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## DISTINCTIONS WITH A DIFFERENCE: WHY PROPER RULE 59(E) MOTIONS SHOULD NOT BE SUBJECT TO "SECOND OR SUCCESSIVE" HABEAS ANALYSIS

Imad S. Matini

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# DISTINCTIONS WITH A DIFFERENCE: WHY PROPER RULE 59(E) MOTIONS SHOULD NOT BE SUBJECT TO “SECOND OR SUCCESSIVE” HABEAS ANALYSIS

IMAD S. MATINI\*

*Motions to reconsider—filed under either Rule 59(e) or 60(b) of the Federal Rules of Civil Procedure—are often considered one in the same, whether due to imprudent labeling by a litigant or due to the belief that little distinction exists between the two. In the context of habeas corpus petitions filed by pro se prisoners, motions under Rule 59(e) and Rule 60(b) are often interchangeably filed. Within this context, however, the following issue persists: whether a motion filed under either rule is subject to the “second or successive” restriction under the Antiterrorism and Effective Death Penalty Act (AEDPA). The Supreme Court of the United States partially resolved this issue in *Gonzalez v. Crosby*. There, the Court held that a motion filed under Rule 60(b) that advances a claim is subject to the second or successive limitation under the AEDPA.*

*Despite the Court’s holding in *Crosby*, debate persists over whether the second or successive limitation under AEDPA should be extended to motions filed under Rule 59(e). Indeed, a circuit split has developed over this issue. Some courts argue that a timely Rule 59(e) motion is a second or successive petition if it advances a “claim,” as analyzed under *Crosby*, while others believe this motion is **not** a second or successive petition, whether or not it advances a claim.*

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\* Federal Law Clerk, United States Court of Appeals for the Fourth Circuit (2016–2017); Federal Law Clerk, Northern District of West Virginia (2014–2016); Doctor of Jurisprudence, West Virginia University College of Law (2014); Master of Business Administration, West Virginia University College of Business and Economics (2014); B.A. in Government and Finance Minor, College of William & Mary (2007). Please note that I wrote this Article prior to accepting my position with the United States Court of Appeals for the Fourth Circuit. The views expressed in this Article are solely attributable to me, and they represent no other institution or employer with which I have been associated. I would like to thank the many friends, colleagues, and professors who reviewed this work for both legal substance and academic scholarship. Those individuals include Professor Atiba R. Ellis, Professor William H. Rhee, Robert K. Kerns, Nicholas F. Stump, and Joshua Deal. I thank them for their thorough feedback, strong words of encouragement, and more importantly, their patience and understanding. I would also like to thank my family and my fiancée for their help and wisdom throughout this lengthy process. Those individuals, among many others, have supported me not only with regard to this Article, but also with regard to my legal career.

*Proponents of the latter belief have argued that Crosby should not be extended to motions under Rule 59(e) when that motion is filed during a litigant's initial habeas petition. Why? Because that motion arguably relates to a petitioner's one complete opportunity to seek collateral relief, as provided under the AEDPA. This Article echoes this argument, asserting that Crosby should not apply to motions under Rule 59(e), whether they advance a claim or not, because such motions are part and parcel of a party's one, entitled-to-attempt at pursuing habeas relief under the AEDPA.*

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## INTRODUCTION

This Article discusses a common issue in the prisoner litigation context: habeas corpus petitions and post-judgment motions. More specifically, this Article examines a specialized yet consistent problem regarding the “second or successive” limitations imposed

under the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>1</sup> The AEDPA imposes restrictions upon a prisoner's second or successive habeas petition.<sup>2</sup> This means that after filing one habeas petition, a petitioner will likely need prior approval before her next habeas petition may be considered, subject to limited exceptions. Thus, *pro se* petitioners will likely file post-judgment motions under either Rule 59(e)<sup>3</sup> or Rule 60(b)<sup>4</sup> of the Federal Rules of Civil Procedure in order to seek relief from an adverse judgment.<sup>5</sup> Recently, however, the Supreme Court decided *Gonzalez v. Crosby*, holding that a Rule 60(b) motion that asserted a "claim" can qualify as a second or successive habeas petition.<sup>6</sup> However, the *Crosby* Court did not explicitly state whether its holding applied to motions under Rule 59(e).<sup>7</sup> Since *Crosby*, a circuit split has developed in the courts of appeals over whether *Crosby* should apply to motions properly filed under Rule 59(e), regardless of whether a petitioner asserts a claim.<sup>8</sup>

This Article asserts that properly filed motions under Rule 59(e) should *not* be considered second or successive for four reasons. First, the historical and practical differences between a motion filed under Rule 59(e) and Rule 60(b) are neither subtle nor merely semantic in nature. Second, a motion filed under Rule 59(e)—as opposed to one filed under Rule 60(b)—is generally not considered a collateral attack in the habeas context. Third, the substantive reasons and procedural grounds for filing a motion under either rule are distinct. Finally, out of a policy of fairness, motions under 59(e) should not fall under the AEDPA's limitations. In particular, a properly filed Rule 59(e) motion will be part of the petitioner's one full opportunity to seek habeas relief. After that attempt, any future attempts face the AEDPA's limitations, which severely limit (rightly or wrongly) attempts to seek habeas relief. These limitations, coupled with the liberal construction of *pro se* filings under *Haines v. Kerner*,<sup>9</sup> favors not applying *Crosby* to proper Rule 59(e) motions.

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1. Pub. L. No. 104-132, § 106(b)(3)(E), 110 Stat. 1214, 1221 (1996) (amending 28 U.S.C. § 2244(b) (1994)).

2. *See id.*

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

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

5. In the habeas context, these motions amount to asking a court to reconsider its denial of a petitioner's habeas petition.

6. 545 U.S. 524, 531 (2005).

7. *Id.* at 527 n.1.

8. *See, e.g., Blystone v. Horn*, 664 F.3d 397, 412 (3d Cir. 2011).

9. 404 U.S. 519, 520–21 (1972) (*per curiam*).

In presenting this argument, the Article will proceed as follows. Part I will provide a background of Rules 59 and 60, discussing both their history and their current application. Part I will also discuss habeas corpus petitions, the AEDPA, and the interaction between the two. Part II will then consider the Court's decision in *Gonzalez v. Crosby*. Part III will examine the circuit split regarding the application of *Crosby* to motions filed under Rule 59(e). Part IV will assert the reasons for which motions properly filed under Rule 59(e) should not be subject to the restrictions of the AEDPA, whether or not the motion asserts a claim.

## I. BACKGROUND OF THE RULES

The Federal Rules of Civil Procedure provide two primary means of addressing a judgment or ruling—a motion to alter or amend a judgment under Rule 59(e) and a motion for relief from a judgment or order under Rule 60(b).<sup>10</sup> Parties often label these motions as “motion to reconsider,” without specifying under which rule their motion is filed.<sup>11</sup> By filing a “motion to reconsider,” a movant seeks to have the court reconsider a ruling or judgment.<sup>12</sup> Distinctions exist, however, between each motion's purpose and effect in underlying civil actions. This Article will first briefly discuss the history of Rules 59 and 60 before focusing upon their modern application.

### A. History of Post-Judgment Relief

Understandably, the modern versions of Rules 59(e) and 60(b) do not perfectly resemble their original drafts. Indeed, their creation and evolution involved different paths. Despite this, both rules are still grounded in the conflict between the finality of judgments and the service of justice. Theoretically, the rules as currently drafted aim to resolve this conflict.

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10. See FED. R. CIV. P. 59(e) (providing for motion to alter or amend a judgment); FED. R. CIV. P. 60(b) (providing for motion for relief from judgment or order).

11. See *Piper v. U. S. Dep't. of Justice*, 312 F. Supp. 2d 17, 20 (D.D.C. 2004) (stating that a motion for reconsideration is appropriately treated as a motion to alter or amend a judgment “even though the movant does not specify under which rule relief is sought”).

12. See FED. R. CIV. P. 59(e) (provides movant with a possible means for altering or amending a judgment); FED. R. CIV. P. 60(b) (provides movant with a possible means for seeking relief from judgment or order).

Rule 59(e) is derived from the common law principle that a judge should set aside a jury verdict and grant a new trial when unsatisfied with the verdict.<sup>13</sup> As William Forsyth stated in *History of a Trial by Jury*:

Man is so fallible in his opinions, so liable to be deceived by evidence, and so apt to draw mistaken inferences from facts, that if in all cases the verdict of a jury in the first instance were final, and subject to no revision, great hardship and injustice must necessarily ensue.<sup>14</sup>

As further stated by Lord Mansfield,<sup>15</sup> “[i]t is absolutely necessary to justice that there should, upon many occasions, be opportunities for reconsidering [a civil action] by a new trial.”<sup>16</sup> More specifically, this judicial duty and its corresponding power originally related to the control and revision by a judge “of excessive verdicts through the means of new trials.”<sup>17</sup> To set aside an excessive verdict “was firmly settled in England before the foundation of [the colonies], and has

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13. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 2801 (3d ed. 2016); see *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 352–54 (4th Cir. 1941) (detailing the English roots of the practice of granting new trials for excessive verdicts); *Smith v. Times Publ'g Co.*, 36 A. 296, 298 (Pa. 1897) (referencing the long-standing English tradition of granting new trials in the face of excessive verdicts).

14. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 149 (James Appleton Morgan ed., 2d ed. 1875), <http://www.constitution.org/cmt/wf/htj.htm>.

15. It should be noted that Lord Mansfield's full name was William Murray, First Earl of Mansfield. NORMAN S. POSER, *Preface to LORD MANSFIELD: JUSTICE IN THE AGE OF REASON*, at ix (2013).

16. *Bright v. Eynon*, 1 Burr. 390, 393, 97 Eng. Rep. 365, 366 (K.B. 1757) (“Trials by jury, in civil cases, could not subsist now, without a power, somewhere, to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set it right . . . . But a general verdict can only be set right by a new trial: which is no more than having the cause more deliberately considered by another jury; where there is a reasonable doubt, or perhaps a certainty, that justice has not been done.”). See generally Fleming James, Jr., *Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All of the Issues, Remittitur and Additur*, 1. DUQ. L. REV. 143 (1963), [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4132&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4132&context=fss_papers) (recognizing new trials as an avenue for remedying excessive or inadequate verdicts).

17. *Aetna Cas. & Sur. Co.*, 122 F.2d at 353 (quoting *Smith*, 36 A. at 298). See generally *Klein v. Auto Owners Ins. Co.*, 39 F.R.D. 24, 26 (D. Minn. 1965) (“Rule 59 of the Federal Rules of Civil Procedure . . . recognizes the common law principle that it is the duty of the trial judge who is not satisfied with the verdict to set it aside and grant a new trial.”).

always existed [in the United States of America] without challenge under any of [the States'] constitutions."<sup>18</sup> In fact, the power to grant new trials has existed in England since at least 1665, which may mark the first recorded instance of a judge granting a new trial.<sup>19</sup> As to courts in America, the Judiciary Act of 1789<sup>20</sup> and the Seventh Amendment to the Constitution of the United States provided explicit authority to grant new trials.<sup>21</sup> The authority prescribed by the Judiciary Act continued until 1938, when Congress enacted the Rules Enabling Act.<sup>22</sup> Rule 59 was later adopted in 1946, and would then undergo a series of amendments and revisions.<sup>23</sup>

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18. *Smith*, 36 A. at 298.

19. FORSYTH, *supra* note 14, at 154.

20. 1. Stat. 73 § 17 (1789) ("And be it further enacted, [t]hat all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law[.]") (emphasis in original).

21. The Seventh Amendment states the following: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII (emphasis added).

22. Theodore R. Mann, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77, 80 (1951); see ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES [hereinafter REP. OF PROP. AMEND.], 5 F.R.D. 433, 476 (1945-46) (providing the 1945-46 proposed amendments to Rule 59); WRIGHT ET AL., *supra* note 13, at § 2801 ("The provision about new trials in the 1789 Act was carried forward without substantial change in the statutes until the adoption of the 1948 Judicial Code[.]"). It should be noted that Congress enacted the Rules Enabling Act by inaction on September 16, 1938. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. REV. 691, 691 n.4 (1998). Prior to the Rules Enabling Act, the Conformity Act of 1872 prescribed that "the civil procedure in each federal trial court conform 'as near as may be' with that of the state in which the court sat." *Id.* at 692. It was "passage" of the Enabling Act, however, that authorized the Supreme Court of the United States to promulgate the Federal Rules of Civil Procedure. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987). For more background information about the adoption of the Federal Rules of Civil Procedure, see *id.* (detailing the "inherent nature of the Federal Rules"); see also Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958) (providing perspective on the effects of the federal civil rules from 1938-1958); see generally CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 5-54 (2d ed.1947) (characterizing the evolution of code pleading from its early roots in Roman civil procedure to the rise of modern federal code pleading in the United States). The sources cited in this footnote are not limited to

As to Rule 60, its initial purpose was regulating “the procedures by which a party may obtain relief from a final judgment.”<sup>24</sup> Its most important result was removing “the uncertainties and historical limitations of ancient remedies while preserving all of the various kinds of relief that they [those ancient remedies] afforded.”<sup>25</sup> Before Rule 60, an odd assortment of ancillary and equitable remedies served as the primary means of setting aside a final judgment.<sup>26</sup> These remedies, however, maintained significant restrictions due to the archaic “term rule”<sup>27</sup> used by courts of this era to limit the time in which a court maintained plenary power over a civil or criminal action.<sup>28</sup> During the term a judgment was entered, a court maintained the power to relieve a party from a judgment; after that term expired, however, a court generally lost the power to reconsider final judgments, with few exceptions.<sup>29</sup> Although the term

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Rule 59(e), but rather apply generally to the development of the rules as we know them today.

23. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REP. OF PROP. AMEND, 5 F.R.D. 433, 476 (1945–46).

24. WRIGHT ET AL., *supra* note 13, at § 2851; see generally Dustin B. Benham, *Beyond Congress’s Reach: Constitutional Aspects of Inherent Power*, 43 SETON HALL L. REV. 75 (2013) (noting the inherent power courts have had regarding the vacating of judgments under Rule 60).

25. WRIGHT ET AL., *supra* note 13, at § 2851; see Scott Dodson, *Rethinking Extraordinary Circumstances*, 106 NW. U. L. REV. 377, 379–80 (2012) (noting that Rule 60 replaced a “haphazard assortment of common law remedial devices”); Henry Brownstein, Note, *Rule 60(B): A Rule Suitable for a Sua Sponte Motion*, 15 B.U. PUB. INT. L.J. 165–66 (2005) (noting that Rule 60 is a codification of courts’ “historic power of equity to set aside fraudulently begotten judgments”).

26. WRIGHT ET AL., *supra* note 13, at § 2851; Dennis M. Kelly, Note, *Federal Rule 60(b): Finality of Civil Judgments v. Self-Correction by District Court of Judicial Error of Law*, 43 NOTRE DAME L. REV. 98, 99 (1968); see Dodson, *supra* note 25, at 379–80 (noting that “common law remedial devices” were employed to correct judgments prior to the enactment of Rule 60); Mary K. Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 43 (1978), [http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1298&context=faculty\\_scholarship](http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1298&context=faculty_scholarship) (noting that Rule 60 codified already “well-recognized” exceptions to finality of judgments). For a great historical discussion, see Mann, *supra* note 22, at 78 (discussing the previous use of ancillary remedies and original actions in equity to vacate judgments) and Thomas D. Clark, *Rule 60(b): Survey and Proposal for General Reform*, 60 CAL. L. REV. 531, 534–535 (1972) (discussing remedies for relief from final judgments prior to enactment of the Federal Rules).

27. Kelly, *supra* note 26, at 99.

28. *Zimmern v. United States*, 298 U.S. 167, 169–70 (1936); Mann, *supra* note 22, at 78.

29. James W.M. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627 (1946); see *Zimmern*, 298 U.S. at 169–70 (holding



rule clearly settled the issue of finality of judgments, it disserved the interests of justice.<sup>30</sup> Thus, to better balance these virtues, the Advisory Committee created Rule 60.<sup>31</sup>

### *B. Motions for Post-Judgment Relief as They Exist Today*

Under Rule 59(e), a party may file a motion to alter or amend a judgment, whether that judgment is from a jury trial or court ruling.<sup>32</sup> In effect, a Rule 59(e) motion “suspends the finality of the

that it was within a judge’s plenary power to extend a term to “modify his judgment for error”); WRIGHT ET AL., *supra* note 13, at § 2851 (noting that courts “had power to give relief from a judgment during the term in which it was entered”).

30. See Moore & Rogers, *supra* note 29, at 627 (discussing *United States v. Mayer*, in which a motion for a new trial was denied because it was made after the term expiration despite evidence of concealed juror bias).

31. Clark, *supra* note 22, at 535–39; Moore, *supra* note 29, at 627–29; Mary C. Cavanagh, Note, *Interpreting Rule 60(B)(6) of the Federal Rules of Civil Procedure: Limitations on Relief from Judgments for “Any Other Reason,”* 7 SUFFOLK J. TRIAL & APP. ADVOC. 127, 127 (2002); see Peter H. Bresnan & James P. Cornelio, *Relief from Default Judgments Under Rule 60(b)—A Study of Federal Case Law*, 49 FORDHAM L. REV. 956, 965–66 (1981) (noting Rule 60’s competing goals of finality of judgment and the belief that decisions should be decided on the merits and not procedural distinctions). Similar to the previous section, for more background information, see the sources cited in *supra* note 11. Those sources are not limited to Rule 59(e), but rather apply generally to the development of the rules as we know them today. The Supreme Court of the United States eloquently stated the tradition of Rule 60(b), which is that the rule “reflects and confirms the courts’ own inherent and discretionary power, ‘firmly established in English practice long before the foundation of our Republic,’ to set aside a judgment whose enforcement would work inequity.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34 (1995) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).

