In reaching this decision, the court looked to the preclusion doctrine, reasoning that, as in civil litigation, there are circumstances in which a court does not reach the merits of an application, but nonetheless, subsequent applications should be precluded. With this context, the Seventh Circuit established the rule that applications returned under Rule 2(e) of the

136. The former § 2244 provided as follows:

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (emphasis added).

Rule 9(b) provided, and still provides, in the context of same claim successive applications: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ." Rule Governing Section 2254 Cases 9(b) (emphasis added). The Rule further states, "a second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ." Rule Governing Section 2255 Proceedings 9(b) (emphasis added).

137. See infra Part II.B.8.

138. 28 U.S.C. § 2244(b)(1) (as amended) ("A claim presented in a second or successive habeas corpus application . . . .") & (b)(2) (same).

139. See Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996).

140. See id.
Rules Governing Section 2254 Cases or dismissed for failure to exhaust remedies do not count for successive application purposes, but that applications disposed of in any other manner "presumptively" count. The First Circuit has come close to establishing a rule as to which prior applications should count for successive application purposes. While declining to fully define successive applications, the court stated that the definition of successive application generally encompasses the abuse of the writ doctrine, meaning that a petitioner's claim is successive if it properly could have been raised in the prior petition.

In contrast to the Seventh Circuit, and more similar to the First, this Article concludes that whether a prior application should count for successive application purposes depends upon whether the petitioner had the opportunity to raise all of the then-available claims in the prior application. This Article arrives at this conclusion by examining various ways that district courts may dispose of applications and considering whether such applications should count. This section first explores the issue of whether a prior application must challenge the same judgment of conviction as the current application to count as a successive application. Second, this section explores whether applications dismissed under the various dispositions provided for in the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings should count. Third, this section examines whether applications dismissed under the various procedural defenses should count. Finally, this section explores certain unique situations in which a petitioner's first application necessary could not raise all then-available claims.

1. Challenging a Different Judgment

The AEDPA is silent as to whether an application is successive only when the petitioner challenges the same judgment of conviction in the present application as in his or her prior application, and no circuit court has yet held that this is a requirement. However, the only interpretation of the Act's successive application provisions that is...
consistent with the law prior to the enactment of the AEDPA and with the federal rules governing applications, is that a prior application challenging a different judgment of conviction should not count for successive application purposes.\textsuperscript{144} As under post-AEDPA law, the pre-AEDPA statutes and Rules were also silent as to whether a prior application must have challenged the same judgment to make the present application successive. While not in the statutes or Rules, courts have read this requirement into the law,\textsuperscript{145} and nothing in the AEDPA or its legislative history suggests that the Act changed this. Furthermore, the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings themselves require that a petitioner file separate applications to challenge either more than one judgment or the judgments of more than one court.\textsuperscript{146} Given this requirement, it would be unfair to apply the successive application provisions to someone who simply followed these rules. Finally, not having such a requirement would completely preclude a petitioner from raising claims challenging a second conviction if the petitioner had collaterally challenged a prior conviction, which could suspend the writ as to the latter application. Based on the above reasons, prior applications that challenged different judgments should continue to not count for successive application purposes.

2. Dismissals for Failure to Pay the Filing Fee

In order to file a § 2254 petition, a petitioner must either pay a five dollar filing fee or obtain a waiver of the fee.\textsuperscript{147} Thus, if a petitioner fails

\textsuperscript{144} See LIEBMAN & HERTZ, supra note 1, § 28.3b, at 1163-72.
\textsuperscript{145} See id. at 1164 (stating that a petitioner does not abuse the writ when the prior application attacked a different judgment and citing cases).
\textsuperscript{146} See Rule Governing Section 2254 Cases 2(d); Rule Governing Section 2255 Proceedings 2(c).
\textsuperscript{147} See 28 U.S.C. § 1914 ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court . . . to pay a filing fee of $150, except that on application for a writ of habeas corpus the filing fee shall be $5."); 28 U.S.C. § 1915(a)(1) states:

\textquote{[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner [sic] possesses that the person is unable to pay such fees or give security therefor.”}

\textit{id.} In contrast, a federal prisoner may file a § 2255 motion without paying any fee because such a motion is considered, for certain purposes such a paying a filing fee, to be a post-judgment motion in the already filed criminal case. See Rule 3 of the Rules Governing § 2255
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to either pay this fee or obtain a fee waiver, then the district court should dismiss the petition without considering any of the claims in the petition. Because a petition dismissed for failure to pay the filing fee should not be considered to have been filed, it should not count for successive application purposes.

The Seventh Circuit has held that a petition dismissed for failure to pay the required filing fee does not count for purposes of determining whether an application is successive. In reaching this conclusion, the court reasoned that such a petition should be returned under Rule 2 of the Rules Governing Section 2254 Cases, and thus never technically "filed." Because the previous petition should not have been filed, the court reasoned that the subsequent petition is actually the first to be filed by the petitioner. The Seventh Circuit's result is certainly correct.

A dismissal for failure to pay the filing fee presents the strongest case for not counting a prior application challenging the same judgment as a first application for purposes of the AEDPA's successive application provisions. Furthermore, this example illustrates that simply because a petitioner has submitted a prior application does not by itself mean that a present application is successive. Once this proposition is accepted, then some standard must be developed to distinguish between prior applications that count and those that do not count for successive application law. Further examples help develop this standard.

3. Rule 2 Dismissals

Rule 2 of both the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings authorizes a district court to return an "insufficient" application to a petitioner. In particular, a

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Proceedings. Thus, the analysis of dismissals for failure to pay the filing fee is only applicable in the § 2254 context.

148. See Benton v. Washington, 106 F.3d 162, 164-65 (7th Cir. 1996).
149. See id.; infra Part II.B.3.
150. See Benton, 106 F.3d at 165.
151. Rule 2(e) of the Rules Governing Section 2254 Cases provides as follows:

RETURN OF INSUFFICIENT PETITION. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

Rule 2(d) of the Rules Governing Section 2255 Proceedings provides as follows:
court may return an application if it fails to substantially comply with the requirements of either Rule 2 or Rule 3 of the § 2254 Rules or the § 2255 Rules, as applicable. These Rules specify several requirements: (1) the application must name the proper respondent; (2) the application must be in the proper form; (3) the application must specify the grounds for relief; (4) the application must be legible; (5) the application must be signed; and (6) the application may only challenge one judgment of conviction or the judgments of one court. If an application does not

RETURN OF INSUFFICIENT MOTION. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

152. Rule 2(a)-(d) of the Rules Governing Section 2254 Cases provides as follows:

(a) APPLICANTS IN PRESENT CUSTODY. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) APPLICANTS SUBJECT TO FUTURE CUSTODY. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) FORM OF PETITION. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) PETITION TO BE DIRECTED TO JUDGMENTS OF ONE COURT ONLY. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

Rule 2(a)-(c) of the Rules Governing Section 2255 Proceedings provides as follows:

(a) NATURE OF APPLICATION FOR RELIEF. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for
If the petitioner substantially complies with these requirements, then the court which receives the application may return it rather than file it. Because such relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) FORM OF MOTION. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) MOTION TO BE DIRECTED TO ONE JUDGMENT ONLY. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

Rule 3 of the Rules Governing Section 2254 Cases provides as follows:

(a) PLACE OF FILING; COPIES; FILING FEE. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petitioner in forma pauperis . . . .

(b) FILING AND SERVICE. Upon receipt of the petitioner and filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

Rule 3 of the Rules Governing Section 2255 Proceedings provides as follows:

(a) PLACE OF FILING; COPIES. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) FILING AND SERVICE. Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

153. See Rule Governing Section 2254 Cases 2(e); Rule Governing Section 2255 Proceedings 2(d).
an application should not be filed, an application which is returned under Rule 2 should not count for successive application purposes.

The Seventh Circuit has held that an application dismissed under Rule 2 of the Rules Governing Section 2254 Cases does not count as a first application for successive application purposes. In reaching this decision, the court noted that Rule 2 provides that the court should return applications which are insufficient, rather than filing them. The court thus reasoned that a subsequent application is better understood as an amended application curing the insufficiency in the original application rather than as a separate, second application.

The Seventh Circuit reached the proper conclusion. As with applications dismissed by a district court for failure to pay the filing fee, an application dismissed under Rule 2 should not be considered to have been "filed."

Because the first application should not be considered filed, it should not count for successive application purposes. Furthermore, when a court dismisses an application under Rule 2, the petitioner has not had an opportunity to present the claims in the petition to the court. Finally, allowing the refiling of a petition returned pursuant to Rule 2 raises no traditional abuse of the writ concerns. For these reasons, an application dismissed pursuant to Rule 2 should not count for successive application purposes.

4. Rule 4 Dismissals

Rule 4 of both the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings authorizes a district court to summarily dismiss an application prior to ordering a response from the respondent. A court may dismiss an application under Rule 4 when it

154. See Benton v. Washington, 106 F.3d 162, 164-65 (7th Cir. 1996).
155. See id.
156. Even if a court actually files an application disposed of as insufficient under Rule 2, the application should not be considered to have been filed because the court erred when it filed rather than returned the application.
157. Rule 4 of the Rules Governing Section 2254 Proceedings provides, in relevant part: "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." Id.
Rule 4(b) of the Rules Governing Section 2255 Proceedings provides, in relevant part:

INITIAL CONSIDERATION BY JUDGE. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified.
is plain from the application, any annexed exhibits and, for § 2255 motions, any prior proceedings that the petitioner is not entitled to relief. Because a Rule 4 dismissal is simply an immediate ruling on an application, this dismissed application should count for successive application purposes to the extent that the application had been dismissed after the respondent filed a reply and the court conducted a hearing.

No circuit court has yet addressed the issue of whether an application summarily disposed of under Rule 4 should count as a first application under AEDPA successive application law. Nonetheless, it is clear that such a dismissal should count as if it were a non-summary dismissal. Prior to the AEDPA, an application dismissed under Rule 4 could count for abuse of the writ purposes. Furthermore, in contrast to a Rule 2 dismissal, a Rule 4 dismissal, even though summary, clearly is a final ruling on the application. In fact, a Rule 4 dismissal is a ruling that the application so obviously lacks merit that the proceeding should not continue. In this light, a Rule 4 dismissal should have the same effect as a dismissal after the respondent files a reply and the court conducts a hearing.

5. Dismissals Without an Evidentiary Hearing

Rule 8 of both the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings authorizes a district court to dispose of an application without holding an evidentiary hearing.

158. See Rule 4 of the Rules Governing Section 2254 Cases; Rule 4(b) of the Rules Governing Section 2255 Proceedings.

159. Because the question of whether an application disposed of after the respondent has filed an answer and the court has conducted a hearing should count for successive application purposes depends on the basis for the disposition of the application, when a court disposes of an application pursuant to Rule 4 the question of whether such an application counts depends on the basis of the disposition as well.

160. See McFarland v. Scott, 512 U.S. 849, 856 (1994) ("[S]hould a defendant's pro se petition be summarily dismissed [under Rule 4], any petition subsequently filed by counsel could be subject to dismissal as an abuse of the writ.").

161. Rule 8(a) of the Rules Governing Section 2254 Proceedings states:

DETERMINATION BY COURT. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and the record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.
court may dismiss an application under Rule 8 if, based on the record filed in the proceeding, the court determines that an evidentiary hearing is not required. As with a Rule 4 dismissal, a Rule 8 disposition should count for purposes of successive application law to the same extent as if the application were dismissed after a hearing.

No circuit court has yet addressed the issue of whether an application disposed of without an evidentiary hearing should count as a first application under AEDPA successive application law. However, there are a number of reasons for finding that a hearing is not necessary for the first application to count. As with a Rule 4 dismissal, a Rule 8 disposition generally is a ruling on the substance of the application. In fact, applications are routinely denied without an evidentiary hearing. This was so even before the enactment of the AEDPA, when a formal hearing was not required for an application to have been considered dismissed on the merits. Thus, a Rule 8 disposition should have the same effect as if it were a dismissal after an evidentiary hearing.

6. Withdrawn Applications

Although neither the Rules Governing Section 2254 Cases nor the Rules Governing Section 2255 Proceedings contain a rule governing the withdrawal of filed applications, the Federal Rules of Civil Procedure, which courts may apply in § 2254 and § 2255 proceedings, do contain a

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Rule 8(a) of the Rules Governing Section 2255 Proceedings states:

DETERMINATION BY COURT. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

162. See Rule 8(a) of the Rules Governing Section 2254 Cases; Rule 8(a) of the Rules Governing Section 2255 Proceedings.


164. See Rule 11 of the Rules Governing Section 2254 Cases ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules."); Rule 12 of the Rules Governing Section 2255 Proceedings ("If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal
procedure for withdrawing an action. Specifically, Rule 41(a) authorizes
a plaintiff to voluntarily dismiss an action either through filing a notice
of dismissal, by stipulation, or by order of the court.\textsuperscript{165} The Rule further
provides that a voluntary dismissal is without prejudice, unless the
document effectuating the dismissal specifies otherwise.\textsuperscript{166} Based on the
preclusive effect of a withdrawn application under the Federal Rules of
Civil Procedure, a withdrawn application should not count for successive
application purposes unless the order effectuating the withdrawal
specifies that it is with prejudice.

The Seventh Circuit, the first circuit court to address whether a
withdrawn application counts as a first application for successive
application purposes, has held that an application which is withdrawn
when it is evident that it will be denied on the merits does count.\textsuperscript{167} The
court reasoned that holding otherwise would allow a petitioner to thwart
the successive application provisions by filing an application,
withdrawing the application when it is clear that the petitioner will not
obtain relief, and then filing a new application at a later date.\textsuperscript{168} The
court cited both pre-AEDPA and post-AEDPA law in support of its
conclusion.\textsuperscript{169} While the Seventh Circuit subsequently held that an
application was not successive when two prior applications had been
withdrawn,\textsuperscript{170} in so holding the court noted that the petitioner had not
conceded defeat in either of the two prior withdrawals, such that the
case fell outside of its prior holding.\textsuperscript{171} The Tenth Circuit also found an
application not successive when a prior application had been withdrawn,
adopting the Seventh Circuit's standard for determining when such a
withdrawn application counts.\textsuperscript{172}

The Seventh Circuit's approach to whether a withdrawn application

\begin{footnotes}
\item See Fed. R. Civ. P. 41(a)(1) & (2).
\item See id.
\item See Felder v. McVicar, 113 F.3d 696, 698 (7th Cir. 1997).
\item See id.
\item See id. (citing Hurd v. Mondragon, 851 F.2d 324, 329 (10th Cir. 1988) (holding that a
district court did not abuse its discretion when it denied a motion to withdraw a petition));
Spann v. Martin, 963 F.2d 663, 672-73 (4th Cir. 1992) (holding that a district court abused its
discretion when it granted a motion to withdraw a petition without prejudice); Neal v.
Gramley, 99 F.3d 841, 846 (7th Cir. 1996) (denying a motion to defer an appellate decision),
cert. denied, 522 U.S. 834 (1997). As demonstrated by the descriptions of the cases cited by
the Seventh Circuit in Felder, they do not exactly support the court's holding in Felder.
\item See Garrett v. United States, 178 F.3d 940, 943 (7th Cir. 1999).
\item See id. at 942-43.
\item See Haro-Arteaga, 199 F.3d 1195, 1197 (10th Cir. 1999) (per curiam).
\end{footnotes}
counts for successive application purposes is flawed because it is inconsistent with the federal rules. As noted, Rule 41(a), the only federal rule which authorizes a voluntary dismissal of a civil action, clearly states that such dismissals are without prejudice unless otherwise specified in the document effectuating the dismissal. A dismissal without prejudice means that the petitioner is not precluded from filing a subsequent application just as if the first application had not been filed. The Seventh Circuit, however, failed to consider Rule 41(a) when reaching its decision.

Instead of the Seventh Circuit's approach, it is recommended that a voluntarily withdrawn application does not count for successive application purposes unless the document effectuating the withdrawal specifically states that the withdrawal is with prejudice. Under this approach, the subsequent court would look to the order of dismissal in the prior action to determine whether the current application is successive. This approach properly tracts the Rules of Civil Procedure. In addition, this approach replaces the Seventh Circuit's subjective standard for determining whether a subsequent application is successive with an objective standard under which the petitioner will know at the time that the original application is withdrawn whether or not a subsequent application will be precluded. As to the Seventh Circuit's apparent concern that not counting a withdrawn application for successive application purposes will allow petitioners to abuse the writ by withdrawing an application if, during the course of the proceeding, it becomes apparent that the petitioner will not prevail, Rule 41(a) does not allow a petitioner to withdraw an application when the motion is made after service or the filing of an answer without a court order.

Thus, if the court considering a motion to withdraw decides that the petitioner is being abusive, the court could rule that the petitioner can only withdraw the application with prejudice. This would prevent the petitioner from being able to withdraw the application and then refile a different application at a later time without the successive application provisions applying.

This is the first situation considered in which a petitioner has actually "filed" an application that should not count for successive

173. See infra notes 187-89 and accompanying text.
174. See Fed. R. Civ. P. 41(a)(2) ("Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's insistence save upon order of the court and upon such terms and conditions as the court deems proper . . . . Unless otherwise specified, a dismissal under this paragraph is without prejudice.").
application purposes. This is significant because it demonstrates that the standard for determining whether a prior application should count as a first application for successive application purposes is not simply whether the petition was properly filed, satisfying Rules 2 and 3 of the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings, but rather how the court disposed of the application after it was filed. Thus, it is essential for a court deciding whether the prior application counts to consider the court order dismissing the prior application.