32. In particular, Rule 59 provides the following:

(a) In General.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact

judgment.”<sup>33</sup> Regarding the tolling of appeal time, a timely Rule 59(e) motion “automatically tolls the period for filing a notice of appeal[,]”<sup>34</sup> and must be filed within twenty-eight days after the entry of judgment by the court.<sup>35</sup> Relief under such a motion is granted sparingly and is considered an extraordinary remedy.<sup>36</sup> In a more general sense, Rule 59(e) is designed to allow a district court to correct its own errors, “sparing the parties and the appellate courts the burden of unnecessary appellate proceedings.”<sup>37</sup> A Rule 59(e) motion is, however, inherently subject to abuse, which has prompted a variety of judicial restrictions on its use. A party is not permitted to “[seek] merely to re-litigate old matters; to present evidence or raise arguments which could have been brought to the court’s attention before the judgment was issued; or to assert a novel legal

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and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court’s Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party’s motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

FED. R. CIV. P. 59.

33. *Blystone v. Horn*, 664 F.3d 397, 414 (3d Cir. 2011).

34. *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008); *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2002).

35. The 28-day time limit is mandatory. FED. R. CIV. P. 59(e). Rule 6(b) of the Federal Rules of Civil Procedure prohibits any extension of time for motions filed under Rule 59(e). FED. R. CIV. P. 6(b). An untimely motion under Rule 59(e) is a nullity. *Morris v. Unum Life Ins.*, 430 F.3d 500, 502 (1st Cir. 2005). It should also be noted that initially, Rule 59(e) provide only ten days for filing such motion; it has since been increased to 28 days pursuant to a 2009 Amendment. *Cent. Produce El Jibarito v. Luna Commercial Corp.*, 880 F. Supp. 2d 282, 285 n.3 (D.P.R. 2012).

36. *Pacific Ins. v. Am. Nat’l Fire Ins.*, 148 F.3d 396, 403 (4th Cir. 1998).

37. *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995).

theory that the litigant could have addressed in the first instance.”<sup>38</sup> As one court phrased it, litigants should not use a Rule 59(e) motion “to ask the court to rethink what the court [has] already thought through—rightly or wrongly.”<sup>39</sup> A movant cannot assert new arguments or evidence in a Rule 59(e) motion that were previously available because “Rule 59(e) motions are aimed at reconsideration, not initial consideration.”<sup>40</sup> Moreover, although a Rule 59(e) motion can be used to pursue a variety of errors, courts largely agree that it should be reserved for relief based on the following grounds: “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.”<sup>41</sup>

A motion filed under Rule 60(b), however, “allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.”<sup>42</sup> Courts have applied Rule 60(b)(6) in many situations, including the following:

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38. *Cotton v. Francis*, No. 3:06CV31, 2008 WL 857765, at \*2 (N.D.W. Va. Mar. 28, 2008); see *Russell*, 51 F.3d at 749 (noting that Rule 59(e) may not be used “to raise novel legal theories that a party had the ability to address in the first instance”); *Concordia College Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir. 1993) (affirming that appellant could not use Rule 59(e) to raise new legal theories); *FDIC v. World Univ., Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (noting that Rule 59(e) motions must “establish a manifest error of law or must present newly discovered evidence”); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (noting that Rule 59(e) motions cannot “be used to argue a case under a new legal theory”); see also *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (noting that a Rule 59(e) motion does not “enable a party to complete presenting his case after the court has ruled against him”) (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)); *WRIGHT ET AL.*, *supra* note 13, at § 2810.1 (“The Rule 59(e) motion may not be used to re-litigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.”).

39. *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

40. *GSS Grp. Ltd. v. Nat’l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012) (quoting *District of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010)); see *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (“Rule 59(e) motions may not be used to make arguments that could have been made before the judgment was entered[.]”) (citing *Pacific Ins. Co.*, 148 F.3d at 403).

41. *Hill*, 277 F.3d at 708 (quoting *Collison v. Int’l Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)).

42. *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60 states, in its entirety, the following:

[S]ettlement agreements when one party fails to comply and courts use the rule to return the parties to the status quo, or in cases where fraud is used by a party's own counsel, by a codefendant, or by a third-party witness, which does not fit within rule 60(b)(3)'s provision for fraud by an adverse

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(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

- (1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
- (2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
- (3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

party. . . The most common application is to grant relief when the losing party fails to receive notice of the entry of judgment in time to file an appeal.<sup>43</sup>

Rule 60 in general provides courts with the authority “adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”<sup>44</sup> Similar to Rule 59(e), motions under Rule 60 should only be granted in “extraordinary circumstances[.]”<sup>45</sup> and within a “reasonable time[.]”<sup>46</sup>

Four key distinctions<sup>47</sup> exist between Rule 59(e) and Rule 60(b) motions.<sup>48</sup> First, a Rule 60(b) motion applies “only to relief from a final judgment or order.”<sup>49</sup> On the other hand, a Rule 59(e) motion

43. *Macias v. New Mexico Dep’t of Labor*, 300 F.R.D. 529, 547 (D.N.M. 2014) (internal citations and quotations omitted).

44. *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949).

45. *See Ackermann v. United States*, 340 U.S. 193, 199–200 (1950) (denying petitioner’s Rule 59(e) motion because, unlike the *Klapprott* case, petitioner’s case was not one of “extraordinary circumstances”).

46. As Rule 60(c) states:

A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1) [mistake, inadvertence, surprise, or excusable neglect], (2) [newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)], and (3) [fraud . . . misrepresentation, or misconduct by an opposing party] no more than a year after the entry of the judgment or order or the date of the proceeding.

FED. R. CIV. P. 60(c). Note, however, that certain enumerated grounds for filing a Rule 60(b) motion have a firm one-year deadline. *See, e.g., L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm’n of Nassau Cty., Inc.*, 956 F. Supp. 2d 402, 412–13 (E.D.N.Y. 2013) (“The one-year limitation period for Rule 60(b) motions is ‘absolute.’”) (internal citations omitted).

47. It should be noted, however, that both motions under Rule 59(e) and Rule 60(b) are permitted in the habeas context. *See, e.g., Harvest v. Castro*, 531 F.3d 737, 745 n.6 (9th Cir. 2008) (“The Supreme Court has also explicitly held that . . . Rule 59 appl[ies] in habeas corpus proceedings.”) (citing *Browder v. Director*, 434 U.S. 257, 270–71 (1978)). *See generally Crosby*, 545 U.S. at 529–30 (applying the AEDPA to a petitioner’s Rule 60(b)(6) motion to determine whether it was second or successive collateral attack).

48. For a general explanation of both rules, see David J. Healey et al., *From Final Judgment to Notice of Appeal: An Overview of Post-Judgment Motions, Supersedeas and Stays Pending Appeal, and Notices of Appeals from Final Judgments in Federal Court*, 5 FED. CIR. B.J. 1, 11–20 (1995).

49. *St. Mary’s Health Ctr. of Jefferson City v. Bowen*, 821 F.2d 493, 498 (8th Cir. 1987) (citing *Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 366 (7th Cir. 1983)).

applies to any ruling or judgment.<sup>50</sup> Because any judgment or order to which a Rule 60(b) motion may apply must be “final,”<sup>51</sup> interlocutory judgments, for example, do not fall under the restrictions of Rule 60(b).<sup>52</sup> Stated another way, a Rule 59(e) motion addresses a “broader array of amendment-seeking factors (including many discretionary trial level rulings) than does Rule 60(b)(1).”<sup>53</sup> Second, a Rule 60(b) motion contains a set of reasons that, although not necessarily a strict limitation, provide specific grounds as to why a court may grant such a motion.<sup>54</sup> As stated by one court, “the scope of Rule 59(e)” is “unrestricted,” but “Rule 60(b) relief may be invoked . . . only for the causes specifically stated in [Rule 60(b)].”<sup>55</sup> It should be noted that Rule 60(b)(6) provides a catch-all provision upon which many litigants rely when filing their motion.<sup>56</sup> That provision states that a court may relieve a party from any judgment or ruling for “any other reason that justifies relief.”<sup>57</sup> Third, a motion

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50. See *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1103 (2d Cir. 1990) (stating that Rule 59(e) motions are not limited to final judgments).

51. A final order is one that resolves a case on its merits, which thus leaves a court with nothing further to do but to enter judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (“A ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”) (citing *St. Louis I.M. & S.R.R. v. S. Express Co.*, 108 U.S. 24, 28 (1883)); see also *SEC v. Van Waeyenberghe*, 284 F.3d 812, 814–15 (7th Cir. 2002) (“A Rule 60(b) motion is proper only after the terminating order of the whole litigation[.]”).

52. *Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013) (“Ordinarily, [the court of appeals] [does] not possess appellate jurisdiction over interlocutory orders—such as the denial of a Rule 12(b)(6) motion to dismiss or the denial of a Rule 12(c) motion for judgment on the pleadings—because such decisions are not final judgments within the meaning of 28 U.S.C. § 1291.”).

53. Kevin Parker, Note, *Relief from Final Judgment Under Rule 60(b)(1) Due to Judicial Errors of Law*, 83 MICH. L. REV. 1571, 1575 (1985).