7. Dismissals for Failure to Exhaust State Court Remedies

Both before and after the enactment of the AEDPA, habeas corpus law generally has required a § 2254 petitioner to exhaust available state court remedies before bringing a claim in federal court.\(^\text{175}\) Furthermore, the Supreme Court in *Rose v. Lundy*\(^\text{176}\) held that a district court must dismiss a petition containing at least one unexhausted claim, but that the petitioner can either "resubmit [the] petition with only exhausted claims or exhaust the remainder of their claims" and refile the entire petition.\(^\text{177}\) Thus, the Court provided petitioners with two options after a district court determines that a petition is not completely exhausted.

Seven circuits have held that a petition dismissed without prejudice for failure to exhaust state court remedies does not count for determining whether a subsequent application is successive.\(^\text{178}\) In addition, the Supreme Court assumed this without a detailed analysis in its decision in *Stewart v. Martinez-Villareal*.\(^\text{179}\) The Second Circuit was

175. *See* 28 U.S.C. § 2254(b) (prior to the AEDPA, and as amended). The exhaustion requirement serves the principle of comity, allowing state courts to adjudicate and, if necessary, correct any federal constitutional errors before a federal court will disturb a state court conviction. *See* *Rose v. Lundy*, 455 U.S. 509, 515 (1982).

176. 455 U.S. 509.

177. *Id.* at 520.

178. *See* Carlson v. Pitcher, 137 F.3d 416, 420 (6th Cir. 1998); McWilliams v. Colorado, 121 F.3d 573, 575 (10th Cir. 1997); In re Gasery, 116 F.3d 1051, 1051 (5th Cir. 1997); Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997); Benton v. Washington, 106 F.3d 162, 165 (7th Cir. 1996); In re Turner, 101 F.3d 1323, 1323 (9th Cir. 1996); Dickinson v. Maine, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam); Camarano v. Irvin, 98 F.3d 44, 47 (2d Cir. 1996); *see also* LIEBMAN & HERTZ, *supra* note 1, § 28.3b, at 1170-71 & n.37.

179. *See* 523 U.S. 637, 644 (1998) ("[N]one of our cases ... have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition."). The Supreme Court held that a petitioner's current claim was not successive even though the petitioner has filed three previous petitions that had each been dismissed for failure to exhaust state court remedies. *See id.*
the first circuit to reach this conclusion, and also has provided the most
thorough analysis of the issue. Since all of the other circuits which have
addressed the issue have reached the same conclusion as the Second
Circuit, some simply relying on the Second Circuit's decision without
further analysis,\(^\text{180}\) that court's reasoning will be presented.

In reaching its decision, the Second Circuit initially noted that the
AEDPA eliminated the requirement that a previous claim be decided
"on the merits" for a petitioner to be precluded from raising the same
claim in a subsequent petition. According to the court, this omission
provided some support for finding that a petition dismissed for failure to
exhaust state court remedies counts for purposes of successive
application law.\(^\text{181}\) However, the court declined to adopt this
construction based on three factors: this construction would constitute a
drastic change in habeas law not envisioned by the AEDPA; this
construction is inconsistent with the abuse of the writ doctrine both
prior to the enactment of the AEDPA and as presented in \textit{Felker}; and
this construction is inconsistent with the doctrine of \textit{res judicata}.\(^\text{182}\)

First, the Second Circuit reasoned that if the successive petition
requirements were to apply to petitions filed after a first petition had
been dismissed without prejudice for failure to exhaust state court
remedies, rather than being "well within the compass of the revolving
doctrine of abuse of the writ,"\(^\text{183}\) such a change in habeas law would
constitute an "unjustifiable deviation" from the exhaustion doctrine
developed by the Supreme Court.\(^\text{184}\) As noted, the Court in \textit{Rose} held
that a petitioner may refile a petition dismissed for failure to exhaust all
claims either excluding the unexhausted claims or including all of the
claims after the unexhausted claims have been exhausted.\(^\text{185}\) Counting a
dismissed petition as a first petition for successive application purposes
would preclude a petitioner from taking advantage of either option

\(^{180}\) See Dickinson, 101 F.3d at 791 (relying on the reasons stated in \textit{Camarano} to reach its decision); \textit{In re Turner}, 101 F.3d at 1323 (simply citing \textit{Camarano} without providing any reasons for reaching its decision).

\(^{181}\) See \textit{Camarano}, 98 F.3d at 46; \textit{see supra} note 178 and accompanying text.

\(^{182}\) See \textit{Camarano}, 98 F.3d at 46.

\(^{183}\) \textit{Id.} (quoting \textit{Felker v. Turpin}, 518 U.S. 651, 664 (1996)).

\(^{184}\) \textit{Id.}

\(^{185}\) Furthermore, the Supreme Court in \textit{McCleskey v. Zant} cited \textit{Rose} for the
proposition that a petitioner risks abuse of the writ if the petitioner proceeds with exhausted
claims in a first petition and then waits until a second petition to raise unexhausted claims,
implying that the \textit{McCleskey} Court subscribed to the view that a petitioner does not risk
abuse if he or she follows the options provided for in \textit{Rose}. 499 U.S. 467, 488-89 (1991).
allowed by Rose.\(^{186}\)

Second, the Second Circuit noted that prior to the enactment of the AEDPA, a number of circuits have held that a "second" petition submitted subsequent to a dismissal without prejudice for failure to exhaust state court remedies of a "first" petition generally was not considered to be barred as either a successive or an abusive petition;\(^{187}\) one of these courts had reached this conclusion by specifically noting that this result was compelled by Rose.\(^{188}\) The Second Circuit further found that allowing a subsequent petition in such situations does not raise either finality or comity concerns.\(^{189}\)

Third, the Second Circuit relied on the Supreme Court's description of the abuse of the writ doctrine as a "modified res judicata rule" to support its conclusion.\(^{190}\) Under res judicata, a dismissal without prejudice does not bar a subsequent action raising the same claim.\(^{191}\)

\(^{186}\) If a petition dismissed for failure to exhaust counted for successive application purposes, then a petitioner who exhausted the unexhausted claims after the dismissal would be completely precluded from raising any of these claims in a subsequent petition. See 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). A petitioner who filed a petition raising only exhausted claims after a dismissal for failure to exhaust would face the same result. Only if the petitioner were able to amend the original petition to include only exhausted claims would this result be avoided, and then the claims brought after exhaustion, rather than being subject to abuse of the writ standards, would be completely precluded.

\(^{187}\) See Camarano, 98 F.3d at 46 (citing Woods v. Whitley, 933 F.2d 321, 322 n.1 (5th Cir. 1991) (disregarding the first petition, which had been dismissed without prejudice, for abuse of the writ purposes); Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989) (holding that a petition neither presented a successive claim, because the prior petition had been dismissed without prejudice for failure to exhaust state remedies, nor abused the writ); Jones v. Estelle, 722 F.2d 159, 168-69 (5th Cir. 1983) (en banc) (stating that, under Lundy, "dismissal of a mixed petition does not create a hurdle of writ abuse on petitioner's return"), cert. denied, 466 U.S. 976 (1984); see also Hendricks v. Zenon, 993 F.2d 664, 672 (9th Cir. 1993) (noting that a second habeas petition could not be construed as abusive if it raised the unexhausted claims brought in the prior petition which had been dismissed without prejudice).

\(^{188}\) See Jones, 722 F.2d at 168-69.

\(^{189}\) See Camarano, 98 F.3d at 46.


\(^{191}\) See Camarano, 98 F.3d at 47 (citing 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2327, at 398 ("A dismissal without prejudice under subdivision (b) [involuntary dismissal], although a final termination of the present action, does not bar a second suit." (citations omitted)) and Arnold Graphics Indus., Inc. v. Indep. Agent Ctr., Inc., 775 F.2d 38, 41 (2d Cir. 1985)).
Thus, the Second Circuit found that the claim preclusion doctrine supported the finding that a dismissal without prejudice should not bar a subsequent petition.\footnote{192 See id. at 46-47.}

Two additional reasons for finding that a petition dismissed without prejudice for failure to exhaust state court remedies should not bar a subsequent petition should also be noted. First, a contrary holding would raise serious constitutional concerns that the AEDPA successive application provisions suspend the writ of habeas corpus.\footnote{193 While, as noted, the Supreme Court in \textit{Felker} held that § 2244(b) was a constitutional restriction on the writ, there is no indication in the opinion that the Court considered whether the restrictions are constitutional as applied to the present context. In fact, the Supreme Court in \textit{Stewart v. Martinez-Villareal} recognized that its decision in \textit{Felker} was no bar to finding that certain applications are not successive under the AEDPA. See \textit{Stewart v. Martinez-Villareal}, 523 U.S. at 644.} In particular, precluding a petitioner who brings unexhausted claims in a first petition which is dismissed for failure to exhaust from raising any of the claims from the first petition ever again could unconstitutionally suspend the writ by completely precluding a petitioner from raising certain claims.\footnote{194 See \textit{Camarano}, 98 F.3d 44, 46 ("To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.").} Thus, the AEDPA is best interpreted as not counting a petition dismissed without prejudice for failure to exhaust state court remedies for successive application purposes in order to avoid potential constitutional problems.\footnote{195 See \textit{supra} note 191 and accompanying text.} A second reason for not counting a petition dismissed because of unexhausted claims is the fact that the AEDPA addressed the exhaustion doctrine in other provisions,\footnote{196 See 28 U.S.C. § 2254(b) (as amended) (requiring that state court remedies be exhausted, unless the state expressly waives exhaustion, for a petition to be granted, but allowing a petition to be denied on the merits even though the petitioner failed to exhaust state court remedies).} suggesting that the Act is not intended to modify the practice as established by \textit{Rose v. Lundy}.\footnote{197 See \textit{supra} note 191 and accompanying text.}

Finally, it must be noted that the general rule which these seven circuits have adopted need not be categorical. The Supreme Court in \textit{Rose} provides a petitioner who files a petition containing unexhausted claims with two options: omit the unexhausted claims, or exhaust those claims and refile the petition. However, a petitioner may pursue a third option, namely filing a new petition that contains claims not advanced in the petition that was dismissed without prejudice. Because such a petitioner has failed to follow either of the two options presented in
Successive habeas corpus petitions

Rose, at least the new claims could be considered successive. The Supreme Court recently resolved this issue in the pre-AEDPA context, holding that a petitioner can raise any claim in a petition subsequent to a petition dismissed for failure to exhaust remedies. Only the Sixth Circuit has considered this issue in the post-AEDPA context, holding that a petitioner may raise new claims in a petition filed after the prior petition was dismissed for failure to exhaust without the new petition being successive. In so holding, the court reasoned that since the AEDPA's goal was to ensure that petitioners were able to file only one petition, a petitioner could raise any available claim in that one petition regardless of whether a prior petition had been dismissed for failure to exhaust. As to the other circuit courts, although under the Second Circuit's formulation no petition dismissed for lack of exhaustion would count for successive application purposes, the holdings of some of the other circuits have been more limited. Still, there is no reason to doubt that the Supreme Court will not apply its rule in the pre-AEDPA context to the post-AEDPA context as well.

8. Dismissals as Procedurally Barred

A district court may deny a claim raised in an application if the claim is procedurally barred. A court may so deny a claim in the § 2254 context when the claim was procedurally defaulted in state court and

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197. Whether raising claims not raised in an original petition dismissed for failing to exhaust state court remedies should be considered successive may depend upon whether the prior dismissal was without prejudice to filing another petition generally, or was limited to being without prejudice to filing a petition raising the same claims.


200. See id.

201. Compare Camarano v. Irvin, 98 F.3d 44, 47 (2d Cir. 1996) (holding that a petition dismissed without prejudice for failure to exhaust does not count); McWilliams v. Colorado, 121 F.3d 573, 575 (10th Cir. 1997) (same) with Dickinson, 101 F.3d at 791 (holding that a petition was not successive when the petitioner claimed to have exhausted state court remedies after the prior petition was dismissed for failure to exhaust); In re Turner, 101 F.3d 1323, 1323 (9th Cir. 1996) (holding that a petition is not successive when it raises the same claims that were previously dismissed without prejudice for failure to exhaust); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (holding that a claim renewed after exhaustion is not successive). See also Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998) (stating that no case has held that a petition is successive when a petitioner returns to federal court after exhausting state court remedies).

202. See Slack, 120 S. Ct. at 1605 ("[W]e do not suggest that the definition of second or successive would be different under AEDPA.").

in the § 2255 context when the claim was not raised on direct appeal.204 In both contexts, a court may only reach the merits of the claim if the petitioner demonstrates either cause for the default and prejudice or that a miscarriage of justice will result from the failure to consider the claim.205 A court may also deny a claim as barred in the § 2255 context when the claim was raised on direct appeal, in which case a court generally may not consider the claim unless there has been an intervening change in law, or the petitioner relies on newly discovered evidence.206 In both of these situations, a claim denied as procedurally barred is not technically decided "on the merits" because the bar prevents the court from considering the merits of the claim. Nonetheless, a denial of an application based on a procedural bar should count as a prior application for successive application law.207

The Second Circuit was the first court to address the issue of whether an application in which the claims are denied as procedurally barred counts for determining whether a subsequent application is successive. The court held that such applications count, based on the fact that such a disposition counted for successive application purposes prior to the enactment of the AEDPA, and the AEDPA strengthened successive application law.208 This decision makes sense. In the context of same-claim applications, a number of circuits had characterized the denial of a claim on a procedural grounds as a determination "on the merits."209 Because a procedural default denial is on the merits, the claim would be successive if the petitioner raises it again. In the context of new-claim applications, however, at least one circuit has indicated that a claim found to be procedurally barred has not been decided on the merits; that court then held that a prior decision on the merits is not a prerequisite to finding a present petition to be abusive, so that

206. See Davis v. United States, 417 U.S. 333, 342 (1974); LIEBMAN & HERTZ, supra note 1, § 41.7e, at 1610-11.
207. It should be noted a court may deny an application by finding that some claims are procedurally barred and the other claims are without merit. Presumably, such an application would count for successive application purposes. Thus, this Article only discusses the situation in which a court denies all of the claims in the first application as procedurally barred.
209. See the following cases cited in Carter, 150 F.3d at 205: Hawkins v. Evans, 64 F.3d 543, 546-47 (10th Cir. 1995); Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994) (per curiam); Shaw v. Delo, 971 F.2d 181, 184 (8th Cir. 1992), cert. denied, 507 U.S. 927 (1993); Howard v. Lewis, 905 F.2d 1318, 1322-23 (9th Cir. 1990).
procedurally barred claims still trigger abuse of writ analysis. This difference in how courts have treated procedurally barred claims in the same-claim and new-claim contexts may be based on the fact that, prior to the AEDPA, the same-claim successive law required that a prior decision be "on the merits," whereas the new-claim abusive law did not.

Regardless of whether a decision that a claim is procedurally barred can be characterized as a decision "on the merits," such a decision should count for successive application purposes. As noted, such decisions counted under pre-AEDPA law, and it is doubtful that the AEDPA would make it easier for petitioners to raise a claim in a successive application. Furthermore, because a petitioner is not precluded from raising other then-available claims in an application even if some claims are barred, the petitioner would have the opportunity to raise those claims at that time, and raising them at a subsequent time would be abusive.

9. Dismissals as Premature

Generally, a petitioner cannot file a § 2255 motion if her or his direct appeal is pending or if another post-conviction motion is pending. In such circumstances, the § 2255 motion is premature and a court should dismiss it as such.

The Seventh Circuit has held that a § 2255 motion returned because motions filed pursuant to Rules 32 and 35 of the Federal Rules of Criminal Procedure were pending should not count for successive application purposes. In reaching this decision, the court simply noted that the petitioner whose prior motion was returned had not yet had his one full and fair opportunity to collaterally attack his conviction. This decision, which is similar to the situation in which a petition is dismissed for failure to exhaust state court remedies, is proper; in both situations, no court addressed the merits of the claims in the original application because the petitioner filed the application too early. Furthermore, this rule should apply to any situation in which a prior § 2255 motion was dismissed as premature.

210. See Macklin v. Singletary, 24 F.3d 1307, 1314 (11th Cir. 1994) ("[I]t is not a prerequisite to application of the abuse of the writ doctrine that the petitioner has had a prior petition adjudicated on the merits instead of having it denied or dismissed on procedural default grounds."). cert. denied, 513 U.S. 1160 (1995).

211. See O'Connor v. United States, 133 F.3d 548, 550 (7th Cir. 1998).

212. See id.
10. Dismissals as Untimely

Prior to the enactment of the AEDPA, Rule 9(a) of the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings authorized district courts to dismiss applications as untimely.213 The Act, however, established a general one-year period of limitations on the filing of applications.214 Because dismissals as untimely were uncommon prior to the enactment of the AEDPA,215 there is little precedent as to whether an application dismissed under Rule 9(a) makes a subsequent petition successive.216 However, it is likely that this issue will become more prominent as more applications are dismissed under the strict period of limitation and as courts considering any subsequent attempt to file an application face the issue of whether the application is successive.

To the extent that a dismissal of an application as untimely is analogous to a dismissal for failure to meet the statute of limitation under a general civil case,217 such a dismissal should count for successive application purposes. In the civil context, an action dismissed as barred by the statute of limitations has preclusive effect.218 Furthermore, a petitioner would have his or her full opportunity to raise all of the then-available claims at that time—unfortunately for the petitioner, however, all such claims would be untimely.