54. If a movant fails to explicitly invoke a subsection of Rule 60(b), courts will usually apply the relevant provisions under the rule. See, e.g., *Fisher v. Kadant, Inc.*, 589 F.3d 505, 513 (1st Cir. 2009) (analyzing motion for relief from judgment under Rule 60(b) even though plaintiffs did not invoke subsection (2)). Indeed, “post-judgment relief will not normally be denied for the movant’s failure to designate the proper subsection of Rule 60(b).” *Id.* (citing *Mitchell v. Hobbs*, 951 F.2d 417, 421 n.5 (1st Cir. 1991); *Acevedo-Garcia v. Vera-Monroig*, 368 F.3d 49, 54 (1st Cir. 2004)).

55. *Williams v. Thaler*, 602 F.3d 291, 303 (5th Cir. 2010) (quoting *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 666 (5th Cir. 1986) (en banc); see *Harris v. United States*, 367 F.3d 74, 80 (2d Cir. 2004) (stating that a Rule 60(b) motion must be based on “narrow and specific grounds”).

56. See *Harris*, 367 F.3d at 80 (noting that a “proper case” for Rule 60(b)(6) is simply one of “extraordinary circumstances” or “extreme hardship”).

57. FED. R. CIV. P. 60(b)(6).

under Rule 60(b) traditionally “does not alter the time for filing a notice of appeal.”<sup>58</sup> However, recent amendments to the Federal Rules of Appellate Procedure now permit motions under either Rules 59(e) or 60(b) to toll the time for filing an appeal.<sup>59</sup> Therefore, if a party files either motion within 28 days of a judgment or ruling, then the time for filing an appeal may be tolled until the ruling of that motion.<sup>60</sup> Nonetheless, a motion under Rule 59(e) must be filed within 28 days after a judgment or ruling; otherwise, the court may construe that motion as being filed under Rule 60(b).<sup>61</sup> Fourth and

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58. *Koelling v. Livesay*, 239 F.R.D. 517, 520 (S.D. Ill. 2006); *accord Vantassel v. Rozum*, 469 F. App'x 110, 111 (3d Cir. 2012) (“[U]nder Appellate Rule 4(a)(4)(A)(iv), a timely motion to alter or amend a judgment under Rule 59(e), i.e., one filed within 10 days of the challenged judgment or order . . . tolled the time to file a notice of appeal. . . . [U]nder Appellate Rule 4(a)(4)(A)(vi), a timely motion under Rule 60 would also toll the time to appeal if that motion was filed within 10 days of the challenged judgment or order.”); *Townsend v. Soc. Sec. Admin.*, 486 F.3d 127, 133 (6th Cir. 2007) (“[A] Rule 60(b) motion brought on any ground does not toll the deadline for appeal unless it is filed within ten days after judgment is entered.”); *Van Waeyenberghe*, 284 F.3d at 814 (“A motion under Rule 60(b) is on the list in Rule 4(a)(4)(A) only when filed within 10 days of the decision,” meaning that a Rule 60(b) motion filed after that 10 day period “does not extend the time for appeal.”); *see Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989) (holding that petitioner’s Rule 60(b) motion was untimely because petitioner filed the motion more than one year after judgment).

59. *WRIGHT ET AL.*, *supra* note 13, at § 2871 (“In 2009, however, the appellate rules were amended to specifically add timely filed Rule 60 motions to those motions that automatically extend the time to file an appeal until the court disposes of them.”).

60. For a concise explanation of how an appeal works with the filing of motion under either a Rule 59(e) or Rule 60(b), see the following:

A notice of appeal in a civil case must be filed within 30 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(A). A motion for relief under Rule 60 that is filed within 28 days after the entry of the judgment is considered a tolling motion, and the appeal period runs from the entry of the order disposing of the last such outstanding motion. Fed. R. App. P. 4(a)(4)(A)(vi). A Rule 60(b) motion filed more than 28 days after the entry of judgment, however, does not toll the time for filing a notice of appeal. *See Am. Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1522 (11th Cir. 1984). The denial of such a motion is separately appealable, and “does not bring up the underlying judgment for review.” *Gibbs v. Maxwell House, A Div. of Gen. Foods Corp.*, 738 F.2d 1153, 1155 (11th Cir. 1984) (citation omitted).

*Goode v. Wild Wing Cafe*, 588 F. App'x 870, 873 (11th Cir. 2014).

61. *See, e.g., Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1241 (10th Cir. 2006) (converting petitioner’s untimely Rule 59(e) motion into a Rule 60(b) motion).

finally, Rule 59 serves as the only real means of seeking a new trial for relief;<sup>62</sup> Rule 60 does not provide for such relief.<sup>63</sup>

## II. BACKGROUND OF AEDPA AND HABEAS PETITIONS

With the above distinctions in mind, this Article will now provide a brief background about the AEDPA, the writ of habeas corpus and the current relationship between the two. The AEDPA “was enacted in part to bring finality to state court judgments.”<sup>64</sup> The AEDPA addresses many areas of law, involving matters such as free speech, wire-tapping, and the death penalty.<sup>65</sup> Of most relevance to this Article, the AEDPA greatly reformed certain aspects of collateral attacks against a criminal judgment,<sup>66</sup> including the review process conducted by federal courts and the time available to file habeas petitions. In essence, the AEDPA “lays out the requirements for filing successive petitions, serving as gate-keeper by preventing the repeated filing of habeas petitions that attack the prisoner’s underlying conviction.”<sup>67</sup> Discussed below is a brief history about habeas corpus, followed by a discussion of how the AEDPA and habeas petitions generally interact. Following that section, this Article will examine the Supreme Court’s ruling in *Gonzalez v. Crosby*.

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62. For the explicit text of Rule 59, see FED. R. CIV. P. 59, *supra* note 32.

63. For the explicit text of Rule 60, see FED. R. CIV. P. 60, *supra* note 42.

64. *Leal Garcia v. Quarterman*, 573 F.3d 214, 220 (5th Cir. 2009) (citing *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

65. For a thorough discussion of the AEDPA, see Thomas K. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEG. J. 201 (1996). For a narrower analysis of the national security and terrorist aspects of the law, see Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism*, 73 IND. L. J. 2 (1998).

66. A collateral attack is defined as “an effort to set aside a judgment that has become final through exhaustion of judicial remedies.” *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2005). Phrased differently, a collateral attack is an attack on a prior judgment in a new case. That means a party is attacking a judgment through direct means, such as a direct appeal.

67. *Leal Garcia*, 573 F.3d at 220 (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).



### A. Background<sup>68</sup> of the Great Writ in America

The writ of habeas corpus, sometimes referred to as “the Great Writ,” has been a feature of English law for centuries.<sup>69</sup> Our modern version of the Great Writ stemmed from the English “*habeas corpus ad subjiciendum*—the writ used to ‘inquir[e] into illegal detention with a view to an order releasing the petitioner.’”<sup>70</sup> This power of review was formally granted to American courts by the Judiciary Act of 1789<sup>71</sup> and to this day remains a fundamental privilege under the Constitution of United States of America.<sup>72</sup> The Judiciary Act permitted federal courts to grant writs of habeas corpus but limited this power to federal prisoners.<sup>73</sup> Congress later extended this power to state prisoners in 1867.<sup>74</sup> From this development until the passage of the AEDPA in 1996, Congress and the Court both periodically expanded and then limited the application of the writ to prisoners.<sup>75</sup>

68. Here, this Article employs the term “background” in its briefest sense, as a plethora of detailed scholarship already exists on the writ of habeas corpus’ history. See generally BRIAN R. MEANS, *POSTCONVICTION REMEDIES* § 4:1 (2015) (providing extensive citations and information regarding additional sources on the matter).

69. *Preiser v. Rodriguez*, 411 U.S. 475, 484 n.2 (1973).

70. *Id.* (quoting *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963)).

71. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 81–82.

72. 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.”).

73. *Ex parte Dorr*, 44 U.S. 103, 105 (1845) (“Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process.”)

74. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

75. As indicated earlier, a great number of sources exist that more thoroughly discuss the Great Writ’s history prior to the AEDPA. See, e.g., JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* (2011); WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* (1980); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 CHI. L. REV. 243 (1965). For a simple and informative history about habeas corpus, see *History of the Federal Judiciary: Habeas Corpus Jurisdiction in Federal Courts*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/jurisdiction\\_habeas.html](http://www.fjc.gov/history/home.nsf/page/jurisdiction_habeas.html) (last visited Mar. 9, 2017).

*B. The Great Writ and the AEDPA Today*

A petitioner convicted in federal court may file a habeas petition under 28 U.S.C. § 2241 (“§ 2241”),<sup>76</sup> whereas a petitioner convicted in state court may do the same under 28 U.S.C. § 2254 (“§ 2254”). Naturally, these two statutes provide jurisdiction over habeas petitions filed by either federal or state prisoners.<sup>77</sup> A habeas petition is used to attack the “execution of a sentence,”<sup>78</sup> which amounts to challenging the Bureau of Prisons’ sentence calculations,<sup>79</sup> time served calculations<sup>80</sup> or determination of where an inmate will serve her sentence.<sup>81</sup> A habeas petition should not be confused with another common motion in the prisoner context: those filed under 28 U.S.C. § 2255 (“§ 2255”). These motions challenge the conviction or sentence,<sup>82</sup> but are not technically habeas petitions; rather, § 2255 serves as the primary method of collaterally attacking a sentence.<sup>83</sup> Further, it does not replace habeas relief but instead

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76. It should be noted that under the statute, a writ of habeas corpus is referred to as an “application for a writ of habeas corpus.” This Article refers to such applications and writs of habeas corpus as simply “habeas petitions.”

77. *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001); MEANS, *supra* note 68, § 5:1; Alan Ellis et al., *Presentence and Postconviction Remedies*, 12 CRIMINAL JUSTICE 2, 52 (1997), <http://www.jamesfeldman.com/documents/The%20Basic%20Tools,%202241%20and%202255%20Habeas%20Petitions,%20Criminal%20Justice%200,%20Summer%201997.pdf>.

78. See *United States v. Addonizio*, 442 U.S. 178, 185–88 (1979) (Section 2241 is the only statute that confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence); *Preiser v. Rodriguez*, 411 U.S. 475, 499–500 (1973) (holding that, where a prisoner challenges the duration of his imprisonment, his only remedy is a writ of habeas corpus); *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) (motions that challenge the legality of a sentence must be filed under § 2255, but petitions challenging “the manner, location, or conditions of a sentence’s execution” must be filed under § 2241); *Chambers v. United States*, 106 F.3d 472, 474 (2d Cir. 1997) (§ 2255 provides relief when a sentence violates the Constitution, when the court did not have jurisdiction to impose a sentence, when the sentence exceeded the amount authorized by law, or when the sentence is “otherwise subject to collateral attack”).

79. See, e.g., *Jiminian v. Nash*, 245 F.3d 144, 145 (2d Cir. 2001) (using § 2255 to challenge sentence calculation).

80. See, e.g., *United States v. Mares*, 868 F.2d 151, 151 (5th Cir. 1989) (holding that a motion for credit for time served must be filed under § 2244).

81. See, e.g., *Montez v. McKinna*, 208 F.3d 862, 864 (10th Cir. 2000) (using § 2241 to challenge interstate prison transfers).

82. *Sawyer v. Holder*, 326 F.3d 1363, 1365 (11th Cir. 2003).

83. See, e.g., MEANS, *supra* note 68, § 5:6 (“Having essentially superseded habeas corpus, the motion to vacate sentence pursuant to § 2255 is now the general postconviction remedy for prisoners challenging federal judgments . . . . Indeed, in

“constitutes a statutory motion by which federal prisoners can seek post-conviction relief, separate and apart from an application for a writ of habeas corpus.”<sup>84</sup> Indeed, the purpose behind § 2255 is “to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.”<sup>85</sup> So, if an inmate is challenging the sentence, she must file a § 2255 motion. Conversely, if an inmate is attacking the execution of the sentence, he may file a § 2241 or § 2254 petition, contingent on which statute applies.

Under the AEDPA, every prisoner receives “one full [and unrestricted] opportunity to seek collateral review.”<sup>86</sup> When a court receives a second or successive habeas petition from a prisoner, that court must “determine whether a ‘claim presented in a second or successive habeas corpus application’ was also ‘presented in a prior [habeas] application.’ If so, the claim must be dismissed.”<sup>87</sup> If the

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practice, the § 2255 motion is usually an exclusive substitute for habeas and the only remedy to which persons attacking federal judgments are entitled.”); see *Boumediene v. Bush*, 553 U.S. 723, 774–75 (2008) (explaining that § 2255 “replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, ‘imposed in violation of the Constitution or laws of the United States’” (quoting *United States v. Hayman*, 342 U.S. 205, 207 n.1 (1952))). A petitioner may seek relief pursuant to § 2241 rather than § 2255, however, under what is deemed the “savings clause,” “if [it] appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). That rarely occurs because of a higher standard that a petitioner must satisfy, which is essentially showing her “actual innocence.” MEANS, *supra* note 68, § 5:7 (“Although the precise formulations vary, essentially each test provides that a federal prisoner who is ‘actually innocent’ of the crime of conviction, but who never has had an unobstructed procedural shot at presenting a claim of innocence, may resort to § 2241 if the possibility of relief under § 2255 is foreclosed.”).

84. MEANS, *supra* note 68, § 5:6 (“Section 2255 is not available to challenge every violation of federal law. Rather, review under § 2255 is available to check violations of federal law only in those cases where the error qualifies as ‘a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.’ This standard is more onerous for prisoners than the harmless error test applied to non-constitutional claims raised on direct appeal.”) (internal citations and footnotes omitted).

85. *Boumediene*, 553 U.S. at 775 (quoting *Hayman*, 32 U.S. at 219).

86. *Urinyi v. United States*, 607 F.3d 318, 320 (2d Cir. 2010) (internal citations omitted). For an abbreviated analysis of habeas petitions under the AEDPA, see *Spitznas v. Boone*, 464 F.3d 1213, 1215 n.2 (10th Cir. 2006) (explaining the requirements imposed on filing second or successive petitions).

87. *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (quoting 28 U.S.C. § 2244(b)); see *Magwood v. Patterson*, 561 U.S. 320 (2010) (citing 28 U.S.C. § 2244(b) for same principles). For an interesting account of the history of the AEDPA’s bar on

petitioner's second or successive petition does not assert the same claim, then the court must determine whether that claim satisfies one of the statutory exceptions.<sup>88</sup> The first exception is that the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review" by the court that previously was unavailable.<sup>89</sup> The second exception is that (1) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and (2) "the facts underlying the claim," collectively viewed, would sufficiently show "by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."<sup>90</sup> If the claims do not satisfy an exception, then the petition must be dismissed as "second or successive."<sup>91</sup> If one of those exceptions applies to the petition, the petitioner may seek authorization from the appropriate court of appeals in order to permit consideration of the petitioner's second or successive petition.<sup>92</sup>

As to appealing a ruling on a § 2255 motion or a § 2254 habeas petition, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."<sup>93</sup> The same generally applies to state prisoners filing a § 2241 petition.<sup>94</sup> To obtain such a certificate, a petitioner must make "a

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successive habeas petitions, see Stefan Ellis, Comment, *Gonzalez v. Crosby and the Use of Federal Rule of Civil Procedure 60(B) in Habeas Proceedings*, 13 U. PA. J. CONST. L. 207, 211–14 (2010) (discussing the evolution of § 2244 and relevant amendments and rules, including AEDPA, Habeas Rule 11, and Rule 60(b)).

88. 28 U.S.C. § 2244(b) (2012).

89. *Id.* § 2244(h)(2).

90. *Id.* § 2244 (b)(2)(B)(ii).

91. *Id.* § 2244(b)(1).

92. *Id.* § 2244 (b)(3)(A).

93. *Current Rules of Practice and Procedure: Rules Governing Section 2254 Proceedings for the United States District Courts*, UNITED STATES COURTS 26, <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure>; *Rules Governing Section 2255 Proceedings for the United States District Court*, CAPITAL DEFENSE NETWORK 28, [http://www.capdefnet.org/2255/uploadedFiles/Public/Statutes\\_and\\_Rules/Rules\\_Governing\\_%C2%A7\\_2255\\_Proceedings/2255%20rules%20and%20notes.pdf](http://www.capdefnet.org/2255/uploadedFiles/Public/Statutes_and_Rules/Rules_Governing_%C2%A7_2255_Proceedings/2255%20rules%20and%20notes.pdf); see 28 U.S.C. § 2253(c)(1) (2012).

94. See, e.g., *Morales v. Florida Dep't. of Corr.*, 346 F. App'x 539, 540 (11th Cir. 2009) (denying a motion for a certificate of appealability for a state prisoner); *Davis v. Boone*, 31 F. App'x 630, 630 (10th Cir. 2002) (same); *Harmeson v. Sacchet*, 64 F. App'x 908, 908 (4th Cir. 2003) (per curiam) ("An appeal may not be taken from the final order in a § 2241 proceeding unless a circuit justice or judge issues a certificate of appealability.").

substantial showing of the denial of a constitutional right.”<sup>95</sup> For example, a prisoner can satisfy this standard by showing that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong[,]” and that any dispositive procedural ruling by the district court is similarly debatable.<sup>96</sup> If a district court denies the petitioner a certificate of appealability, the petitioner may request a circuit judge from the appropriate circuit court of appeals to issue such a certificate. Generally, a § 2241 habeas petition filed by a federal prisoner, however, does not require the petitioner to obtain a certificate of appealability to appeal the court’s denial of such a petition.<sup>97</sup>

The second or successive limitation explicitly applies to habeas petitions filed under § 2254<sup>98</sup> and motions filed under §2255.<sup>99</sup> As to habeas petitions filed under § 2241, the second or successive limitation does not apply, meaning that it is unnecessary for a petitioner to seek permission from a court of appeals before filing a second or successive § 2241 petition.<sup>100</sup> This does not mean a petitioner may file an unlimited number of § 2241 petitions, however, as “§ 2244(a) bars successive petitions under § 2241 directed to the same issue concerning the execution of a sentence.”<sup>101</sup> More specifically, § 2244(a) permits district courts to do the following:

To refuse “to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears

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95. 28 U.S.C. § 2253 (c)(2).

96. *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003).