Counting an application dismissed on the period of limitation grounds as a first application actually might not have any practical affect on petitioners. Petitioners may only file applications after the one year period of limitation in three circumstances. Two of these circumstances, the date on which the Supreme Court has newly recognized a right and

213. See Rule Governing Section 2254 Cases 9(a); Rule Governing Section 2255 Proceedings 9(a).

214. See supra note 5 and accompanying text.

215. See Calderon v. United States Dist. Court, 128 F.3d 1283, 186 (9th Cir. 1997) ("Prior to AEDPA's enactment, state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition."); LIEBMAN & HERTZ, supra note 1, § 24.2, at 922-25 (noting that courts rarely deny applications based on delays of less than 15 years).

216. Given the fact that prior to the AEDPA it was unusual for an application to be dismissed as time barred, it was even more rare for a court to be faced with a subsequent application after a prior application was dismissed as time barred.

217. See Millar v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (noting that the period of limitation is not jurisdictional).

218. See PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 (2d Cir. 1983) (citing FED. R. CIV. P. 41(b), which provides that only certain enumerated dismissals are not considered dismissals on the merits, while holding that a dismissal on statute of limitations grounds is an adjudication on the merits for purposes of res judicata), cert. denied, 464 U.S. 936 (1983).
made it retroactively applicable to cases on collateral review and the date on which new facts could have been discovered, are both situations under which the AEDPA explicitly authorizes the filing of a successive application. The third circumstance, when an unconstitutional state-created barrier to filing an application is removed, might also constitute cause justifying the filing of a successive application. Thus, in many instances in which the petitioner is able to file past the initial one year period of limitation, the petitioner should have grounds to have authorization granted to file a successive application.

11. First Petition Necessarily Could not Raise all Claims

Finally, there is a narrow but important category of cases in which a petitioner files a first application properly raising claims brought in a habeas action, the district court rules on the merits of these claims, but a subsequent application nonetheless should not be subject to the AEDPA's successive application restrictions. This category includes situations when the law itself forces a petitioner to file multiple applications in order to assert the full range of challenges to a conviction.

In this context, the Tenth Circuit has held that an application raising a claim of excessive appellate delay does not count for successive application purposes. The court reached this conclusion based on the fact that, by its nature, a properly brought claim of excessive appellate delay excludes the unexhausted claims challenging the underlying judgment of conviction. Thus, the court found that the decision on the initial petition was similar to a dismissal for failure to exhaust state court remedies, which does not count for successive application purposes.

The Tenth Circuit has also held that a successful § 2255 motion raising a claim of ineffective assistance of trial counsel for failure to file an appeal from a criminal conviction does not count for successive application purposes. The court reasoned that, since the success of the motion simply puts the petitioner in the same position as if the petitioner had filed a timely notice of appeal, the success of the § 2255

219. See 28 U.S.C. §§ 2244(d)(1)(C) & (D), 2255 para. 6(3) & (4).
221. See Reeves v. Little, 120 F.3d 1136, 1139 (10th Cir. 1997) (per curiam).
222. See id.
223. See id.
224. See United States v. Scott, 124 F.3d 1328, 1330 (10th Cir. 1997) (per curiam).
motion should similarly allow the petitioner to have her or his one chance to collaterally attack his or her sentence as if the first § 2255 motion had not been filed.\textsuperscript{225} The court also noted that, as in a petition claiming undue appellate delay, a petitioner is unable to bring certain substantive challenges to a judgment of conviction in a motion alleging that the trial counsel failed to file a notice of appeal.\textsuperscript{226} The Fourth and Seventh Circuits subsequently adopted the Tenth Circuit's holding.\textsuperscript{227} The First Circuit, however, has to the contrary, held that a § 2255 motion raising a claim of ineffective assistance of trial counsel for failure to file an appeal from a criminal conviction counts for successive application purposes because the petitioner could have raised other claims in the first motion.\textsuperscript{228} In this circumstance, the majority view appears to be the more sound position, as a full appellate opportunity certainly can shape the nature of the claims raised on collateral review, such that petitioners should have the full opportunity to litigate a § 2255 motion subsequent to their direct appeal.

Another unique situation is when a petitioner's first application was successful and resulted in an amended sentence. In this context, the Second, Fourth, and Seventh Circuits have all held that the successive application provisions do not apply to those claims challenging aspects of the sentence amended.\textsuperscript{229} Although the Second Circuit did not so rule, this holding could be extended to allow a petitioner to raise any claim in a first challenge to an amended judgment of conviction.\textsuperscript{230} The Fourth and Seventh Circuits, however, have indicated that an application challenging an amended sentence is successive to the extent that it raises claims concerning the amended sentence.\textsuperscript{231}

Finally, the Ninth Circuit has held that the AEDPA's successive application provisions do not apply to an application raising a competency claim even though a federal court had reached the merits of a previous application.\textsuperscript{232} In reaching this decision, the court first noted

\textsuperscript{225} See id. at 1329.
\textsuperscript{226} See id. at 1329-30.
\textsuperscript{227} See In re Goddard, 170 F.3d 435, 437-38 (4th Cir. 1999); Shepeck v. United States, 150 F.3d 800, 801 (7th Cir. 1998) (per curiam).
\textsuperscript{228} See Pratt v. United States, 129 F.3d 54, 62-63 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998); see also In re Goddard, 170 F.3d at 438-41 (Wilkins, J., dissenting).
\textsuperscript{229} See In re Taylor, 171 F.3d 185, 187 (4th Cir. 1999); Walker v. Roth, 133 F.3d 454, 455 (7th Cir. 1997) (per curiam); Esposito v. United States, 135 F.3d 111, 113-14 (2d Cir. 1997); Galtieri v. United States, 128 F.3d 33, 37-38 (2d Cir. 1997).
\textsuperscript{230} See LIEBMAN & HERTZ, supra note 1, § 28.3b, at 918.
\textsuperscript{231} See Walker, 133 F.3d at 455 n.1; In re Taylor, 171 F.3d at 187-88 & n.*.
\textsuperscript{232} See Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), aff'd, 523 U.S. 637
that since the nature of competency claim is such that it cannot be raised in an initial application challenging a conviction, a petitioner who wishes to both attack her or his conviction and raise a competency claim must file two applications. Rather than reading the AEDPA to prohibit petitioners from pursuing both claims, the court held that a petitioner may raise the full range of claims by not subjecting an application raising a competency claim to the successive application provisions. The Ninth Circuit's decision was subsequently affirmed by a decision of the Supreme Court, which, as noted above, was the Court's first acknowledgment that the AEDPA's second and successive provisions cannot be read literally.

All of these above situations demonstrate that the AEDPA's successive application restrictions must be read flexibly. Such flexibility allows equitable considerations in successive application law prior to the enactment of the AEDPA to reemerge in post-AEDPA law. This is accomplished when courts use equitable principles in determining whether an application actually is successive within the meaning of the Act.

C. Circuit Court Standard of Review

A final issue in determining whether an application is successive, and one not yet addressed by any circuit, is under what standard a circuit court should review a district court decision regarding whether an application is or is not successive. Prior to the AEDPA, there was some disagreement as to whether a circuit court would review a district court determination that an application was abusive for an abuse of discretion or de novo. The AEDPA, however, appears to make the issue of


232. See Stewart, 118 F.3d at 633-34.

233. See id. But cf. id. at 635 (Nelson, J., specially concurring) (stating that the successive application provisions preclude the petitioner from raising the competency claim, but that the provisions suspend the writ in such circumstances).

234. See Stewart, 523 U.S. at 642; supra Part I.C (discussing the Court's decision in Stewart).


236. Compare Macklin v. Singletary, 24 F.3d 1307, 1313 (11th Cir. 1994) (reviewing abuse of the writ decisions de novo), cert. denied, 513 U.S. 1160 (1995) with Campbell v. Blodgett, 997 F.2d 512, 516 (9th Cir. 1992) (reviewing abuse of the writ decisions for an abuse of discretion), cert. denied, 510 U.S. 1215 (1994) and Williams v. Groose, 979 F.2d 1335, 1337 (8th Cir. 1992) (per curiam) (same). This discrepancy may be due to circuit courts reviewing a district court's decision that an application is subject to dismissal for abuse of the writ de novo, whereas they review a district court's decision to dismiss an application that is subject to dismissal for an abuse of discretion. Cf. Macklin, 24 F.3d at 1312-13 (discussing the
whether an application is successive to be one of law reviewed *de novo*.238

III. AUTHORIZATION PROCEDURAL ISSUES

The AEDPA dramatically and fundamentally changed the manner in which the federal judiciary adjudicates successive § 2254 petitions and § 2255 motions by requiring that a circuit court play a role in this adjudication before a district court considers an application. This requirement reverses the traditional relationship between district courts and circuit courts under which a circuit court only considers most issues after a district court first considers the issue. The radicalness of this role reversal should not be underestimated.239 Furthermore, because this relationship is novel and untested, unanticipated procedural problems with this structure have already and will continue to arise.

One major reason that the AEDPA's authorization procedures are producing procedural difficulties is that the Act only requires circuit court authorization for a limited class of applications. As extensively discussed in Part II, when a petitioner seeks to file an application, often times it is by no means obvious whether the application is non-successive, and not requiring circuit court authorization, or successive and requiring such authorization. While some courts must determine this threshold question of whether the application is successive and requiring authorization, whether authorization is required determines which court a petitioner should go to in the first instance. This makes successive application procedures especially complicated.

This Part explores a full range of procedural issues that have arisen under the AEDPA's successive application authorization requirements. This Part first addresses to what extent the successive application provisions of § 2255 incorporate the successive applications procedures which apply to § 2254 petitions. This Part then explores four related issues: how a district court should dispose of unauthorized successive applications, whether respondents bear the burden of pleading that an application is successive, whether proper authorization is a jurisdictional requirement, and whether a respondent may consent to authorization. This Part then explores the Act's mandate that circuit courts adjudicate

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238. *See* Graham v. Johnson, 168 F.3d 762, 772 (5th Cir. 1999).

239. *See* Allen Ellis et al., *It's not too Late Part II: Filing Second and Successive 2255 Motions under the New Habeas Corpus Reform Law*, CHAMPION, Jan.-Feb. 1997 at 16-17 (stating that the AEDPA "creates a truly unique and bizarre procedure ").
authorization motions within thirty days of their filing. Next, this Part addresses the issue of whether a circuit court may grant authorization only as to certain claims in an application or if instead it must grant authorization for an entire application. This Part then explores the issue of in which court a petitioner should file an application if it is unclear whether the application is successive. Finally, this Part explores the scope of review of the denial of an authorization motion that a petitioner may obtain in the circuit court which denied authorization, in the Supreme Court, and in the appropriate district court.

A. To What Extent Does § 2255 Incorporate the § 2254 Provisions?

Before discussing the various procedural issues that the AEDPA's authorization provisions have produced, the question of to what extent § 2255 incorporates the provisions governing successive § 2254 petitions must be addressed. This is an issue because the Act, rather than including the authorization procedures that apply to successive § 2255 motions in its amendments to § 2255, instead amended § 2255 to refer to the successive § 2254 petition procedures without specifically stating which procedures are incorporated.

The procedures for granting authorization to file successive § 2254 petitions are found at the amended § 2244(b)(3), which contains five subsections providing as follows: subsection (A) requires a petitioner to move in a circuit court for an authorization order before filing a successive application; subsection (B) provides that a three-judge circuit court panel will decide the motion for an authorization order; subsection (C) provides that a circuit court may only grant authorization if the application makes a *prima facie* showing that it satisfies the successive application requirements; subsection (D) imposes on circuit courts a thirty-day time limit on adjudicating an authorization motion; and subsection (E) restricts review of an authorization motion decision. Rather than mirror the authorization procedures governing § 2254 petitions, § 2255 as amended provides that "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" either "newly discovered evidence" or "a new rule of constitutional law."240 In addition to what may be a relatively minor inconsistency of using the term "certify" while § 2244 uses the term "authorize," this provision fails to specify exactly which provisions of § 2244 are incorporated into § 2255.

Surprisingly, circuits courts generally have not considered the issue of to what extent § 2255 incorporates the successive authorization provisions in § 2244.\textsuperscript{241} The Second Circuit is one exception: it has held that § 2255 incorporates subsections (D) and (E).\textsuperscript{242} In reaching this holding, the court reasoned that because § 2255 did not specify which subsections in § 2244 it incorporated, it could be assumed that Congress intended for § 2255 to incorporate all of the subsections governing successive application authorization.\textsuperscript{243} Aside from the Second Circuit, the other circuits have not addressed to what extent § 2255 incorporates the procedures governing successive § 2254 application authorization motions. This silence is indicative of circuit court failure to appreciate the difference between the successive application provisions governing § 2254 petitions and § 2255 motions.

Despite the Second Circuit's decision that § 2255 incorporates all of the procedural subsections of § 2244, it is questionable whether § 2255 incorporates more than subsections (A), (B), and (D) of § 2244(b)(3). Subsection (A), which requires a petitioner to move for authorization prior to filing a successive application, appears to be redundant of the requirement in § 2255 that a successive motion be certified by a panel of the appropriate circuit court. Thus, it is of little consequence whether § 2255 incorporates this subsection. Subsection (B) merely specifies that a three-judge circuit court panel must rule on an authorization motion. Because this procedure is not specified in § 2255 and is an authorization procedure, it is reasonable to find that § 2255 incorporates this subsection.\textsuperscript{244}

The question of whether § 2255 incorporates subsection (C) of § 2244(b)(3) is especially problematic. Section 2255 requires that a circuit

\textsuperscript{241} Cf. United States v. Villa-Gonzalez, 208 F.3d 1160, 1164 (9th Cir. 2000) (per curiam) (stating that § 2255 incorporates the procedures in § 2244, without further discussion); LIEBMAN & HERTZ, supra note 1, § 41.7d, at 395 (1997 Supp.) ("[Section 2255, as amended] appears to adopt the same procedure for section 2255 cases as applies to successive state-prisoner habeas corpus petitions.").

\textsuperscript{242} See Triestman v. United States, 124 F.3d 361, 367 (2d Cir. 1997); see also Galtieri v. United States, 128 F.3d 33, 36 (2d Cir. 1997) (holding that § 2255 incorporates subsection (D) of § 2244); Liriano v. United States, 95 F.3d 119, 121 n.1 (2d Cir. 1996) (stating that, as the standard for certification in subsection (C) is not included in § 2255, § 2255 apparently incorporates this subsection).

\textsuperscript{243} See Triestman, 124 F.3d at 367. As the incorporation of other subsections was not at issue in the case, the Second Circuit's specific holding was limited to finding that § 2255 incorporated subsections (D) and (E).

\textsuperscript{244} It should be noted that it would have been much easier for the AEDPA simply to have included the words "three-judge" in its amendment to § 2255 itself rather than through having § 2255 incorporate § 2244(b)(3)(B).
court certify that a successive motion "contain" newly discovered evidence or a new rule of constitutional law. Subsection (C), by contrast, requires that a successive application make a "prima facie showing" that it satisfies the substantive successive application standards in order for a circuit court to grant authorization. These provisions appear to be in conflict.\textsuperscript{245} If the \textit{prima facie} showing requirement elaborates on the requirement in § 2255 that a successive § 2255 motion "contain" new evidence or a new rule of constitutional law, then § 2255 may incorporate subsection (C). However, if the \textit{prima facie} requirement is more stringent than the "contain" requirement, then § 2255 should not incorporate this subsection because § 2255 has its own substantive standard for granting authorization.\textsuperscript{246}

Subsection (D) of § 2244(b)(3), which imposes a thirty-day time limit on deciding authorization motions, is not in § 2255 and does not conflict with the express requirements of § 2255. Thus, it appears that § 2255 incorporates this subsection. Finally, subsection (E) restricts review after a circuit court has made an authorization decision. Because this subsection governs post-authorization procedures, it appears to fall outside the purview of § 2255's mandate that successive § 2255 motions be "certified as provided in section 2244," and thus might not be incorporated by § 2255. These considerations implicate complex questions of statutory construction which will not be fully explored here; instead, it can simply be noted that these issues deserve a more rigorous circuit court analysis.

\textbf{B. How Should District Courts Dispose of Unauthorized Successive Applications?}

Perhaps the first procedural issue which courts faced after the enactment of the AEDPA was how district courts should dispose of successive applications filed in district court without proper circuit court authorization. While the AEDPA's successive application provisions applied to applications filed immediately after its enactment,\textsuperscript{247}
petitioners continued to file successive applications in the district courts without first seeking the required circuit court authorization. This was not surprising, since petitioners, especially those proceeding pro se, could hardly have been expected to be immediately familiar with the AEDPA's authorization procedures. Thus, after the AEDPA was enacted district courts continued to receive successive applications even though the applications lacked authorization.

Unfortunately, courts which confronted the issue of what to do with an unauthorized successive application often sua sponte disposed of the applications while overlooking two issues which should have been addressed first. The first preliminary issue is whether respondents bear the initial burden of asserting that an application is successive. The second is whether proper circuit court authorization is a jurisdictional prerequisite for district court consideration of a successive application. Only after these two issues are resolved should the question of how district courts should dispose of unauthorized successive applications be considered. This Article, however, discusses this last question first because courts considered this issue first. The two following sections will then discuss the pleading and jurisdictional issues.

The Second Circuit was the first circuit court to address the issue of how a district court should dispose of a successive application filed without proper authorization. In Liriano v. United States, the court held that when a petitioner files a successive application in a district court without authorization, the district court should transfer the application to the appropriate circuit court. The court held that such a transfer could be effectuated under the statutory authority of 28 U.S.C. § 1631, which authorizes courts to transfer civil actions and appeals in order to cure a lack of jurisdiction when such a transfer is in the interests of justice. The Second Circuit further held that after an application is

AEDPA's enactment. By contrast, other courts have held that at least some aspects of the successive application provisions do not apply when the prior application was filed prior to the enactment of the AEDPA when this would have an adverse consequence. See cases discussed supra notes Part I.A-F.

248. See Liriano v. United States, 95 F.3d 119, 122 (2d Cir. 1996) ("The filing [in district court] will almost invariably reflect ignorance concerning the new procedural requirements of § 2244(b)(3), rather than an effort to circumvent those requirements.").

249. Id.

250. See id. at 123.

251. See id. The complete text of § 1631 is as follows:

Transfer to cure want of jurisdiction. Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of
transferred to the circuit court, the circuit court should notify the petitioner that he or she must file an authorization motion in the circuit court within forty-five days of the notice.\(^{252}\) The court continued by holding that, for purposes of the one-year limitation period, the filing date of the application would be the date that it was initially filed in district court as provided for by § 1631.\(^{253}\) In a later decision, the Second Circuit held that district courts cannot circumvent the AEDPA's gatekeeping provision by adjudicating, on the merits, unauthorized successive applications.\(^{254}\)

The few other circuits which have addressed the issue of how a district court should dispose of an unauthorized successive application have either followed the Second Circuit's approach or adopted alternatives. The Sixth and Tenth Circuits fall into the former category, holding that district courts should transfer unauthorized successive applications to the appropriate circuit court, and that such applications are deemed filed on the date that the petitioner originally filed in district court.\(^{255}\) The Tenth Circuit further adopted the Second Circuit's procedure of notifying petitioners, whose applications have been

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\(252\). See \textit{Liriano}, 95 F.3d at 123. The Second Circuit noted that, if the petitioner did not file an authorization motion within 45 days of the notice informing the petitioner of the need to file an authorization motion, then the court would enter an order denying authorization. \textit{Id.} The court also noted that such an order would not preclude the petitioner from filing a subsequent authorization motion; however, if the petitioner did file a subsequent motion, he or she could not take advantage of the earlier district court filing date for limitation period purposes. \textit{Id.} at 123 n.2. While stating that a petitioner who does not file an authorization motion within the 45 day deadline could file another authorization motion, the Second Circuit did not address the possibility that a petitioner may be barred from raising certain claims in a subsequent authorization motion because the claims could have been raised previously, namely within the 45 days provided to the petitioner to file the initial authorization motion. \textit{See infra} Part IV.C.1.c & 2.a. If this is the case, then a petitioner's failure to file an authorization motion within 45 days would have the same effect as if the court denied authorization. \textit{See infra} Part III.I.1.c (discussing the standards governing successive authorization motions). However, a court could style an order denying authorization for failure to file the authorization motion to be without prejudice to renewal to avoid this result.  


\(254\). See Corrao v. United States, 152 F.3d 188, 191 (2d Cir. 1998).  

\(255\). See \textit{In re Sims}, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam); Coleman v. United States, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam).
transferred to the circuit court, that they need to file an authorization motion with the court in order for the court to consider granting authorization. The Seventh Circuit, by contrast, has treated a petitioner's notice of appeal from the denial of an unauthorized successive application as a motion for authorization filed in the circuit court. The court reasoned that this procedure was an efficient way to deal with unauthorized successive applications. The Seventh Circuit also declined to allow the petitioner to file additional papers to support his authorization motion because the court could reach a decision based on the papers already filed. The First Circuit has indicated that district courts can either dismiss or transfer unauthorized successive applications.

Although the procedures adopted by the various circuits may at first seem like effective solutions to the problem of unauthorized successive applications, they are theoretically problematic and have practical shortcomings. This section first addresses the procedure followed by the Second, Sixth, and Tenth Circuits, and then that of the Seventh Circuit.

The procedure of transferring an unauthorized successive application pursuant to 28 U.S.C. § 1631 is a misapplication of § 1631. A successive application filed in district court without authorization has been filed in the correct court; the problem with such an application is not that it should have been filed in a different court, but rather that it was filed without authorization. Furthermore, when a district court transfers an unauthorized application to a circuit court, the circuit court does not even render a decision on the application. Instead, the circuit court requires the petitioner to file an authorization motion and then

256. See Coleman, 106 F.3d at 341.
257. See Nunez v. United States, 96 F.3d 990, 991-92 (7th Cir. 1996). The Tenth Circuit has also treated petitioners' notice of appeal from the denial of an unauthorized successive application as a motion for authorization filed in the circuit court. See Lopez v. Douglas, 141 F.3d 974, 976 (10th Cir. 1998) (per curiam); United States v. Gallegos, 142 F.3d 1211, 1212 (10th Cir. 1998) (per curiam); Pease v. Klinger, 115 F.3d 763, 764 (10th Cir. 1997) (per curiam). However, it appears that the Tenth Circuit's general rule is that established in Coleman, namely that district courts should transfer unauthorized successive applications.
258. See Nunez, 96 F.3d at 991 ("Treating an appeal in these circumstances as a request for authorization will speed cases to decision with a minimum of paperwork . . . .").
259. See id. at 991-92. The Seventh Circuit left open the possibility that, if it were unclear whether authorization should be granted based on the papers that the petitioner has already filed, then the petitioner would be given an opportunity to present further material. See id. at 992.
260. See Pratt v. United States, 129 F.3d 54, 57 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998); see also United States v. Barrett, 178 F.3d 34, 41 n.1 (1st Cir. 1999) (noting that transferring "may be preferable [to dismissal] in some situations").
rules on the authorization motion, if filed. Under this procedure, if the circuit court denies an authorization motion filed after the transfer, no court ever makes a ruling on the application filed in the district court, which essentially disappears.\(261\)

From a more practical perspective, the procedure of transferring unauthorized successive applications may prevent circuit courts from reviewing district court determinations that an application is successive. In particular, when the circuit court receives a transferred application, it simply requires the petitioner to file an authorization motion without providing the petitioner with an opportunity to raise the argument that the district court erred in finding that the application is successive in the first place. Furthermore, when no authorization motion is filed after an application is transferred it is unlikely that the circuit court will independently review whether the application is really successive before denying authorization.\(262\)

Another practical problem that may occur if a district court transfers an unauthorized successive application to a circuit court is that a petitioner may raise claims in the subsequent authorization motion filed in the circuit court that he or she did not raise in the original application filed in the district court.\(263\) Such circumstances may put a circuit court in a dilemma as to which claims it should consider when deciding whether to grant authorization: only those in the authorization motion, only those in the original application, or all of the claims. Technically, the only claims before the court are those presented in the authorization motion. However, a petitioner should only be able to take advantage of the earlier filing date for claims raised initially in the district court. Thus, it may be that a circuit court should only consider those claims in the authorization motion, and only use the earlier filing date for claims

\(261\) Similarly, if a petitioner were to file a successive application, rather than an authorization motion, directly in the circuit court, it would be appropriate for the circuit court to transfer it to the district court. See Fed. R. App. P. 22(a) ("If [a § 2254 and, possibly, a § 2255 application is] made to a circuit judge, the application must be transferred to the appropriate district court."); see also 28 U.S.C. § 2241(b) ("[A]ny circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.").

\(262\) It does not appear that a petitioner would be able to appeal an order transferring an application pursuant to § 1631. See, e.g., Ukiah Adventist Hosp. v. Fed. Trade Comm’n, 981 F.2d 543, 546 (D.C. Cir. 1992) (holding that a § 1631 transfer order was not appealable, and citing other circuits), cert. denied, 510 U.S. 825 (1993); see also 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3914.12, at 724-25.

\(263\) A pro se prisoner who does not understand the authorization procedures is most likely to raise new claims in an authorization motion.
originally filed in the district court.

Treating a notice of appeal from the denial of an unauthorized successive application as an authorization motion is an even more troublesome procedure. This procedure does have the advantage of preventing a petitioner from raising additional claims in his or her authorization motion by simply treating the claims raised in the original application as those that the petitioner raises in the authorization motion. However, this procedure unfairly disadvantages petitioners by failing to provide them with an opportunity to support their authorization motions. Establishing a *prima facie* showing that one is entitled to relief in an authorization motion requires substantially more documentation than is required to file an application in the district court. Without providing a petitioner with notice and an opportunity to file supporting documents, a circuit court essentially deprives a petitioner of the ability to present a proper authorization motion. Admittedly, circuit courts could allow a petitioner an opportunity to present material if it is unclear whether authorization should be granted. However, the problem of challenging a district court's determination that an application is successive remains as the circuit court may not rule on whether the district court erred in denying the application for lack of authorization, an issue which ordinarily would be up for review in the appeal.

Instead of requiring district courts to transfer unauthorized successive applications or treating notices of appeal from the denial of unauthorized successive applications as requests for authorization, the following recommended alternative appears to be more sound. A district court should dismiss an unauthorized successive application without prejudice to renewal upon the petitioner's obtaining proper authorization. The court should further provide the petitioner with any documents necessary to file an authorization motion in the circuit court, or give the appropriate circuit court notice of the petitioner's application so that the circuit court can forward the proper papers to the petitioner. Under this procedure, a petitioner could file an authorization motion in the appropriate circuit court and, if authorization is granted, renew the originally filed application in the

264. See *supra* note 259.

265. Cf. Thompson v. Calderon, 151 F.3d 918, 928 (9th Cir. 1998) (Kleinfeld, J., concurring) (stating that the district court properly dismissed an unauthorized successive application and that the circuit court should have simply affirmed the dismissal rather than consider the appeal as an authorization motion).
district court. Furthermore, if the petitioner does renew the originally filed application, the application should be considered to have been filed on the date that it was initially filed so as to preserve the earlier filing date for period of limitations purposes.

Although this alternative procedure is not perfect, it best follows the structure established by the AEDPA. One advantage of this procedure is that it allows a petitioner to challenge a district court decision that an application is successive. Specifically, a petitioner whose application is dismissed without prejudice could simply appeal the district court dismissal to the circuit court and argue that the district court erred because the application is not successive. Another advantage of this procedure is that it avoids the anomalous situation of an application being transferred to a circuit court but then never actually ruled on. One disadvantage of this procedure is that it is potentially more time consuming and more burdensome on petitioners because it requires the filing of an authorization motion in a circuit court and then if authorization is granted, renewal of the application back in district court. However, this is precisely the structure established by the AEDPA, and procedural convenience should not be followed when improper.

C. Must the Respondent Plead that an Application is Successive?

When a petitioner files an application in district court which may be successive, the first procedural question that the court should resolve is whether it can \textit{sua sponte} inquire into whether the application is successive, or if instead the respondent bears the burden of pleading that the application is successive. If the court can \textit{sua sponte} inquire into whether an application is successive and its inquiry reveals that the application is successive, then the court can immediately act on the application without allowing the proceeding to continue. However, if the court cannot raise this issue \textit{sua sponte}, then even if the application is clearly successive the court must direct the respondent to reply to the application, assuming that the application should not be disposed of for other reasons pursuant to either Rule 2 or Rule 4 of the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings. After the respondent has filed a reply, the court would then consider whether the application is successive only if the respondent has so pled in its reply.

Prior to the enactment of the AEDPA, it was clear that the defense
of abuse of the writ was an affirmative defense which could be waived. In fact, the Supreme Court had held that the burden generally was on the respondent to plead abuse of the writ, including documenting the petitioner's prior application or applications. In addition, although the Supreme Court had not reached this issue, it appears that it was the respondent's burden to plead that an application was successive as well. In this respect, abuse of the writ was similar to other affirmative defenses in habeas corpus law, such as exhaustion and procedural default, that place purely procedural restrictions on petitioners and that can be waived in certain circumstances. Nonetheless, although the Supreme Court had clearly stated that respondents bear the burden of pleading abuse of the writ, a number of circuit courts had held under pre-AEDPA law that a district court may raise this defense so long as the court provides the petitioner with notice and an opportunity to be heard prior to ruling on the defense. No circuit court

266. See, e.g., Burris v. Farley, 51 F.3d 655, 658 (7th Cir. 1995) (cite McCleskey v. Zant, 499 U.S. 467, 477 (1991)).

267. See McCleskey, 499 U.S. at 494 ("[T]he government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ."). The rule that a respondent must plead abuse of the writ originates in Price v. Johnston, 334 U.S. 266 (1948). See also Sanders v. United States, 373 U.S. 1, 10-11 (1963). In Price, the Supreme Court adopted the pleading rule because requiring pro se prisoners to plead cause for not raising a claim earlier would be an imposition, and the government is in the best position to raise this defense. 334 U.S. at 291-93. This pleading rule also ensures that the court deciding whether a petitioner abused the writ has a proper record before it when making the decision.

268. See LIEBMAN & HERTZ, supra note 1, § 28.4b, at 1206-07.

269. See Gray v. Netherland, 518 U.S. 152, 164-66 (1996) (holding that procedural default is an affirmative defense which is waived if not raised by the state); Granberry v. Greer, 481 U.S. 129, 135 (1987) (holding that, if the state fails to raise a nonexhaustion defense in the district court, then the court of appeals may consider the defense waived in order to avoid unnecessary delay in granting relief that is plainly warranted due to a miscarriage of justice). While the Supreme Court has held that circuit courts may sua sponte raise the exhaustion defense, see id., 481 U.S. at 133-34, it has specifically declined to decide whether circuit courts may raise the procedural default defense sua sponte, see Trest v. Cain, 522 U.S. 87, 90 (1997).

270. See LIEBMAN & HERTZ, supra note 1, § 28.3c, at 1175-76 & nn.57-58 (citing cases). The Second Circuit has held that not only may a district court raise the abuse of the writ defense sua sponte, but additionally that a district court may sua sponte dismiss an application for abuse of the writ without prior notice if it is clear that the petitioner cannot demonstrate actual prejudice. See Femia v. United States, 47 F.3d 519, 523 (2d Cir. 1995). While the Second Circuit's ruling conflicts with the decisions of other circuits, the court's ruling is consistent with its decisions in general civil cases that a district court may sua sponte dismiss a complaint as frivolous based on an affirmative defense even if the defense may be waived. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995). Liebman and Hertz, by contrast, have suggested that the Supreme Court's decision in McCleskey implies that a district court may
has yet reevaluated whether, after the enactment of the AEDPA, respondents continue to bear the burden of pleading that an application is successive. However, it is recommended that respondents continue to have the burden of pleading with particularity that an application is successive. The Supreme Court clearly established this rule in McCleskey, and nothing in the AEDPA explicitly changes it. While the Act does establish special procedures for successive applications, it does not address how a court is to determine whether an application is successive in the first place.

A strong argument can be made that the structure of the AEDPA, by establishing a new procedure for filing successive applications and stating that authorization must be granted before a successive application may be filed, makes the issue of whether an application is successive one for the courts to decide regardless of whether it is pled. Specifically, if a successive application cannot be filed without authorization, then it is for the district court to decide when a petitioner attempts to file an application whether it is successive and thus requires authorization. This is particularly the case if authorization is jurisdictional, as courts can raise jurisdictional considerations sua sponte. However, as under pre-AEDPA law, requiring the respondent to plead abuse facilitates the development of a proper record on which a district court can base its decision as to whether an application is successive. If the respondent does successfully so plead, then the district court can dispose of the successive application as discussed above. However, if the respondent does not so plead or so pleads incorrectly, then the application will proceed in district court.

D. Is Authorization Jurisdictional?

Another related consideration that should be addressed before deciding how district courts should handle unauthorized successive applications is whether circuit court authorization is a jurisdiction requirement or only a statutory prerequisite for filing a successive application. How this issue is resolved has important implications both for the procedures, which a district court should follow to dispose of
unauthorized successive applications, and for the issue of whether proper authorization may be waived.

A number of circuits have indicated that authorization is jurisdictional, finding that district courts lack jurisdiction to adjudicate unauthorized successive applications. Furthermore, those circuit courts that direct district courts to transfer successive applications filed in the district court without authorization pursuant to 28 U.S.C. § 1631 imply that authorization is jurisdictional, because the transfer is to cure jurisdiction. While an argument certainly can be made that proper authorization, like a host of other procedural defenses to applications, should not be jurisdictional and should be waivable by respondents, the AEDPA itself uses the phrase "an order authorizing the district court to consider the application." This language describes the authorization order as a document without which the district court is unable to consider an application, indicating the authorization is jurisdictional. Still, this issue certainly warrants more circuit court attention.

E. Can a Respondent Consent to Authorization?

As noted above, before the AEDPA was enacted, abuse of the writ was as an affirmative defense which a respondent could waive either by failing to plead abuse or through an explicit waiver. The AEDPA, however, provides that a circuit court must authorize a successive application before it is filed in the district court. Despite this requirement, it may be that a respondent can consent to authorization when a petitioner files an authorization motion in circuit court.

The Eighth Circuit, the only circuit court to have addressed this issue so far, has held that a respondent cannot consent to authorization.

272. See Pease v. Klinger, 115 F.3d 763, 764 (10th Cir. 1997) (per curiam) (holding that the district court lacked jurisdiction to adjudicate an unauthorized successive application); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996) (holding that a district court must dismiss a successive application lacking proper authorization, as the AEDPA allocated subject matter jurisdiction to the court of appeals for commencing a successive application); see also Pratt v. United States, 129 F.3d 54, 57 (1st Cir. 1997) ("AEDPA's prior approval provision allocates subject-matter jurisdiction to the court of appeals by stripping the district court of jurisdiction over a second or successive habeas petition unless and until the court of appeals has decreed that it may go forward.")., cert. denied, 523 U.S. 1123 (1998).

273. See supra Part III.B. However, even if proper authorization is a jurisdictional requirement, the transfer of an application lacking proper authorization itself does not cure the lack of jurisdiction. Only if the circuit court grants authorization would the jurisdictional defect, namely the lack of authorization, be cured.