97. *See, e.g., Washington v. Chandler*, 533 F. App’x 460, 461 (5th Cir. 2013) (“Because [petitioner] is proceeding under § 2241, he is not required to obtain a certificate of appealability to pursue his appeal.”); *Muza v. Werlinger*, 415 F. App’x 355, 357 n.1 (3d Cir. 2011) (same); *Washington v. Garcia*, 378 F. App’x 854, 854 (10th Cir. 2010) (same); *Kelley v. Hickey*, 307 F. App’x 424 (11th Cir. 2009) (same); *Harrison v. Ollison*, 519 F.3d 952, 958 (9th Cir. 2008) (same); *Powell v. Ogle*, 91 F. App’x 868, 869 (4th Cir. 2004) (same); *Melton v. Hemingway*, 40 F. App’x 44, 45 (6th Cir. 2002) (same); *Sugarman v. Pitzer*, 170 F.3d 1145, 1146 (D.C. Cir. 1999) (per curiam) (same).

98. 28 U.S.C. § 2254(b)(1)–(3) (2012).

99. *Id.* § 2255(h).

100. *See Queen v. Miner*, 530 F.3d 253, 255 (3d Cir. 2008) (per curiam) (“[T]he provisions of § 2244(b) refer specifically to claims presented in a second or successive habeas corpus petition filed pursuant to 28 U.S.C. § 2254 and therefore do not apply to a petition filed pursuant to § 2241.”).

101. *Valona v. United States*, 138 F.3d 693, 695 (7th Cir. 1998); *Miner*, 530 F.3d at 255.

that the legality of such detention has been determined by a judge or court of the United States on a prior” habeas petition, except as provided in § 2255. Thus, § 2244(a) prevents a federal inmate from using § 2241 to challenge the validity of a conviction or sentence that was already subjected to collateral review.<sup>102</sup>

In addition to the statutory authority under § 2244(a), a court may also limit second or successive § 2241 petitions under the common law’s abuse of writ doctrine. The Supreme Court has permitted the application of this doctrine within the habeas context:

When a prisoner files a second or subsequent application, the 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 burden to disprove abuse then becomes petitioner’s. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner’s opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.<sup>103</sup>

Since the passage of the AEDPA, courts have held that the AEDPA does not eliminate or prohibit the doctrine’s application to second or successive petitions filed under § 2241.<sup>104</sup> Under the AEDPA, “an

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102. MEANS, *supra* note 68, § 5:7 (quoting 28 U.S.C. § 2244(a)).

103. McCleskey v. Zant, 499 U.S. 467, 494–95 (1991).

104. Zayas v. I.N.S., 311 F.3d 247, 256–57 (3d Cir. 2002); *see also* Esposito v. Ashcroft, 392 F.3d 549 (2d Cir. 2004) (per curiam) (petitioner denied relief on his second habeas corpus petition challenging deportation); Barapind v. Reno, 225 F.3d 1100, 1110–12 (9th Cir. 2000) (gatekeeping provisions of AEDPA do not apply to all habeas petitions, and not every collateral attack is second or successive); Davis v. Fechtel, 150 F.3d 486, 490–91 (5th Cir. 1998) (gatekeeping provisions of AEDPA did

'application' for habeas relief is a filing that contains one or more 'claims.'<sup>105</sup> At its most basic definition, a claim is "an asserted federal basis for relief from a state court's judgment of conviction."<sup>106</sup> Therefore, a "habeas petitioner's filing that seeks vindication of [a claim] is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute."<sup>107</sup>

So, where does that leave us regarding the analysis used under the AEDPA? A petition for habeas relief is one that contains a claim, as defined in case law and applied under the statute. If it contains a claim, then it is subject to any restrictions prescribed in the AEDPA. Further, if a filing contains a claim that a petitioner presented in a prior petition, then that claim must be dismissed as second or successive unless an exception applies. Thus, the AEDPA provides every prisoner "one full opportunity to seek collateral review."<sup>108</sup> After that, without proper consideration and approval by the appropriate court of appeals, a district court cannot consider a petition that may be "second or successive." With this framework in mind, this Article will next address the holding by the Court in *Gonzalez v. Crosby*.

### III. BACKGROUND OF *GONZALEZ V. CROSBY*<sup>109</sup>

In *Crosby*, the petitioner was serving an unappealed 99-year sentence in a Florida state prison after pleading guilty to one count of robbery with a firearm.<sup>110</sup> Twelve years later, however, the petitioner attempted to collaterally attack his sentence<sup>111</sup> by filing

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not apply to petitioner's third habeas claim, which was deemed an abuse of writ on other grounds).

105. *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

106. *Id.*

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

108. *Urinyi v. United States*, 607 F.3d 318, 320 (2d Cir. 2010) (quoting *Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2002)). For a helpful, abbreviated analysis of habeas petitions under the AEDPA, see *Spitznas v. Boone*, 464 F.3d 1213, 1215 n.2 (10th Cir. 2006) (quoting *Crosby*, 545 U.S. at 524).

109. *Id.* For purposes of this Article, the author attempts to provide a concise and to-the-point background of *Gonzalez v. Crosby*. However, for those that would like a more thorough discussion as to the procedural history of the case, see *Ellis*, *supra* note 87, at 214–225.

110. *Crosby*, 545 U.S. at 526. Because he was under state rather than federal custody, he sought relief under § 2254. See Brief of Petitioner at 2, *Gonzalez v. Crosby*, 545 U.S. 524 (2005) (No. 04-6432).

111. *Id.*

two motions for collateral relief under state law, both of which were denied.<sup>112</sup> Following those unsuccessful attempts at relief, the petitioner filed a habeas petition under § 2254 in the United States District Court for the Southern District of Florida.<sup>113</sup> In that petition, the petitioner argued that he unknowingly and involuntarily entered into his guilty plea.<sup>114</sup> The district court dismissed the petitioner's habeas petition because the AEDPA's statute of limitations—which is one year—expired.<sup>115</sup> In particular, the district court found that the petition at issue was improperly filed, as well as “untimely and successive.”<sup>116</sup> Following the district court's ruling, the petitioner was denied a certificate of appealability by an Eleventh Circuit judge.<sup>117</sup> The petitioner did not seek review of that decision.<sup>118</sup>

Three years later,<sup>119</sup> the Supreme Court held in *Artuz v. Bennet*<sup>120</sup> that “an application for state post-conviction relief can be ‘properly filed’ even if the state courts dismiss it as procedurally barred.”<sup>121</sup> Based on *Artuz*, the petitioner filed a “Motion to Amend or Alter Judgment” under Rule 60(b)(6), arguing that the district court erred in dismissing his petition as time-barred.<sup>122</sup> However, the District Court denied the petitioner's Rule 60(b) motion, and the petitioner appealed.<sup>123</sup>

On appeal, “[a] judge of the Court of Appeals for the Eleventh Circuit granted [the] petitioner a [certificate of appealability], but a panel, quashed” that ruling.<sup>124</sup> Eventually “[t]he full court vacated that order and reheard the case *en banc*” affirming the denial of the petitioner's Rule 60(b) motion.<sup>125</sup> Specifically, the court of appeals found that “any postjudgment motion under Rule 60(b) [except] one alleging fraud . . . [should be construed as] a second or successive

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112. *Id.*

113. *Id.*

114. *Id.* at 527.

115. 28 U.S.C. § 2244(d); *Crosby*, 545 U.S. at 527.

116. *Crosby*, 545 U.S. at 527.

117. *Id.*

118. *Id.*

119. *Id.* at 526.

120. 531 U.S. 4 (2000).

121. *Crosby*, 545 U.S. at 527 (citing *Artuz*, 531 U.S. at 8–9).

122. *Id.* at 527; FED. R. CIV. P. 60(b).

123. *Crosby*, 545 U.S. at 527.

124. *Id.* at 528.

125. *Id.* (italics added).



habeas corpus petition.”<sup>126</sup> The petitioner then filed a petition for a writ of certiorari to the Supreme Court, which was granted.<sup>127</sup>

Writing for the majority, Justice Scalia framed the issue as: “whether, in a habeas case, . . . motions [under Rule 60(b)] are subject to the additional restrictions that apply to ‘second or successive’ habeas corpus petitions under the . . . [AEDPA].”<sup>128</sup> The majority first examined the interaction between motions under Rule 60(b) and the AEDPA, specifically analyzing the restrictions on “second or successive habeas petitions” in the Rule 60 motion context.<sup>129</sup> In analyzing that issue, the majority found that “the first step of analysis is . . . whether a ‘claim presented in a second or successive habeas corpus application’ was also ‘presented in a prior application.’”<sup>130</sup> The critical issue was whether a Rule 60(b) motion presented a claim,<sup>131</sup> which the Court defined as “an asserted federal basis for relief from a state court’s judgment of conviction.”<sup>132</sup> The majority stated the following about determining when a claim is asserted:

A motion that seeks to add a new ground for relief . . . will of course qualify. A motion can also be said to bring a “claim” if it attacks the federal court’s previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.<sup>133</sup>

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126. *Id.*

127. *Id.*; *Gonzalez v. Crosby*, 543 U.S. 1086, 1086–87 (2005).

128. *Gonzalez v. Crosby*, 545 U.S. 524, 526 (2005). On review, the Court specifically addressed the catch-all provision of Rule 60(b)(6), which permits the reopening of the movant’s case “when the movant shows any . . . reason justifying relief from the operation of the judgment. . . .” *Id.* at 528–29 (first alteration in original) (internal quotation omitted). This catch-all provision contrasts with the numerated reasons under Rule 60(b)(1)–(5). *Id.* at 529.

129. *Id.* at 529–30.

130. *Id.* at 530 (quoting 28 U.S.C. § 2244(b)).

131. *Id.*

132. *Id.*

133. *Id.* at 532 (emphasis in original).

Therefore, the majority found that if “no ‘claim’ is presented,” then that motion is not subject to the restrictions under the AEDPA.<sup>134</sup> Because the petitioner’s Rule 60(b) motion applied to the district court’s denial of his petition,<sup>135</sup> rather than “substantively address [the] federal grounds for setting aside [his] state conviction,”<sup>136</sup> the Court found that the AEDPA restrictions did not apply.<sup>137</sup> The majority, however, denied the petitioner’s Rule 60(b) motion because *Artuz*, which “change[d]. . . the interpretation of the AEDPA statute of limitations[,]”<sup>138</sup> failed to constitute “extraordinary circumstances justifying relief.”<sup>139</sup> The majority concluded with the following:

We hold that a Rule 60(b)(6) motion in a [habeas proceeding] is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant’s state conviction. A motion that, like petitioner’s, challenges only the District Court’s failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3).<sup>140</sup>

In Justice Breyer’s brief concurrence, he disagreed with any new standard that may be construed to exist concerning the majority’s interpretation of “claim.”<sup>141</sup> Absent such a conclusion, however, he concurred with the majority opinion.<sup>142</sup> Justice Stevens and Justice Souter dissented, disagreeing with how the majority addressed the merits of the petitioner’s motion.<sup>143</sup> More specifically, the dissent contended that “[t]he Court reache[d] beyond the question on which we granted certiorari . . . and adjudicate[d] the merits of [the petitioner’s Rule 60(b)] motion.”<sup>144</sup> The dissent asserted that a district court, rather than an appellate court, should first address a

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134. *Id.* at 533.

135. *Id.* at 535.

136. *Id.* at 533.

137. *Id.* at 533–36.

138. *Id.* at 536.

139. *Id.* at 537–38.

140. *Id.* at 538.

141. *Id.* at 538–39.

142. *Id.* at 539.

143. *Id.* at 538–40 (pointing to the issue of certiorari versus what the majority addressed in Part III).

144. *Id.* at 540.

Rule 60(b) motion.<sup>145</sup> Here, because the majority assessed the merits of the petitioner's motion without prior review by the district court, the dissent argued that such action was procedurally improper.<sup>146</sup> The dissent further discussed its disagreement with the analysis of the merits of the motion by the majority, particularly noting that "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."<sup>147</sup>

As stated above, *Crosby* explained when the AEDPA may apply to motions under Rule 60(b) in the habeas context, but was silent as to the treatment of Rule 59(e) motions.<sup>148</sup> Consequently, a circuit split has emerged over whether *Crosby* should be extended to such motions. The next Part of this Article will discuss the current circuit split. Following that Part, this Article will then explain why *Crosby* should not be extended to motions under Rule 59(e), whether or not that motion asserts a claim.

#### IV. LEGAL LANDSCAPE: APPLICATION OF AEDPA AND *CROSBY* TO RULE 59(E)

After *Crosby*,<sup>149</sup> a new issue arose: applying the Court's holding to motions under Rule 59(e). As will be discussed below, a circuit split currently exists over the issue. More specifically, courts are split regarding whether a timely 59(e) motion is second or successive, even if advancing a claim or not, and thus remain outside the AEDPA. As more explicitly stated in *Howard v. United States*,<sup>150</sup> those courts that believe *Crosby* should not apply in such contexts "conclude that a timely Rule 59(e) motion, whether or not it should properly be denied on its merits, does not require a transfer to [an appellate court] to determine whether the requirements of § 2255(h) are met."<sup>151</sup> Those circuits on the other end of the spectrum,

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145. *Id.*

146. *Id.* The dissent specifically pointed to the fact-intensive inquiry in assessing Rule 60(b) motions, and the limited briefings and record associated with the petitioner's motion at issue. *Id.*

147. *Id.* at 541 (alteration and emphasis in original) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996)).

148. *Id.* at 538.

149. *Id.*

150. 533 F.3d 472 (6th Cir. 2008).

151. *Id.* at 476; *see also*, *Blystone v. Horn*, 664 F.3d 397 (3d Cir. 2011) (quoting *Howard* on this principle); *Curry v. United States*, 307 F.3d 664 (7th Cir. 2002)

however, apply *Crosby* to Rule 59(e) motions.<sup>152</sup> Finally, a third group of circuits exist that have not, as of the date of this Article, decided one way or the other. This interesting arrangement of circuit division is briefly discussed below.

A. *Circuits that Apply Crosby to Motions under Rule 59(e)*

Four circuits apply the holding of *Crosby* to Rule 59(e) motions. These four circuits are the Fourth,<sup>153</sup> Fifth,<sup>154</sup> Eighth,<sup>155</sup> and Tenth<sup>156</sup> Circuits. These circuits consider a Rule 60(b) motion and Rule 59(e) motion to be so similar as to impose the AEDPA's limitations and the holding of *Crosby*.<sup>157</sup> Although these circuits may acknowledge that differences exist between the two motions, they conclude that "[i]n practice . . . Rules 59(e) and 60(b) permit the same relief—a change in judgment."<sup>158</sup> Based on such conclusions, these circuits applied the analytical framework prescribed in *Crosby*—determining first whether the motion at issue asserts a claim, then determining its treatment under the AEDPA<sup>159</sup>—to motions filed under Rule 59(e).<sup>160</sup>

B. *Circuits that Do Not Apply Crosby*

In contrast to the circuits discussed above, the Sixth,<sup>161</sup> Third,<sup>162</sup> and Seventh<sup>163</sup> do not apply the holding of *Crosby* to motions filed

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(suggesting the district court should have dismissed the motion for failing to timely file).

152. *E.g.*, *Williams v. Thaler*, 602 F.3d 291 (5th Cir. 2010); *Ward v. Norris*, 577 F.3d 925 (8th Cir. 2009); *United States v. Pedraza*, 466 F.3d 932 (10th Cir. 2006); *United States v. Martin*, 132 F. App'x 450 (4th Cir. 2005) (per curiam) (unpublished).

153. *Martin*, 132 F. App'x at 451.

154. *Thaler*, 602 F.3d at 304.

155. *Ward*, 577 F.3d at 938; *Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006); *see also* *United States v. Lambros*, 404 F.3d 1034, 1037 (8th Cir. 2005) (comparing the similarities of a Rule 60(b) motion and a Rule 59(e) motion).

156. *Pedraza*, 466 F.3d at 934; *Spitznas v. Boone*, 464 F.3d 1213, 1215 n. 3 (10th Cir. 2006).

157. *Thaler*, 602 F.3d at 303.

158. *Id.* (quoting *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir. 1986) (en banc)).

159. *Gonzalez v. Crosby*, 545 U.S. 524, 530 (11th Cir. 2005).

160. *See, e.g.*, *Thaler*, 602 F.3d at 303 (“[W]e believe that Rule 59(e) gives rise to concerns like those the Supreme Court addressed in *Gonzalez*, and therefore apply the *Gonzalez* framework to both of *Williams*’s motions.”).

161. *Howard v. United States*, 533 F.3d 472, 476 (6th Cir. 2008).

under Rule 59(e). Of these circuits, the court in *Blystone v. Horn* most thoroughly addressed the issue.<sup>164</sup> In *Blystone*, the court identified that a circuit split exists “on the issue of whether a Rule 59(e) motion to alter or amend judgment that raises a cognizable habeas claim is properly construed as a second or successive habeas petition.”<sup>165</sup> The court in *Blystone* ultimately determined that “a Rule 59(e) motion to amend or alter judgment is materially different from a Rule 60(b) motion to reconsider, such that it does not constitute a second or successive petition, even if it advances a claim.”<sup>166</sup> One material difference that the court in *Blystone* focused on was that a Rule 60(b) motion “is, in substance, both a collateral attack on the first habeas judgment and a *new* collateral attack on the underlying criminal judgment because Rule 60(b) does not prevent the original habeas judgment from becoming final; instead, it seeks to set aside the already final judgment.”<sup>167</sup> In contrast, the court in *Blystone* stated that a timely motion under Rule 59(e) suspends “the finality of the judgment by tolling the time for appeal.”<sup>168</sup> The court heavily emphasized that a Rule 59(e) motion “is part and parcel of the petitioner’s ‘one full opportunity to seek collateral review.’”<sup>169</sup> Because it is part of the “one full opportunity for collateral review that [the] AEDPA ensures to each petitioner,” the court in *Blystone* found that the holding of *Crosby* does not extend to Rule 59(e) motions.<sup>170</sup> Therefore, the court held that “a timely Rule 59(e) motion to amend or alter a judgment is not a second or successive petition, whether or not it advances a claim, and therefore such a motion lies outside the reach of the jurisdictional limitations that the AEDPA imposes upon multiple collateral attacks.”<sup>171</sup>

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162. *Blystone v. Horn*, 664 F.3d 397, 413 (3d Cir. 2011).