275. See supra Part IV.C.

276. See Oxford v. Bowersox, 86 F.3d 127, 128 (8th Cir. 1996), cert. dismissed, 518 U.S.
The court reasoned that the AEDPA fully defined under what circumstances it has authority to grant authorization such that it cannot grant authorization if the petitioner fails to meet the Act's explicit standards.277 The Eighth Circuit's ruling appears to be correct.

Initially, even if proper authorization is a jurisdictional prerequisite to the filing of a successive application in district court, and thus the authorization requirement cannot be waived,278 it may be that a respondent can consent to authorization being granting when a petitioner files an authorization motion in a circuit court. This is so because the question of whether a district court has jurisdiction to entertain a successive application without proper authorization is distinct from the question of whether a respondent may consent to a circuit court granting authorization in the first place. With this in mind, the actual barrier to a respondent consenting to a grant of authorization is the language of the AEDPA itself. The Act clearly places a burden on a petitioner to make a prima facie showing to the circuit court before authorization can be granted.279 Pursuant to this provision, the Act has written out any role for the respondent in the authorization decision. Thus, a respondent should not be able to consent to authorization.

F. The Thirty-Day Decision Requirement

The AEDPA mandates that circuit courts rule on an authorization motion within thirty days of the filing of the motion.280 However, at least in the non-death penalty sections of the Act,281 the Act does not establish any consequence if a court fails to rule by this deadline.282

1031 (1996). But cf. id. (Heaney, J., dissenting) ("In light of the government's position [that authorization should be granted], I would grant Oxford leave to file his petition in the district court.").

277. See id.


280. See 28 U.S.C. §§ 2244(b)(3)(D) ("The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion."), 2255 para. 8 (possibly incorporating § 2244(b)(3)(D) by reference; see supra Part III.A).

281. The special death penalty sections of the AEDPA provide that states may file a writ of mandamus in the circuit court to enforce the time limits on district court decisions, and may file a writ of mandamus in the Supreme Court to enforce the circuit court time limits. See 28 U.S.C. § 2266(b)(4)(B), (c)(4)(B).

282. See In re Siggers, 132 F.3d 333, 336 (6th Cir. 1997) ("Congress has failed to specify a consequence for noncompliance with the thirty-day time limit imposed by 28 U.S.C. § 2244(b)(3)(D). ").
Without such consequences, a number of circuit courts have established procedures which can avoid this requirement.

Three circuit courts have established procedures which allow them to extend the time to rule on an authorization motion beyond the thirty-day deadline. The Second Circuit has held that the thirty days begins to run only when "all papers required for a reasoned decision" have been filed with the court,\(^2\) guaranteeing that the court will have the necessary records when it rules on an authorization motion. The court further held that it can rule after these thirty-days when the court will publish an opinion "that cannot reasonably be prepared within 30 days,"\(^2\) providing itself with further time to draft opinions when necessary. The Sixth Circuit has adopted a court policy under which the thirty days begins to run only when a staff attorney memorandum and proposed order have been submitted to the motions panel that will rule on the authorization motion.\(^2\) This policy effectively provides the Sixth Circuit with an indefinite amount of time to rule on any authorization motion. In a subsequent decision, the Sixth Circuit stated that the thirty-day time limit is "hortatory or advisory,"\(^2\) an interpretation which completely negates any legal effects of the time limit. The First Circuit adopted this latter decision.\(^2\)

These decisions and policies which extend the thirty-day deadline appear to contravene the explicit requirements of the AEDPA. In addition, a circuit court may also avoid the thirty day deadline by denying an authorization motion and then \textit{sua sponte} granting a rehearing to reconsider the denial of the motion.\(^2\) However, as noted, a circuit court faces no special consequence for using these alternative procedures. Without any consequences, circuit courts can effectively bypass the thirty-day requirement.

\section*{G. Should Circuit Courts Authorize Specific Claims or an Entire Application?}

When a petitioner seeks authorization to file a successive application, he or she may attempt to obtain authorization for more

\begin{itemize}
\item[\(283\).] \textit{Galtieri v. United States}, 128 F.3d 33, 37 (2d Cir. 1997).
\item[\(284\).] \textit{Id.}
\item[\(285\).] \textit{See In re Sims}, 111 F.3d 45, 48 n.1 (6th Cir. 1997).
\item[\(286\).] \textit{Siggers}, 132 F.3d at 336.
\item[\(287\).] \textit{See Rodriguez v. Superintendent}, 139 F.3d 270, 272-73 (1st Cir. 1998); \textit{see also United States v. Barrett}, 178 F.3d 34, 42 n.2 (1st Cir. 1999).
\item[\(288\).] The circuit court authority to \textit{sua sponte} grant a rehearing is discussed below. \textit{See infra} Part III.I.1.a.
\end{itemize}
than one claim. The AEDPA, however, does not specify whether a circuit court authorization should only apply to specific claims in an application or to the entire application. Even though it makes sense for circuit courts to limit authorization to only those claims which satisfy the authorization standard, because the language of the AEDPA does not limit authorization to specific claims, when authorization is granted, it should be for the entire petition.

The Ninth Circuit, the only circuit to have addressed this issue, has held that a circuit court's grant of authorization entitles a petitioner to file in the district court the entire application submitted for authorization. In reaching this conclusion, the court noted that the AEDPA only refers to a court's authority to grant or deny "an application." By contrast, the Act establishes rules governing specific claims in an application in two places, namely in its provisions governing a district court's disposition of an authorized successive application and establishing the new certificate of appealability requirement. The court further noted that courts will often grant authorization without explanation, which indicates that the court may have considered a requirement that it consider each claim in an authorization motion individually to be too burdensome a procedure.

Although the Ninth Circuit's holding appears to correctly interpret the AEDPA, the implicit policy reasons which the court relied on are unpersuasive. When a circuit court adjudicates an authorization motion, the court ordinarily must consider whether each claim satisfies the authorization standard. To the extent that it may be unclear as to which claims merit authorization, the court could grant authorization only to those claims that might meet the standard and deny authorization for the other claims. However, the Ninth Circuit correctly held that the language of the AEDPA indicates that authorization should be granted for the whole application when authorization should be granted for at least one claim.

In the § 2255 context, allowing petitioners to file a § 2255 motion raising all of the claims presented in a successful authorization motion

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289. See Nevius v. McDaniel, 104 F.3d 1120, 1121 (9th Cir. 1996); see also Woratzeck v. Stewart, 118 F.3d 648, 650 (9th Cir. 1997) (citing Nevius, 104 F.3d at 1121).

290. Nevius, 104 F.3d at 1121 (citing 28 U.S.C. § 2244(b)(3)).

291. See id. ("A district court shall dismiss any claim presented in a second or successive application . . . .") (quoting 28 U.S.C. § 2244(b) (emphasis added); see id. ("A certificate of appealability . . . shall indicate which specific issue or issues satisfying the showing . . . .") (quoting § 2253(c)(3) (emphasis added)).

292. See id. at 1121-22.
may allow some petitioners to bypass the AEDPA's successive application substantive restrictions. As discussed below, although the AEDPA establishes a strict standard for granting authorization to file a successive § 2255 motion, it does not explicitly place any restrictions on how a court should adjudicate an authorized successive § 2255 motion itself. In other words, the AEDPA has not changed how a district court should adjudicate a successive § 2255 motion after the motion has been authorized. Because of this omission, a petitioner may be able to include in an authorization motion a claim otherwise barred by the AEDPA's successive application provisions with a claim for which authorization may be granted, obtain authorization for the entire motion based on the latter claim, and then raise both claims in the district court without the AEDPA's restrictions applying to either claim in that proceeding. Using this procedure, a petitioner may be able to bypass certain AEDPA restrictions.

H. Where Should a Petitioner File?

One practical question that a petitioner must confront is where he or she should file if it is unclear whether his or her application is successive. This problem becomes more severe in light of the one year period of limitations, as filing an application in the wrong court could delay filing in the proper court until after the limitations period has expired.

In those circuits that follow the procedure of having district courts transfer second or successive applications to the appropriate circuit court and count the filing in the district court as the filing date, it would be most prudent for a petitioner to file his or her application in the district court. If the district court determines that the application is successive, then the court would transfer it to the circuit court for consideration. This would allow immediate circuit court review of the

293. See infra Part IV.E.2.

294. The Seventh Circuit has questioned the effectiveness of the division of authority between district and circuit courts based on the uncertainties in some situations of whether an application is actually successive:

A prudent legislature may wish to consider, therefore, whether the statutory division of authority between tribunals is appropriate. Assessing the wisdom of § 2244(b) as it stands is not our function, but copies of this opinion will be sent to the appropriate officials in Congress so that the legislature is made aware of the potential for duplication and delay.

Benton v. Washington, 106 F.3d 162, 165 (7th Cir. 1996).
issue, with an application wrongly transferred as a matter of law being
transferred back to the district court. Filing just in the circuit court is
not advisable because, if the circuit court denies the authorization
motion as unnecessary because the application is not successive, then
the petitioner will have to file in the district court and will presumably
be unable to take advantage of an earlier filing date. Of course, a
petitioner could file both in the district court and the circuit court. This
would be the most prudent course in those circuits which do not toll the
period of limitation if a petitioner initially files in the wrong court.

I. Challenges to a Denial of an Authorization Motion

Even though the AEDPA's requirement that a petitioner obtain
circuit court authorization in order to file a successive application in
district court generally makes an authorization order essential for a
petitioner to obtain any relief through a successive application, the
AEDPA severely restricts how a petitioner may challenge an adverse
authorization decision. In particular, the AEDPA provides that an
authorization decision is not appealable, subject to a petition for
rehearing, or subject to a petition for a writ of certiorari.295 Thus,
generally, a petitioner seeking to obtain authorization has only one
opportunity to present her or his case to a court, namely when initially
seeking authorization before the appropriate circuit court. However,
while Congress may have intended to preclude any court review of an
authorization decision, certain limited avenues of review remain
available. In fact, the Supreme Court, the circuit court which
adjudicates an authorization motion, and the appropriate district court
may all to some extent review an initial circuit court authorization
decision. This section explores the scope of review available in each of
these courts.

Before discussing the procedures available for reviewing a circuit
court authorization decision, it should be noted that although the
AEDPA restricts the review of both the denials of authorization and the
grants of authorization,296 the restrictions on challenges to the grants of
authorization motions are essentially meaningless, at least in the § 2254

295. See 28 U.S.C. §§ 2244(b)(3)(E) ("The grant or denial of an authorization motion by
a court of appeals to file a second or successive application shall not be appealable and shall
not be the subject of a petition for rehearing or for a writ of certiorari."). 2255 para. 8
(possibly incorporating § 2244(b)(3)(E) by reference; see supra Part III.A).
context. While the denial of an authorization motion generally concludes a petitioner's attempt to file a successive application, a grant of authorization merely allows the petitioner to file an application without controlling how the district court will adjudicate the application. In other words, when a petitioner files an authorized successive application, it does not matter whether the circuit court erroneously grants authorization because that consideration has no effect on the district court's decision as to whether the petitioner is entitled to relief. Although a circuit court has determined that a petitioner has made a prima facie showing of being entitled to relief, a respondent need not challenge this determination because the respondent can simply argue in the district court in response to the application that the petitioner is not entitled to relief. Thus, the AEDPA's restrictions on reviewing an authorization motion decision in practice are only relevant to a denial of an authorization motion.

I. Review in the Circuit Court

a. Sua Sponte Rehearings

As noted, the AEDPA prohibits an authorization decision from being "the subject of a petition for rehearing." Litigants ordinarily may petition the panel that reached an adverse decision for rehearing on the grounds that the panel overlooked or misapprehended certain law or facts. The AEDPA clearly precludes these petitions. However, a

297. In the § 2255 context, a district court may have broader authority to grant relief on a successive motion than a circuit court has to grant authorization. See infra Part IV.E.2. If this is the case, then allowing a district court to review a circuit court grant of authorization to file a successive § 2255 motion could limit the court's broader authority in those circumstances in which a circuit court should not have granted authorization. In other words, it appears that the AEDPA allows petitioners to obtain relief in some cases in which a circuit court granted authorization in error.

298. Circuit courts have acknowledged that the grant of an authorization motion is not an adjudication on the underlying merits of the application by noting this when granting authorization. See, e.g., Nevius v. Sumner, 105 F.3d 453, 462 (9th Cir. 1996) (granting authorization "[w]ithout intimating any view concerning the merits of [the] claim").

299. While a respondent may wish to have the option to immediately challenge a grant of authorization either in the circuit court that rendered the decision or the Supreme Court, the unavailability of this option does not prevent the respondent from arguing that a petitioner is not entitled to relief in the district court.


301. See FED. R. APP. P. 40(a).
circuit court panel may also *sua sponte* order a rehearing, and this authority was not affected by the AEDPA.

The Second Circuit in *Triestman v. United States*\(^\text{302}\) held that a circuit court may *sua sponte* order a rehearing despite the AEDPA's restrictions on petitions for rehearing.\(^\text{303}\) In reaching this decision, the court first noted that it was well-established that circuit courts have the authority to *sua sponte* order a rehearing.\(^\text{304}\) The court then reasoned that, by its plain language, the provision of the Act prohibiting a rehearing only applies when a *party* seeks the rehearing because the provision prohibits "petitions" for rehearing, rather than rehearings generally.\(^\text{305}\) Thus, the Second Circuit held that the Act did not affect its authority to *sua sponte* order a rehearing.\(^\text{306}\)

The Second Circuit's decision is certainly sound. As the court noted, the AEDPA does not contain a blanket prohibition on rehearings, but instead only prohibits petitions for rehearing.\(^\text{307}\) Furthermore, on a more practical level, the Second Circuit's holding does not compromise the Act's purpose of restricting the review of authorization decisions. When a panel of a circuit court denies a petitioner's authorization motion, the petitioner still may not request that the panel rehear the case and thus may not *himself* or *herself* challenge the denial of authorization through a rehearing. Only the panel which denied authorization can order a rehearing.

One consequence of the ability of a circuit court to *sua sponte* grant a rehearing is that the court may use this procedure to extend the thirty-day deadline for reaching a decision on an authorization motion.\(^\text{308}\) This can ensure that circuit courts are able to orderly reach decisions on authorization motions. A circuit court which grants a rehearing can give itself much needed time to seek responses from the parties, obtain the necessary records, and fully consider the issue of whether authorization should be granted. These benefits are well illustrated by the *Triestman*

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302. 124 F.3d 361 (2d Cir. 1997).
303. *Id.* at 367.
305. *See Triestman,* 124 F.3d at 367.
306. *See id.*
307. *See 28 U.S.C. § 2244(b)(3)(E).* When it drafted the AEDPA, Congress might not have realized that circuit courts have authority to *sua sponte* order a rehearing because this authority is not found in the Federal Rules of Appellate Procedure. However, as with other provisions of the AEDPA, when the Act does not explicitly restrict the available relief, courts should not read these restrictions into the statute.
308. *See supra* Part III.F.
case, which involved a complicated and novel issue arising out of the AEDPA's restrictions on successive applications. The *Triestman* panel denied the authorization motion within the thirty-day limit, but then *sua sponte* granted a rehearing to further consider the merits of the motion so that it could reach a more reasoned decision.

**b. Rehearings En Banc**

In addition to rehearings by the circuit court panel that previously decided a case, the Federal Rules of Appellate Procedure also authorize a circuit court to rehear a case *en banc*. A circuit court may order a rehearing *en banc* either *sua sponte* or at the suggestion of a party. Despite its clear availability, the provision of the AEDPA limiting the review of authorization decisions does not mention rehearings *en banc*. It may be that Congress intended to foreclose this avenue of relief through its general prohibition on petitions for rehearing. However, because the Act does not specifically prohibit rehearings *en banc*, this procedure should still be available, both at the suggestion of a party and *sua sponte*.

The Sixth and Ninth Circuits are the only circuits so far to have touched on the issue of whether the AEDPA prohibits rehearings *en banc*. The Ninth Circuit adjudicated this issue first when, in an addendum to a decision denying an authorization motion, the court dismissed as unauthorized a petitioner's suggestion for rehearing *en banc*. As support for this action, the court simply quoted the AEDPA's provision restricting review of authorization decisions without analyzing the issue. Subsequently, the Sixth Circuit also held that the AEDPA prohibits rehearings *en banc*, reasoning that a rehearing *en banc* simply is a type of rehearing, and that such rehearings are prohibited by the AEDPA's prohibition on appealing circuit court rulings on authorization motions.

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309. *See infra* Part IV.C.1.a.i (discussing whether a petitioner may obtain authorization to file a successive § 2255 motion which asserts a claim based on *Bailey v. United States*, 516 U.S. 137 (1995)).

310. *See* FED. R. APP. P. 35.

311. *See* FED. R. APP. P. 35(a) & (b).

312. *See* LIEBMAN & HERTZ, *supra* note 1, § 28.3d, at 1194-95 & n.119.

313. *See id.* (suggesting that the AEDPA does not preclude rehearings *en banc*).

314. *See* United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997).


316. *See In re* King, 190 F.3d 479, 481 (6th Cir. 1999). The Sixth Circuit also specifically rejected the reasoning from the Liebman and Hertz treatise suggesting that the AEDPA does not preclude rehearings in banc. *See id.*
Contrary to the Sixth and Ninth Circuits' rulings, a petitioner should still be able to file a suggestion for rehearing *en banc* despite the AEDPA's restrictions. The Federal Rules of Appellate Procedure establish two methods for a losing party to challenge a circuit court decision within the circuit, namely by filing either a "petition for panel rehearing" or a "suggestion" of a rehearing *en banc*. As noted by the Second Circuit, however, the Act only prohibits *petitions* for rehearing. Because the AEDPA only applies to petitions, by its plain language it does not preclude a "suggestion" for rehearing *en banc*. In addition, the Act does not specify that it applies to rehearings *en banc* at all.

The AEDPA's restrictions on review also should not preclude a circuit court from *sua sponte* ordering a rehearing *en banc* for two reasons which have been previously discussed. The Ninth Circuit has so held, relying on the Second Circuit's decision that the AEDPA did not preclude a three judge panel from *sua sponte* ordering a rehearing. This ruling makes sense. First, the restrictions do not preclude the court from acting *sua sponte*. Second, as just noted, the restrictions simply do not state that they apply to rehearings *en banc*.

As with allowing a court to *sua sponte* order a rehearing, allowing a suggestion for a rehearing *en banc* also does not undermine the effectiveness of the AEDPA's restrictions on review of authorization decisions. In contrast to a petition for rehearing, a circuit court need not take any action after a petitioner files a suggestion for rehearing *en banc*. Thus, allowing petitioners to make such suggestions would not unduly burden a circuit court. Furthermore, the ability of a circuit court to order a rehearing *en banc* is essential for sound circuit procedures. A rehearing *en banc* generally is the only method for the full circuit court to reconsider a panel decision rather than be bound by the decision.

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317. FED. R. APP. P. 40.
318. FED. R. APP. P. 35.
320. See Thompson v. Calderon, 151 F.3d 918, 922 (9th Cir. 1998) (quoting Triestman v. United States, 124 F.3d 361, 367 (2d Cir. 1997)).
321. See FED. R. APP. P. 35(b) ("[A] vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.").
322. Most circuit courts have established the rule that a panel generally is bound by a prior panel's decision. See United States v. Seals, 130 F.3d 451, 463 (D.C. Cir. 1997), cert. denied, 524 U.S. 928 (1998); United States v. Call, 129 F.3d 1402, 1404 n.2 (10th Cir. 1997), cert. denied, 524 U.S. 906 (1998); Okoro v. INS, 125 F.3d 920, 925 (5th Cir. 1997); Cargill v.
Without the ability to order a rehearing *en banc*, the full circuit court will never have the opportunity to consider an issue that its members disagree over, opening up the possibility of creating unresolvable intra-circuit splits.

c. Successive Authorization Motions

While the AEDPA substantially limits successive applications, it does not address how circuit courts should adjudicate successive *motions for authorization* to file a successive application. Although, in the context of same claims, the successive application provisions prohibit claims "presented in a prior *application*," the Act is completely silent as to whether a successive authorization motion should be treated any differently from a first authorization motion. It is recommended that successive authorization motions not be subject to any stricter standards than first motions, given the AEDPA's silence on the issue and, as will be demonstrated, the likelihood that placing restrictions on successive authorization motions would not substantially curtail the ability of a petitioner to obtain authorization based on a successive authorization motion.

The Seventh Circuit, the only circuit court so far to address how a circuit court should treat a successive authorization motion, has held that a claim raised in a prior authorization motion should be treated as if it had been presented in a prior application, even if the petitioner never actually raised the claim in a prior application filed in district court. In reaching this decision, the Seventh Circuit acknowledged that this was not the literal or natural reading of the AEDPA, but reasoned that a literal reading could not be the correct one because it would result in those who had been granted authorization based on the prior authorization motion being worse off than those who previously had


323. 28 U.S.C. § 2244(b)(1)-(2) (emphasis added).

324. See Bennett v. United States, 119 F.3d 470, 471 (7th Cir. 1997).
been denied authorization. In particular, those who had been granted authorization and thus were able to present their claims in an application filed in the district court would not be able to seek authorization to raise the same claim again, whereas those who were denied authorization and thus were unable to present their claims in an application could raise the claim again. The Seventh Circuit therefore held that when a circuit court denial of an authorization motion is "on the merits," rather than for reasons unrelated to the merits of the authorization motion, the claims in that motion have been "presented in a prior application."  

The Seventh Circuit's decision that a claim raised in a prior authorization motion should be treated as if it had been presented in a prior application should not be followed. The most obvious reason for disagreeing with this decision is that the court read into the AEDPA a restriction on raising claims in a successive application which clearly is not in the statute. A petitioner who merely has sought in an authorization motion to raise a claim in a successive application simply has not "presented" the claim in an application. As discussed in the introduction, restrictions on relief which are not explicit should not be read into the AEDPA to the detriment of the petitioner. In addition, the literal reading of this provision is not so absurd as to reject it. Although the Seventh Circuit found that the literal reading of the AEDPA could not be right, the way in which the court read the Act may have only a minimally different affect than the reading which it rejected. In particular, these provisions readily can be interpreted to require that the law or fact must have been unavailable at the time of the prior authorization motion. Under this interpretation, the only

325. See id.
326. The Seventh Circuit provided three examples of circumstances in which the denial of an authorization motion is unrelated to the merits of the motion: failure to pay the filing fee, failure to exhaust state court remedies, and failure to submit all of the required documents. See id. at 471. However, at least the first two examples might never occur in the authorization motion context: courts have held that petitioners need not pay a filing fee to move for authorization, see, e.g., Liriano v. United States, 95 F.3d 119, 123 (2d Cir. 1997), and the question of whether a petitioner has exhausted state court remedies might not be at issue for purposes of deciding whether authorization should be granted, see infra Part IV.D.
327. Bennett, 119 F.3d at 471.
328. A different case may be presented when a petitioner initially files a successive application in a district court and the court transfers the application to a circuit court. It is arguable in such a situation that the petitioner "presented" the claims in the application to the district court.
329. See supra notes 60-62 and accompanying text.
330. Interpreting the requirement that the law or fact was previously unavailable to
practical difference between these two readings may be in their application to claims raised in a prior authorization motion in the § 2254 context. In this situation, the Seventh Circuit's approach would completely preclude the claim, while the rejected interpretation would only substantially limit these claims to situations in which there was an intervening change in law or new facts were discovered. As to other claims, in the § 2254 context for new claims, for a claim to be authorized it must be based on either a new rule of law which "was previously unavailable" or a factual predicate that could not have been previously discovered.1 Similarly, in the § 2255 context, all claims must be based on a new rule of constitutional law or newly discovered evidence to be authorized. For these claims, both the Seventh Circuit's reading and the reading that it rejected require either new law or newly discovered evidence.

Finally, the Seventh Circuit failed to address the fact that the successive § 2255 motion authorization provisions of the AEDPA do not, on their face, place a blanket prohibition on successive same claims. In the § 2255 context, whether a claim was previously presented is irrelevant to determining whether to grant authorization. Because the Seventh Circuit was considering a motion for authorization to file a successive § 2255 motion, the court incorrectly read the law.

2. Review by the Supreme Court

The AEDPA precludes review of an authorization decision through a petition for a writ of certiorari, the ordinary method by which litigants seek Supreme Court review of circuit court decisions. As noted in the introduction, the Supreme Court upheld this restriction against a constitutional challenge in Felker v. Turpin. In so doing, the Court held that the AEDPA's revocation of its certiorari jurisdiction did not violate Article III, Section 2 of the Constitution because the Court could still review the circuit court authorization decisions through a habeas petition filed directly in the Court pursuant to 28 U.S.C.

mean that the law or fact was unavailable at the time of the prior authorization motion is not a necessary reading of the AEDPA. However, this reading does allow the denial of an authorization motion to have some preclusive effect.

While the Supreme Court has established that review of authorization decisions is available in the Court, this review is extremely limited. Without deciding whether the AEDPA's substantive restrictions on successive applications apply to petitions filed directly in the Supreme Court, the Court in *Felker* noted that these restrictions "certainly inform our consideration of original habeas petitions." Thus, the AEDPA's restrictions circumscribe the review available in the Supreme Court. Furthermore, the Court noted that under its own rules established prior to the AEDPA, a petitioner must demonstrate "exceptional circumstances" in order for the Court to grant an original writ. Thus, a petitioner whose authorization motion was denied by a circuit court may get relief in the Supreme Court only in limited and exceptional circumstances. Even with such restrictions, filing an original writ with the Supreme Court remains open as a method for seeking relief once a circuit court has denied authorization.

A petitioner can obtain Supreme Court review of a circuit court denial of authorization through certiorari if the circuit court erroneously found that the application is successive. In *Stewart v. Martinez-Villareal*, the Supreme Court held that it could review, through the certiorari process, a circuit court decision that authorization is not required. The Court indicated that it reached this decision because the restriction on certiorari review only applies to actual successive applications. This holding presents the problem of the Supreme Court not knowing whether it has authority to review a circuit court decision through the certiorari process until the Court first determines, through an examination of the substance of the circuit court decision, whether the application at issue actually is successive.

3. **Review by the District Court**

A petitioner may also seek review of an authorization decision by filing an application directly in the district court without authorization. A petitioner may use this procedure to challenge a circuit court decision
that an application is actually successive.341 When a petitioner files an application without authorization, the district court must make a decision at that time whether the application is successive. If the court determines that the application is not successive, then the petitioner does need authorization to file it and the application will proceed. Unfortunately for the petitioner, if a district court does find that an application is not successive, this decision is reviewable by the circuit court which denied authorization if either party takes an appeal after the district court's ultimate adjudication of the application.342

In addition, to the extent that a respondent bears the burden of pleading that an application is successive,343 a petitioner may try to file an unauthorized successive application in the district court with the hope that the respondent will fail to plead that the application is successive. However, if the respondent does so plead and the application is truly successive, then the district court will be unable to review the authorization decision as the AEDPA clearly states that a petitioner must first receive authorization to file a successive application. Furthermore, if the district court can sua sponte raise the issue of whether an application is successive, then any unauthorized successive application will be unsuccessful, and the circuit court denial of authorization will be unreviewed.

IV. STANDARDS FOR GRANTING AUTHORIZATION

After having discussed the issues of whether an action is a successive application and what procedures govern adjudicating motions for authorization to file a successive application, this Part explores the standards governing a circuit court's decision on whether to grant or deny an authorization motion. In doing so, this Part first explores the requirement that a petitioner make, in his or her authorization motion, a prima facie showing that the successive application proposed to be filed in district court satisfies the requirements for obtaining relief in order for the circuit court to authorize the application. Next, this Part briefly describes the substantive restrictions on granting authorization as to both same claims and new claims, compares these restrictions to those

341. A challenge to a decision that an application is successive is not technically a challenge to the authorization decision. Instead, this is a challenge to the circuit court decision that authorization is necessary for the application to be filed.

342. Any initial decision by a circuit court denying authorization ordinarily would not be the law of the case concerning the issue of whether the proposed application is actually successive because the denial would not be a ruling on the application itself.

343. See supra Part III.C.
under pre-AEDPA law, and highlights some of the issues raised by these restrictions. This Part then discusses whether a circuit court may or must consider certain defenses not mentioned in the AEDPA's substantive successive application restrictions when adjudicating a motion for authorization to file a successive application. Finally, this Part explores what restrictions the AEDPA's successive application provisions place on authorized successive applications adjudicated in the district court.

A. What Is A Prima Facie Showing?

The AEDPA provides that a circuit court may only grant a motion for authorization to file a successive application if it finds that "the application makes a prima facie showing that the application satisfies the requirements of this subsection [section 2244(b)]." However, as with the term "second or successive application," the AEDPA does not define the term "prima facie showing." Thus, as with other issues, the Act has left the courts with the task of resolving what exactly a petitioner must demonstrate to make a prima facie showing.

The Seventh Circuit has held that the prima facie showing is "a sufficient showing of possible merit to warrant a fuller exploration by the district court" and that a petitioner has made such a showing when "it appears reasonably likely that the application satisfies the stringent" successive application requirements. The court specifically noted that it reached this conclusion "without guidance in the statutory language or history or case law." The First and Ninth Circuits have followed the Seventh Circuit's standard. Unfortunately, the Seventh Circuit's standard, like the statutory standard itself, is not very informative. In this light, this Article will consider whether the prima facie showing standard should be stringent or minimal.

There are a number of considerations that weigh in favor of requiring that a petitioner make only a minimal showing in order to make a prima facie showing. The first is the finality of the authorization

344. 28 U.S.C. §§ 2244(b)(3)(C), 2255 para. 8 (possibly incorporating § 2244(b)(3)(C) by reference; see supra Part III.A). To the extent that § 2255 does not incorporate this provision, an application presumably need only cite the new rule of constitutional law or newly discovered evidence to obtain authorization.
346. Bennett v. United States, 119 F.3d 468, 469-70 (7th Cir. 1997).
347. Id. at 469.
decision. As discussed above, although there are some avenues available for a petitioner to challenge the denial of an authorization motion, these avenues are extremely circumscribed.\footnote{349} Thus, in the ordinary case a circuit court denial of an authorization motion will terminate a petitioner's attempt to file a successive application. Because the authorization decision has such finality, a court should not deny an authorization motion unless it is clear that the petitioner will be unable to obtain relief if allowed to file the successive application in the district court.

The second consideration weighing in favor of a minimal showing is the time constraints which the AEDPA places on circuit courts adjudicating authorization motions. As noted, the Act generally requires that circuit courts render a decision on an authorization motion within thirty days of the filing of the motion.\footnote{350} This is a very short time for a circuit court to obtain a record of the prior proceedings, familiarize itself with the record, seek a response from the respondent, and render an informed decision on the motion. Given this abbreviated time frame, a circuit court may be unable to probe deeply into the merits of the authorization motion. While some circuit courts may use certain procedures to avoid deciding authorization motions within the requisite thirty days,\footnote{351} this time limit imposes significant constraints on those circuit courts which adhere to it.

The third consideration weighing in favor of a minimal showing is that traditionally district courts are the courts of first impression, whereas circuit courts are the courts of review within the federal judiciary. With the proper procedures and experience, district courts are better equipped than circuit courts to resolve any disputed issues that may be relevant to the successive application. By contrast, circuit courts are less familiar with the role of deciding cases in the first instance. In addition, any substantial scrutiny into the merits of a successive application by a circuit court could render any subsequent district court proceeding if authorization is granted essentially superfluous.

Given these considerations, it is better for circuit courts to not hold petitioners to too high of a standard when adjudicating authorization motions.\footnote{352} In this respect, it is important to emphasize that the grant of

\footnotesize{\begin{itemize}
  \item \footnote{349} \textit{See supra} Part III.I.
  \item \footnote{350} \textit{See supra} Part III.F.
  \item \footnote{351} \textit{See supra} notes 283-288 and accompanying text.
  \item \footnote{352} \textit{Cf.} LIEBMAN & HERTZ, \textit{supra} note 1, § 28.3d, at 1193-94 (suggesting that the \textit{prima}}
an authorization motion does not entitle a petitioner to any relief. Instead, it simply allows the petitioner to file the successive application in the district court, which must then independently review the merits of the application to determine whether the petitioner is entitled to relief.\textsuperscript{353} Furthermore, if a district court does grant a petitioner relief after authorization is granted, then the circuit court that authorized the successive application will almost certainly be able to review the decision on appeal in a much more considered fashion.

\textbf{B. Substantive Standards Governing Same Claims}

Prior to the enactment of the AEDPA, a petitioner could not raise a claim in either a successive § 2254 petition or a successive § 2255 motion that the petitioner had raised in a prior petition or motion unless raising the claim served "the ends of justice."\textsuperscript{354} Although the Supreme Court had not settled on the scope of the ends of justice exception, the Court had decided that this exception at least allowed a petitioner to raise a colorable claim of factual innocence.\textsuperscript{355} The AEDPA, however, completely eliminated this ends of justice exception in the § 2254 context. This section briefly discusses same claims in the § 2254 context and the issue of whether the AEDPA eliminated this exception in the § 2255 context.

\textit{1. Section 2254 Petitions}

In the § 2254 context, the AEDPA completely bars a petitioner from raising a claim that he or she raised in a prior petition.\textsuperscript{356} This blanket prohibition eliminated the previous authority of courts to entertain a same claim when it served the ends of justice.\textsuperscript{357} Although this change raises constitutional concerns that this Article will not address, two
circuit courts have upheld this provision against various constitutional challenges.\textsuperscript{358} Other circuits have simply applied this provision without discussing its constitutionality.\textsuperscript{359}

To the extent that the prohibition on same claims is constitutional, it has a relatively straightforward application. Once a court determines that a petitioner has previously raised a claim, then the court cannot grant authorization based on the claim. This leaves only the initial consideration of whether the claim actually is the same claim as one that was previously raised.\textsuperscript{360} Under the law prior to the AEDPA, the question of whether a claim was a different claim was governed by the "substantial similarity" test.\textsuperscript{361} Given its established meaning prior to the enactment of the AEDPA, it is recommended that the same claim language in the AEDPA be interpreted in accordance with its prior usage.\textsuperscript{362}

2. Section 2255 Motions

Unlike the AEDPA's provisions governing successive § 2254 petitions, its provision governing successive § 2255 motions does not distinguish between same claims and new claims in its standard for whether a circuit court may grant authorization.\textsuperscript{363} Instead, the § 2255 provision generally applies whether or not the motion contains claims

\textsuperscript{358} See In re West, 119 F.3d 295, 296 n.3 (5th Cir. 1997) (noting that the Supreme Court in Felker held that the restrictions on successive petitions did not suspend the writ, but declining to decide whether they violate due process or equal protection); Denton v. Norris, 104 F.3d 166, 167-68 (8th Cir. 1997) (holding that the restrictions on successive applications did not suspend the writ, citing Felker, 518 U.S. 651 and declining to decide whether the restrictions violated due process as that claim lacked merit); cf. In re Waldrop, 105 F.3d 1337, 1338 (11th Cir. 1997) (per curiam) (declining to decide "whether a claim of actual innocence may be raised either in a successive habeas petition ... or as a separate and independent constitutional claim").

\textsuperscript{359} See Vancleave v. Norris, 150 F.3d 926, 929 (8th Cir. 1997); In re Jones, 137 F.3d 1271, 1273 (11th Cir.) (per curiam), cert. denied, 523 U.S. 1041 (1998); In re Mills, 101 F.3d 1369, 1371 (11th Cir. 1996) (per curiam); Felker v. Turpin, 101 F.3d 95, 97 (11th Cir.) (per curiam), cert. denied, 519 U.S. 989 (1996); Hatch v. Oklahoma, 92 F.3d 1012, 1016 (10th Cir. 1996) (per curiam).

\textsuperscript{360} See Bennett v. United States, 119 F.3d 470, 471-72 (7th Cir. 1997); LIEBMAN & HERTZ, supra note 1, § 28.4a, at 1205.

\textsuperscript{361} See LIEBMAN & HERTZ, supra note 1, § 28.4a, at 1205.

\textsuperscript{362} Thus, for example, the Seventh Circuit has held that a petitioner's presenting new evidence to support a claim does not make the claim a new claim. See Felder v. McVicar, 113 F.3d 696, 698 (7th Cir. 1997).

\textsuperscript{363} See 28 U.S.C. § 2255 para. 8; LIEBMAN & HERTZ, supra note 1, § 41.7d, at 1609. Paragraph eight of § 2255, the only paragraph in § 2255 governing successive motions, makes no mention of a distinction between same claims and new claims.
which were raised previously. Thus, the AEDPA has not established any additional restrictions specific to same claims in successive § 2255 motions. Since the § 2255 general restrictions are similar to the restrictions on new claims in the § 2254 context, the § 2255 restrictions will be discussed in that section.

Despite the clear statutory difference between how the AEDPA treats § 2254 and § 2255 same claims, only the Second Circuit appears to have recognized this distinction. The Seventh Circuit, by contrast, has held that § 2255 incorporates the substantive restriction on same claims that applies to § 2254 petitions. This argument, however, is unpersuasive. Section 2255 incorporates procedures for granting authorization, not the standards for granting authorization. Furthermore, because § 2255 contains its own substantive standard for granting authorization, incorporation of a § 2244 substantive standard would not make sense. Finally, because the substantial pre-AEDPA restrictions on same claims still apply to claims raised in the district court if a circuit court does grant a petitioner authorization to file a successive § 2255 motion, the Act's failure to completely preclude same claims at the authorization stage does not broaden relief available to a petitioner.

C. Substantive Standards Governing New Claims

Prior to the enactment of the AEDPA, a petitioner could raise a new claim in a successive § 2254 petition or § 2255 motion if the petitioner could demonstrate either (1) cause for failing to raise the claim previously and prejudice from failing to consider the claim or (2) that a miscarriage of justice would result from the failure to consider the claim. Cause could be shown where the factual or legal basis for the claim was not reasonably available at the time of the prior application. However, cause was not limited to these two situations, but instead

364. See Galtieri v. United States, 128 F.3d 33, 35 n.1 and accompanying text (2d Cir. 1997) (noting that the standard for successive § 2255 motion certification is "a slightly different standard applicable to second 2254 petitions").

365. See Alexander v. United States, 121 F.3d 312, 314 (7th Cir. 1997). The Seventh Circuit in Alexander cited as support a prior circuit decision denying an authorization motion because the claim in the proposed § 2255 motion had been raised previously. See id. (citing Bennett, 119 F.3d at 471).


367. See infra Part IV.E.


369. See id. at 493 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).
hinged on the broader question of whether there was an objective factor external to the petitioner which prevented the petitioner from raising the claim previously. Prejudice could be demonstrated through a showing that the error resulted in a trial which was fundamentally unfair. Finally, the miscarriage of justice exception played a role similar to that of the ends of justice exception in the same claim context, namely "guaranteeing that the ends of justice will be served in full."

These standards provided courts with some flexibility in determining whether to entertain a claim in a successive application. The AEDPA, however, replaced this flexibility with only two situations in which a petitioner may present a claim in a successive application: the claim must be based on either (1) a rule of constitutional law, which the Supreme Court has made retroactively applicable on collateral review, and which was previously unavailable; or (2) newly discovered evidence, which at least in the § 2254 context, supports a claim of a constitutional error, and if proven, would demonstrate by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty beyond a reasonable doubt. This section discusses each component of the authorization requirements for claims based on new law and new evidence, and then comments on the elimination of the miscarriage of justice exception.

1. Claims Based on New Law

Allowing a petitioner to present a claim based on a change in law when the legal basis for the claim was not available at the time of the prior application was one of the grounds for establishing cause prior to the enactment of the AEDPA. The AEDPA narrowed this ground in two respects. First, the Act limits the type of change in law which can justify raising a claim in a successive application to new rules of constitutional law, a limitation which appears to severely restrict the types of claims that can be brought in a successive § 2255 motion. Second, the Act appears to require that the Supreme Court have made the new law retroactively available on collateral review, a condition which severely restricts when a petitioner can take advantage of a new rule in a successive application. This section explores the three requirements for raising a claim based on new law under the AEDPA.

370. See id. (citing Murray, 477 U.S. at 488).
372. McCleskey, 499 U.S. at 495.
373. See id. at 494-95.
a. Rule of Constitutional Law

The AEDPA restricted claims based on a change in law to those based on a "new rule of constitutional law." The Act borrows this phrase from the Supreme Court case of Teague v. Lane, 374 which limited the circumstances under which a petitioner could rely on a new rule of constitutional law in a collateral challenge to a conviction. The Court in Teague defined a new rule of constitutional law as a rule that was not previously dictated by the then-existing Court precedent. 375 The Court in Teague further held that a petitioner may only rely on a new rule in a collateral proceeding if the rule either places a class of private conduct beyond the power of the state to proscribe or is a "watershed" rule of criminal procedure that implicates fundamental fairness and accuracy of a criminal proceeding and is implicit in the concept of ordered liberty. 376 In contrast, a petitioner can raise claims in applications which are not based on a "new rule of constitutional law" without regard to the Teague bar. 377

Although the change in law restriction may make sense in the § 2254 context, this change is not appropriate in the § 2255 context. Section 2255 generally provides relief both for constitutional and certain non-constitutional claims based on a change in law. 378 One example of a non-constitutional claim based on new law is when the Supreme Court places conduct outside the scope of a criminal statute by limiting the scope of the statute. While the AEDPA does not limit the relief available in the first § 2255 motion, it does limit the grounds for raising a claim in a

375. See id. at 301. The Court alternatively defined a new rule as one that "breaks new ground or imposes a new obligation on the States of the Federal Government." Id.
376. See id. at 311.
377. See, e.g., United States v. McPhail, 112 F.3d 197, 199 (5th Cir. 1997), and cases cited therein; cf. Bousley v. United States, 523 U.S. 614, 619-21 (1998) (holding that Teague is inapplicable to a claim based on a judicial construction of a criminal statute, which is a substantive rather than a procedural claim).
378. Section 2255 provides that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

379. The AEDPA appears to have limited appellate review of the denial of a § 2255
successive § 2255 motion to a new rule of constitutional law. Thus, there are circumstances in which a petitioner could not raise a claim in a first petition because of then-existing law, but when the law changes, the AEDPA precludes the petitioner from raising the claim in a successive application. This section now discusses two prominent examples of specific claims that previously could be raised in successive § 2255 motions but now no longer can, and briefly explores how courts have and should resolve this problem.

i. Bailey v. United States

In 1995, the Supreme Court in *Bailey v. United States*\(^{380}\) limited the definition of "use" in the criminal statute which proscribes using a firearm "during and in relation to any crime of violence or drug trafficking crime ... for which [the defendant] may be prosecuted in a court of the United States."\(^{381}\) In particular, the Court defined "use" as "actively employ[ing] the firearm during and in relation to the predicate motion to constitutional claims by instituting the certificate of appealability requirement. See 28 U.S.C. § 2253(c). Since in order to obtain a certificate of appealability, a petitioner must make a substantial showing of the denial of a constitutional right. See id. A petitioner may not be able to obtain a certificate of appealability to challenge the denial of a non-constitutional claim raised in a § 2255 motion. Compare *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996) (holding that a petitioner cannot obtain a certificate of appealability based on a non-constitutional, *Bailey* claim), vacated on other grounds, 524 U.S. 236 (1998) with *United States v. Gobert*, 139 F.3d 436, 437-39 (5th Cir. 1998) (holding that a petitioner can obtain a certificate of appealability based on a *Bailey* claim since although *Bailey* is a statutory case it implicates constitutional concerns).

This restriction poses a potential Article III violation because, on its face, a petitioner may not appeal to the circuit court the denial of a nonconstitutional claim properly raised in a § 2255 motion and thus cannot raise the claim in the Supreme Court through direct review. Also, Federal Rule of Appellate Procedure 22(a) precludes renewal in the circuit court: "If an application is made to ... the district court and denied, renewal of the application before a circuit judge shall not be permitted." FED. R. APP. P. 22(a). However, as in *Felker*, it may be that such a petitioner still can seek relief in the Supreme Court through filing a habeas petition directly with the Court. However, this is not a particularly effective remedy. See supra Part III.I.2 (discussing the limited review available in a habeas petition filed directly in the Supreme Court).

This restriction also poses an equal protection problem. The Rules of Appellate Procedure provide that, if the district court grants relief based on a non-constitutional claim and the government appeals, the government need not obtain a certificate of appealability. See FED. R. APP. P. 22(b) ("If an appeal is taken by the State or its representative, a certificate of appealability is not required."). Thus, when a petitioner raises certain non-constitutional claims in a § 2255 motion, the petitioner may not appeal if he or she loses, but the government may appeal if he or she does get relief.

crime. 382 Prior to the Bailey decision, some lower courts employed a broader definition of "use." 383 Because the Bailey decision limited the definition of "use," after the decision was rendered, petitioners who had been convicted in circuits which had subscribed to the broader definition sought relief on the ground that the Supreme Court decision placed their conduct outside the scope of the criminal statute. Such a claim is cognizable if brought in a first § 2255 motion. 384 However, those petitioners who had already filed a first § 2255 prior to the Bailey decision and then raised the Bailey claim in a motion filed after the enactment of the AEDPA had to confront the AEDPA's successive application provisions.

All of the circuits which have addressed the issue have held that a petitioner may not obtain authorization to file a successive application based on a Bailey claim. 385 These courts based their decisions on the conclusion that Bailey did not announce a new rule of constitutional law, but rather simply announced a new rule of statutory construction. 386 Thus, a claim based on Bailey does not fall within the AEDPA's statutory requirement that authorization be granted based on a new rule of constitutional law.

Although all of the circuits to have held that authorization may not be granted based on a Bailey claim, three have held that a petitioner may raise a Bailey claim using an alternative procedural vehicle. The Ninth Circuit first suggested a petitioner unable to obtain authorization to file a successive § 2255 motion raising a Bailey claim may be able to

382. Bailey, 516 U.S. at 150.
383. See, e.g., United States v. Torres-Rodriguez, 930 F.2d 1375, 1385-86 (9th Cir. 1991) (holding that mere possession is sufficient to constitute use).
385. See Gray-Bey v. United States, 209 F.3d 986, 989 (7th Cir. 2000) (per curiam); Triestman v. United States, 124 F.3d 361, 371-72 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 248 (3d Cir. 1997); In re Vial, 115 F.3d 1192, 1195-96 (4th Cir. 1997); Coleman v. United States, 106 F.3d 339 (10th Cir. 1997) (per curiam); United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997); In re Blackshire, 98 F.3d 1293, 1294 (11th Cir. 1996) (per curiam); Nunez v. United States, 96 F.3d 990, 992 (7th Cir. 1996); cf. In re Hanserd, 123 F.3d 922, 930 (6th Cir. 1997) (stating that the petitioner could pursue a Bailey claim under § 2241 if § 2255 were unavailable, but holding that § 2255 was available because the AEDPA did not apply to the petition).
386. See Gray-Bey, 209 F.3d at 989; Triestman, 124 F.3d at 372; In re Dorsainvil, 119 F.3d at 247-48; In re Vial, 115 F.3d at 1195-96; Coleman, 106 F.3d at 341; Lorentsen, 106 F.3d at 279; In re Blackshire, 98 F.3d at 1294; Nunez, 96 F.3d at 992.

In addition, the Fourth Circuit held that preventing a movant from raising a Bailey claim in a successive § 2255 motion does not constitute a suspension of the writ. See In re Vial, 115 F.3d at 1197-98. The Fourth Circuit reached this conclusion based on the Supreme Court's discussion in Felker of the AEDPA's limitations on successive applications. See id.
successfully raise such a claim in a § 2241 petition.\textsuperscript{387} The Second and Third Circuits went further, and in detailed opinions, held that a petitioner who is precluded from raising a Bailey claim in a successive § 2255 motion may in fact raise such a claim in a § 2241 petition.\textsuperscript{388} These courts held that in such circumstances the AEDPA's successive application restrictions rendered relief by way of a § 2255 motion "inadequate or ineffective," because relief pursuant to a § 2241 petition is available when a § 2255 motion is "inadequate or ineffective," relief could be available under § 2241 for a Bailey claim.\textsuperscript{389} However, because § 2241 generally is not available simply because a petitioner has failed on the merits in a § 2255 motion,\textsuperscript{390} the Second Circuit limited the availability of § 2241 to situations in which denying a petitioner any relief would raise serious constitutional concerns.\textsuperscript{391} These decisions are important because they allow a petitioner to obtain relief when such relief is explicitly precluded by the AEDPA's successive application restrictions.\textsuperscript{392}

Because certain circuit courts have held that § 2241 is available for petitioners to pursue relief that the AEDPA has made unavailable under § 2255, raises the question of the scope of § 2241.\textsuperscript{393} The Second Circuit has indicated that § 2241 is available when the unavailability of any other avenue of relief "raise[s] serious constitutional questions."\textsuperscript{394} The Third Circuit stated that § 2241 is available when the unavailability of § 2255 would result in a "complete miscarriage of justice."\textsuperscript{395} The Seventh Circuit has indicated that § 2241 is available to pursue claims involving a fundamental defect in a conviction or sentencing that could not have been raised in the prior § 2255 motion due to an intervening change in law.\textsuperscript{396} The Eleventh Circuit has held that § 2241 is available for claims that circuit court law previously foreclosed, but are based on new law that the Supreme Court has made retroactively applicable and that makes the offenses for which the petitioner was convicted

\textsuperscript{387} See Lorentsen, 106 F.3d at 279.
\textsuperscript{388} See Triestman, 124 F.3d at 373-80; Dorsainvil, 119 F.3d at 248-52.
\textsuperscript{389} See Triestman, 124 F.3d at 380; Dorsainvil, 119 F.3d at 251.
\textsuperscript{390} See supra note 101 and accompanying text.
\textsuperscript{391} See Triestman, 124 F.3d at 377.
\textsuperscript{392} These decisions raise too many issues for a full discussion here.
\textsuperscript{394} Triestman, 124 F.3d at 377.
\textsuperscript{395} Dorsainvil, 119 F.3d at 251.
\textsuperscript{396} See In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998).
nonexistent. The First Circuit has noted § 2241 remains available in limited circumstances, but declined to elaborate on the scope of such circumstances. The Sixth Circuit has indicated that only a claim of "actual innocence" could be pursued through § 2241. This variety of readings of the scope of § 2241 indicates that the AEDPA has created a new and important § 2241 jurisprudence, which most likely will have to be ultimately defined by the Supreme Court.

ii. Rutledge v. United States

In Rutledge v. United States, the Supreme Court held that convicting a defendant of both conspiracy to distribute narcotics and conducting a continuing criminal enterprise violated double jeopardy. Prior to Rutledge, the practice in two circuits when a defendant was convicted of both offenses was to combine the two convictions such that the defendant would only be punished for one of the two convictions, whereas a third circuit authorized concurrent sentences for the two convictions. The Court in Rutledge, however, held that one of the convictions must be dismissed. As with a Bailey claim, a petitioner generally is able to raise a Rutledge claim in a first § 2255 motion, but it does not appear that authorization can be granted on an application based on a Rutledge claim.

The Second Circuit, a circuit that had followed the practice of combining the two convictions, has held that a petitioner may not obtain authorization to file a successive § 2255 motion based on a Rutledge claim. The court reasoned that because any challenged sentencing error involved in combining the convictions was "merely cosmetic," a petitioner could not obtain relief on collateral review. The only practical affect of this combination was the imposition of an extra $50

397. See Wofford v. Scott, 177 F.3d 1236, 1244 (11th Cir. 1999).
398. See United States v. Barrett, 178 F.3d 34, 52 (1st Cir. 1999).
401. See id. at 306-07.
406. See Underwood v. United States, 166 F.3d 84, 87-88 (2d Cir. 1999).
407. See id. at 87.
special assessment, and the court found that the petitioner could have raised a challenge to the $50 special assessment on direct appeal.\textsuperscript{408} Furthermore, the court found that an unjustified $50 assessment does not rise to the level of fundamental miscarriage of justice.\textsuperscript{409} The Second Circuit, without much additional discussion, then held that § 2241 relief was not available based on the same considerations that § 2255 relief was not available.\textsuperscript{410}

Despite the Second Circuit's decision, it is arguable whether a Rutledge claim is sufficiently similar to a Bailey claim such that similar alternative remedies should be available as in the Bailey context. A Rutledge claim is similar to a Bailey claim in that both are claims by a convicted petitioner that a change in law has placed her or his conduct outside the scope of what is legitimately criminal. The Bailey decision accomplished this by narrowing the scope of a criminal statute such that a conviction outside of the scope violates due process. The Rutledge decision accomplished this by finding that a conspiracy to distribute narcotics accompanied by a continuing criminal enterprise conviction violates double jeopardy. While the Second Circuit focused on the practical consequences of the error in law, it was nonetheless an error of law. Thus, as with Bailey claims, even though the terms of the AEDPA's successive application provisions preclude petitioners from obtaining authorization to raise a Rutledge claim in a successive § 2255 motion, some avenue of relief, such as a § 2241 petition, should still be available.

\textit{b. Made Retroactive}

The literal terms of the AEDPA require the Supreme Court to make the new rule of constitutional law retroactively applicable to cases on collateral review for a petitioner to rely on the rule as a basis for a successive application. This provision is most obviously problematic because it requires action by the Supreme Court, whose docket is for the most part discretionary and is extremely limited. In addition, few new rules will meet the standard for being retroactively applicable, namely either placing a class of private conduct beyond the power of the state to proscribe, or being a "watershed" rule of criminal procedure.\textsuperscript{411}

\textsuperscript{408} See id. at 87-88.
\textsuperscript{409} See id. at 88.
\textsuperscript{410} See id.

411. In \textit{Teague v. Lane}, the Court stated that "we believe it unlikely that many such components of basic due process have yet to emerge." 489 U.S. 288, 313 (1989). See
An argument can be made that the AEDPA does not require that the Supreme Court actually decide that a new rule is retroactively applicable for authorization to be granted based on the rule. Under this argument, a circuit court could grant authorization if the court finds that the Supreme Court would hold the new rule to be retroactively applicable based on its precedent. However, this argument, is precluded by the AEDPA's plain language. Thus, the First, Fourth, Seventh, Ninth, and Eleventh Circuits have all required a Supreme Court decision for authorization to be granted as to a new rule.

It should be noted that this conclusion raises a serious issue when the successive application provisions combine with the new period of limitations provisions. In particular, the period of limitation provisions require an application to be brought within one year after a new law is made retroactively applicable on collateral review without regard as to whether the Supreme Court itself has held that the law is retroactively applicable. This means that if a lower court finds a new rule of constitutional law to be retroactively applicable, the period of limitation will begin to run even though the petitioner is unable to obtain authorization until the Supreme Court so holds. Thus, it may be if the Supreme Court does not find the right to be retroactively applicable within one year, a petitioner would be completely precluded from raising the claim in a successive application, thus raising constitutional concerns.

c. Previously Unavailable

The third requirement for a circuit court to grant authorization based on a new rule of constitutional law is that the rule be previously unavailable. This simply means that the rule was not available when the petitioner filed his or her previous application. This unavailability

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412. See LIEBMAN & HERTZ, supra note 1, § 28.3e, at 1198-99; see also In re Vial, 115 F.3d 1192, 1196-97 (4th Cir. 1997) (discussing and rejecting this argument).

413. See In re Vial, 115 F.3d at 1196-97.

414. See Rodriguez v. Bay State Corr. Ctr., 139 F.3d 270, 274-75 (1st Cir. 1998); Bennett v. United States, 119 F.3d 470, 471 (7th Cir. 1997); In re Vail, 115 F.3d at 1196 (specifically rejecting the argument that authorization may be granted if "Supreme Court precedent establishes that the new rule is of the type available to those proceedings on collateral review"); In re Hill, 113 F.3d 181, 184 (11th Cir. 1997) (per curiam); United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997); Nunez v. United States, 96 F.3d 990, 992 (7th Cir. 1996); cf. Triestman, 124 F.3d at 372 n.16 (declining to address this issue).

415. See 28 U.S.C. §§ 2244(d)(1)(C), 2255 para. 7(3).

416. Alternatively, the previously unavailable requirement can mean that the new rule
requirement is the same as under pre-AEDPA law, under which a petitioner could not rely on a legal theory in a successive application which was available when he or she filed the previous application. \(^{417}\) Thus, this third requirement of the AEDPA does not restrict the previously available relief.

d. Prejudice

Under the law prior to the AEDPA, a petitioner was required to demonstrate both cause and prejudice for failing to raise a new claim in a prior application for a court to consider the claim. However, neither the § 2254 nor the § 2255 successive application provisions of the Act establish a prejudice requirement for authorization to be granted based on a new rule of constitutional law. \(^{418}\) Because the Act does not mention a prejudice requirement, prejudice should not be a requirement for granting authorization. \(^{419}\) It would appear that a petitioner need only cite to the new rule of constitutional law which was previously unavailable to obtain authorization. Although the Act requires that a claim "rely on" a new rule, this requirement should be read simply to mean that the rule cited has some bearing on the challenged conviction. Of course, the prejudice requirement would remain in place when the district court considers whether to grant relief in an authorized successive application. \(^{420}\)

2. Claims Based on New Evidence

Relying on newly discovered evidence was another of the established grounds by which a petitioner could establish cause prior to the enactment of the AEDPA. \(^{421}\) The AEDPA established the following three requirements for authorization to be granted on a claim based on newly discovered evidence: (a) the evidence must be newly discovered;
(b) the claim that is supported by the evidence must establish a constitutional error, at least in the § 2254 context; and (c) the evidence, if proven, would demonstrate by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty of the offense beyond a reasonable doubt. While the first two requirements reflect pre-AEDPA law, the third requirement is substantially stricter than the pre-AEDPA prejudice requirement.

a. Newly Discovered

The first requirement for a claim based on new evidence is that the evidence be newly discovered. This requirement is a codification of the pre-AEDPA law under which the evidence underlying a claim in a successive application must have been unavailable at the time of the earlier application to justify raising the claim in a successive application. Thus, applying the AEDPA's requirements, the Tenth and Eleventh Circuits have held that a factual predicate that appears on the face of the record of the direct criminal proceedings is not newly discovered.\footnote{422} Similarly, the Eleventh Circuit has held that evidence is not newly discovered if both the petitioner and the petitioner's counsel had personal knowledge of the evidence during the original criminal proceeding,\footnote{423} and that in order for a petitioner to obtain authorization he or she may not merely allege a prior lack of knowledge but also must demonstrate that a reasonable investigation would not have uncovered the evidence.\footnote{424}

b. Constitutional Error

The second authorization requirement for a claim based on newly discovered evidence is that the claim, at least in the § 2254 context, rely on a constitutional error.\footnote{425} This requirement is simply a codification of the requirement that a claim be grounded in a constitutional error.\footnote{426} The § 2255 successive application provision, however, does not include the constitutional error requirement.\footnote{427} This omission may reflect an acknowledgment that a petitioner can raise certain non-constitutional

\footnote{422. See Hatch v. Oklahoma, 92 F.3d 1012, 1015 (10th Cir. 1996) (per curiam); Felker v. Turpin, 83 F.3d 1303, 1306 (11th Cir. 1996), cert. dismissed, 518 U.S. 651 (1996).}

\footnote{423. See In re Magwood, 113 F.3d 1544, 1548 (11th Cir. 1997) (per curiam).}

\footnote{424. See In re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997) (by the panel).}

\footnote{425. See In re Magwood, 113 F.3d at 1548.}

\footnote{426. See Herrera v. Collins, 506 U.S. 390, 400 (1993).}

\footnote{427. See LIEBMAN & HERTZ, supra note 1, § 41.7d, at 1609-10.}
claims in a § 2255 motion.

c. But For / Prejudice

Prior to the enactment of the AEDPA, a petitioner could establish prejudice by demonstrating that he or she was denied fundamental fairness at trial. The AEDPA, however, substantially heightened this prejudice requirement. In both the § 2254 and § 2255 contexts, the Act requires that the newly discovered evidence demonstrate by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty of the challenged offense. This requirement, essentially that but for the unavailability of the evidence at trial the petitioner would not have been convicted as a matter of law, represents a substantial departure from the prior standard of demonstrating that the error resulted in a fundamentally unfair trial. In fact, this restrictive standard is similar to the pre-AEDPA requirements governing the circumstances in which a petitioner could raise a claim previously raised or a claim for which the petitioner could not establish cause and prejudice.

The AEDPA's restrictions also appear to prevent petitioners from challenging any aspect of a sentence in a successive application based on newly discovered evidence. In particular, a petitioner can only be granted authorization by demonstrating that a jury would find him or her innocent of the offense, and any claim as to a sentence has no bearing on a conviction. Thus, the Seventh, Ninth, and Eleventh Circuits have all held that authorization could not be granted for a claim challenging a sentence. Similarly, the Seventh and Eleventh Circuits have held that authorization cannot be granted for a claim of innocence of the death penalty because this is a sentencing claim, not a challenge

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428. See supra note 378 and accompanying text.
431. See Liebman & Hertz, supra note 1, § 28.3e, at 1199-200; see also Mark M. Oh, Note, The Gateway for Successive Habeas Petitions: An Argument for Schlup v. Delo's Probability Standard for Actual Innocence Claims, 19 CARDOZO L. REV. 2341, 2346 (1998) (arguing that the AEDPA's "clear and convincing evidence" standard violates due process); Woolley, supra note 4, at 422-24. Even with its restrictiveness, at least one court has found that a petitioner satisfied the newly discovered evidence standard. See In re Boshears, 110 F.3d at 1541 ("the application clearly proves that the applicant could not have been convicted").
432. See In re Jones, 137 F.3d 1271, 1274 (11th Cir.) (per curiam), cert. denied, 523 U.S. 1041 (1998); Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir.) (per curiam), cert. denied, 519 U.S. 1102 (1997).
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The Ninth Circuit, however, has held that authorization can be granted for a claim of innocence of the death penalty, reasoning that the challenged underlying offense is the capital aspect of the offense.\(^\text{434}\) Despite these rulings, restrictions on challenges to sentences raise constitutional problems if there is no other available procedure to raise such claims.

3. Claims Based on a Miscarriage of Justice

Prior to the enactment of the AEDPA, a petitioner who could not demonstrate both cause and prejudice for failing to raise a claim in a prior application could still raise a claim by showing that a "fundamental miscarriage of justice would result from a failure to entertain the claim."\(^\text{435}\) This exception served a similar purpose as the ends of justice exception that allowed a petitioner to raise a same claim in a successive application, namely to allow a petitioner to raise a claim when justice so required.\(^\text{436}\) The AEDPA, however, eliminated this exception to the general cause and prejudice requirement. It is yet to be seen whether the courts will find that this exception has survived the AEDPA's successive application restrictions.\(^\text{437}\)

D. Other Potential Defenses

For a circuit court to grant a petitioner authorization to file a successive application, the AEDPA only explicitly requires that the application make a *prima facie* showing that the application satisfies the substantive authorization requirements discussed above. There may, however, be other reasons unrelated to the merits of the claim that a claim raised in a successive application may ultimately be unsuccessful. In particular, the claim may be unexhausted,\(^\text{438}\) procedurally barred,\(^\text{439}\) premature,\(^\text{440}\) or untimely.\(^\text{441}\) However, because these defenses are not

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\(^{433}\) See Burris v. Parke, 116 F.3d 256, 258 (7th Cir. 1997); In re Medina, 109 F.3d 1556, 1565-66 (11th Cir. 1997); Hope, 108 F.3d at 120.

\(^{434}\) See Thompson v. Calderon, 151 F.3d 918, 923-24 (9th Cir. 1998).


\(^{436}\) See supra note 372 and accompanying text.

\(^{437}\) As with the elimination of the same-claim ends of justice exception, the elimination of the miscarriage of justice exception may suspend the writ or violate due process or equal protection.

\(^{438}\) See supra Part II.B.7.

\(^{439}\) See supra Part II.B.8.

\(^{440}\) See supra Part II.B.9.

\(^{441}\) See supra Part II.B.10.
part of the AEDPA's substantive standards for granting authorization, it is recommended that circuit courts not consider these issues when deciding whether to grant authorization motions.\textsuperscript{442}

Two circuit courts have addressed the issue of whether circuit courts may or should consider defenses not explicit in the AEDPA's successive authorization provisions when adjudicating an authorization motion. The Tenth Circuit has held that the issue of whether a petitioner has exhausted all of her or his claims is not properly before the court when it is adjudicating an authorization motion.\textsuperscript{445} The court reasoned that the AEDPA simply did not make exhaustion a prerequisite of its granting authorization in performing its gatekeeping function.\textsuperscript{444} The First Circuit has relied upon the Tenth Circuit's holding without discussion.\textsuperscript{445}

There are a number of reasons for circuit courts to not consider the issues of exhaustion, procedural bar, and timeliness when deciding an authorization motion. First, following the reasoning of the Tenth Circuit, the AEDPA does not include these issues in its substantive standard for granting authorization. Second, given a circuit court's already difficult task of determining whether authorization should be granted within thirty-days and often times with a minimal record, it could be additionally burdensome for a circuit court to consider these potential defenses that may present complicated questions better resolved by the district court. Third, the failure to exhaust, procedural bar, and untimeliness defenses may all be waived by the respondent.\textsuperscript{446} Because a petitioner who is authorized to file a successive application despite the availability of these defenses may ultimately get relief, a circuit court should not prevent such a petitioner from filing an application in the first instance.\textsuperscript{447}

Although it may be tempting for a circuit court to deny authorization based on any one of these defenses if it is clear that the defense, if asserted, would preclude relief, it is nonetheless

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\textsuperscript{442} See LIEBMAN \& HERTZ, supra note 1, § 28.3b, at 278-79 (1997 Supp.) (concluding that the AEDPA "evidently render[s] irrelevant other possible grounds for dismissal such as ultimate lack of merit, nonexhaustion, procedural default, and the like").
\textsuperscript{443} See Hatch, 92 F.3d at 1016.
\textsuperscript{444} See id.
\textsuperscript{445} See Dickinson v. Maine, 101 F.3d 791, 791 n.1 (1st Cir. 1996) (per curiam).
\textsuperscript{446} See supra note 196 (exhaustion and procedural default); Calderon v. United States Dist. Court, 128 F.3d 1283, 1288 (9th Cir. 1997) (holding that the period of limitation, as with other statutes of limitations, is not a jurisdictional bar).
\textsuperscript{447} If a respondent states in its opposition to an authorization motion that it intends to raise one of the defenses then a circuit court may be more justified in considering the issue.
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recommended that courts decline to do so. The primary benefit of such a practice is judicial efficiency, as it may be a waste of judicial resources to authorize the filing of a successive application which ultimately cannot get the petitioner the desired relief. However, such efficiency should not outweigh the importance of orderly litigation and the rights of petitioners to file successive applications that meet the explicit authorization requirements.

E. Post-Authorization Standards

If a circuit court actually grants a petitioner authorization to file a successive application, then the petitioner must proceed to the appropriate district court, which will then decide whether the petitioner is entitled to relief. Despite all of the above pages devoted to the question of when authorization should be granted, authorization is just the preliminary step in the successive application process. The second step is the traditional district court disposition of a successive authorization motion. This section will briefly describe what restrictions the AEDPA places on successive applications once they are filed in the district court.

1. Authorized Section 2254 Petitions

The AEDPA mandates that district courts independently review whether the claims in an authorized successive § 2254 petition meet the authorization requirements. This provision is particularly important when a petition contains multiple claims, as a circuit court may grant authorization for the entire petition even if only one of the claims satisfies the authorization standard. Under this provision, district courts should dismiss claims which do not satisfy the authorization standard. As to the claims that satisfy the authorization requirements, the pre-AEDPA successive application law should apply, including any defenses to the petition and any restrictions on relief available in a successive application. Rather than replacing the underlying law, the AEDPA simply added new restrictions on relief.

2. Authorized Section 2255 Motions

In contrast to the AEDPA's successive § 2254 petition provisions,

448. 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.").

449. See supra Part III.G.
the Act's successive § 2255 motion provision does not include any restrictions on successive § 2255 motions. Read literally, once a circuit court has granted authorization to file a successive § 2255 motion, the AEDPA's successive application provisions place no restrictions on the district court's consideration of the motion. While this omission may be unintentional and present another example of the AEDPA's poor draftsmanship, since the Act does not include a restriction, none should apply. In other words, the AEDPA simply does not apply to authorized successive § 2255 motions. Thus, pre-AEDPA successive application law should govern authorized successive § 2255 motions.

An argument could be made that the reference in § 2255 that a successive motion "must be certified as provided in section 2244" refers to § 2244(b)(4), the provision of § 2244 which applies to district courts. However, the reference is to circuit court authorization, whereas § 2244(b)(4) governs district court disposition of an authorized application. Another argument is that the district court should be able to review whether the circuit court should have granted authorization. However, there is no authority in the Act or anywhere else for such review. Thus, the Act simply does not affect the disposition of authorized successive § 2255 motions.

V. CONCLUSION

As is evident from the discussions in this Article, the successive application provisions of the Antiterrorism and Effective Death Penalty Act of 1996 substantially changed both the procedures and substantive law governing successive § 2254 petitions and § 2255 motions in a manner that has engendered a host of issues. The final resolution of these issues will take years, if not decades, just as the role of the Great Writ has been evolving for decades. In resolving these issues, rather than simply mechanically applying the provisions of the Act, courts, commentators, and litigants acting under this regime must keep in mind the ultimate purposes of the writ: relief for those who are actually innocent and a guarantee of fundamental fairness at trial and in direct criminal proceedings.

450. See supra notes 60-62, 329 and accompanying text.
451. See, e.g., Woolley, supra note 4, at 416.