163. *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2002).

164. *Blystone*, 664 F.3d at 413–15.

165. *Id.* at 412.

166. *Id.* at 413.

167. *Id.* (emphasis in original).

168. *Id.* at 414.

169. *Id.* (quoting *Urinyi v. United States*, 607 F.3d 318, 320 (2d Cir. 2010)).

170. *Id.* at 415.

171. *Id.* It should be noted that the Court in *Blystone* later discussed the granting of penalty-phase relief. *Id.* at 416–27.

### C. Circuits that Are Undecided

At the time of writing, the First,<sup>172</sup> Second,<sup>173</sup> Ninth,<sup>174</sup> Eleventh,<sup>175</sup> and District of Columbia Circuits have not definitively

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172. It should be noted, however, that the First Circuit Court of Appeals held that “a district judge should treat a Rule 60(b) motion in a habeas case as a second or successive habeas petition . . . whenever the factual predicate set forth in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction. In contrast, if the factual predicate of the motion challenges only the procurement of the federal habeas judgment, it may be adjudicated under Rule 60(b).” *Rodwell v. Pepe*, 324 F.3d 66, 71 (1st Cir. 2003). That holding was made prior to *Crosby*, and clearly applied only to Rule 60(b) motions. Despite those facts, however, it is interesting to note that slightly more liberal stance towards relief under Rule 60(b). Although the Court has not addressed whether the holding of *Crosby* applies to motions under 59(e), it may choose to side with the circuits that decline to extend the holding of *Crosby*.

173. It appears that the Second Circuit has not directly addressed the issue. In *Harris v. United States*, however, the court did indicate that a Rule 60(b) motion is not automatically second or successive, and instead such a determination requires an examination of the underlying substance of that Rule 60(b) motion. 367 F.3d 74, 79–80 (2d Cir. 2004). In *Pena v. Bellnier*, however, the United States District Court for the Southern District of New York found that a petitioner’s Rule 59(e), as well as Rule 60(b), motions were barred as second or successive under the AEDPA, pursuant to *Crosby*. No. 09CV8834, 2012 WL 4558511, at \*1 (S.D.N.Y. Sept. 29, 2012).

174. It should be noted that the United States Court of Appeals for the Ninth Circuit did not apply *Crosby* in a situation where a petitioner filed a Rule 60(b)(6) motion and a Rule 59(e) motion. The Court applied *Crosby* to the motion under Rule 60(b)(6), but did not do so to the motion under Rule 59(e). The Court, however, did not explicitly state its rejection or affirmation of *Crosby* to motions filed under Rule 59(e). *Wood v. Ryan*, 759 F.3d 1117, 1119–20 (9th Cir. 2014). However, several district courts within that circuit have applied *Crosby* to Rule 59(e) motions, finding them to be second or successive under the AEDPA. *See Montes v. United States*, No. 1:06CR342, 2012 WL 3778856 (E.D. Cal. Aug. 31, 2012) (applying *Crosby* to petitioner’s motion to alter or amend an order denying his 59(e) motion); *United States v. Hicks*, No. 5CV2065, 2007 WL 173885, at \*2 (S.D. Cal. Jan. 17, 2007) (applying *Crosby* to petitioner’s request for reconsideration of his § 2255 motion).

175. Although the United States Court of Appeals for the Eleventh Circuit has not definitively decided whether the *Crosby* and AEDPA framework apply to motions under Rule 59(e), several district courts have applied that framework to Rule 59(e) motions. *See, e.g., Madison v. Allen*, No. 1:09CV09, 2011 WL 1545103, at \*2 (S.D. Ala. Apr. 25, 2011) (“[T]he ‘jurisdictional prohibition on Rule 60(b) motions in the habeas context applies with equal force to Rule 59(e) motions.” (quoting *Aird v. United States*, 339 F. Supp. 2d 1305, 1311 (S.D. Ala. 2004))); *see also Holt v. United States*, 249 F. App’x 753, 757 (11th Cir. 2007) (upholding district court’s jurisdiction to decide a Rule 59(e) habeas motion when that Rule 59(e) motion attacked a prior Rule 60(b) motion that was deemed successive); *see generally Carmichael v. United States*, No. 2:14CV619, 2014 WL 4055994 (M.D. Ala. Sept. 26, 2014) (adopting a

decided the issue of extending the holding of *Crosby* to motions filed under Rule 59(e). With the current legal landscape in mind, this Article will now show why courts like those in *Blystone* correctly refuse to extend the holding of *Crosby* and the AEDPA's limitations to Rule 59(e) motions.

## V. SIGNIFICANCE OF THE DISTINCTIONS

As shown above, the current legal landscape appears unclear regarding the application of *Crosby* to Rule 59(e) motions. One may ask: are not motions under 59(e) and 60(b) used to seek the same relief, which is for a ruling or judgment to be vacated or altered? Therefore, should *Crosby* apply to all such motions in the habeas context? The reality, however, is that these motions are used so often in the prison litigation context, and have such distinct purposes, that the current situation—and consequences—become important. The following sections will discuss why *Crosby* should not be construed so as to apply to Rule 59(e) motions.

### A. *Technical but Significant Differences*

As previously discussed, clear differences exist between motions filed under Rule 59(e) and 60(b). Those differences create significant

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recommendation from the lower court that petitioner's motions asserting new claims be construed as a second or successive motions under § 2255 and dismissed); *Soto-Herrera v. United States*, No. 95CV79, 2013 WL 2422911, at \*1 n.2 (S.D. Ala. June 4, 2013) (denying petitioner's motion to reconsider under 59(e) per the *Crosby* framework); *Pearson v. United States*, No. 8:06CV1153, 2007 WL 2774215, at \*1–2 (M.D. Fla. Sept. 24, 2007) (applying the *Crosby* framework and denying petitioner's motion to reconsider the Court's decision denying relief for lack of jurisdiction without authorization from the Eleventh Circuit); *Walters v. Crosby*, No. 8:04CV2019, 2007 WL 2097204 (M.D. Fla. July 20, 2007) (applying the *Crosby* test and finding petitioner's motion to reconsider functionally equivalent to a second or successive motion); *McAffee v. United States*, No. 8:05CV06, 2006 WL 563122 (M.D. Fla. Mar. 8, 2006) (discussing the Court's lack of jurisdiction over petitioner's motion for reconsideration of a lower court's decision because it is second and successive per *Crosby*, and attacks the substance of the Court's resolution, therefore requiring authorization from the Eleventh Circuit to hear the motion). Recently, however, the Eleventh Circuit denied a petitioner relief under either Rule 59(e) or Rule 60(b) when that petitioner filed an amended petition that was deemed successive. *Henderson v. Sec'y, Florida Dep't. of Corr.*, 441 F. App'x 629, 631 (11th Cir. 2011) (per curiam). In that case it does not appear that the petitioner formally filed a motion under either Rule 59 or Rule 60. Further, that decision was an unpublished decision, meaning it technically carries lesser weight within that circuit.

procedural consequences in a civil action. The following subsections point out those specific differences and explain why each motion warrants different treatment.

### 1. Collateral vs. Non-Collateral

One critical distinction between a Rule 59(e) and Rule 60(b) motion is that the former should not be considered a collateral attack. Why is this significant? As discussed earlier, the AEDPA imposes statutory limits on second or successive habeas petitions under § 2254<sup>176</sup> and motions under § 2255.<sup>177</sup> In the habeas context, motions under Rule 60(b) “[come] into play after the time to appeal has expired and the judgment has become final.”<sup>178</sup> When a petitioner files a Rule 60(b) motion in this context, the prior judgment regarding the petitioner’s habeas petition has already become final. Or, as Judge Posner stated in *Curry v. United States*, “[a] Rule 60(b) motion is . . . an effort to set aside a judgment that has become final through exhaustion of judicial remedies.”<sup>179</sup>

So, what does that mean? Suppose a petitioner filed a habeas petition to collaterally attack the execution of her underlying criminal judgment (“criminal judgment”). The district court denies that petition, and the time for filing an appeal expires. That means the judgment denying the petitioner’s habeas petition (“habeas judgment”) is **final**.<sup>180</sup> Later, the petitioner files a timely Rule 60(b) motion regarding the habeas judgment. This motion serves to collaterally attack the habeas judgment because a Rule 60(b) motion, unlike a Rule 59(e) motion, does not prevent the habeas judgment from becoming final. Because the petitioner’s Rule 60(b) motion is collaterally attacking the already final habeas judgment, that Rule 60(b) motion itself becomes a second or successive collateral attack. Why? Because that Rule 60(b) motion is attempting to “set aside a judgment that has become final through exhaustion of judicial

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176. See *supra* Part II.B.

177. See *supra* Part II.B.

178. *Blystone v. Horn*, 664 F.3d 397, 413 (3d Cir. 2011).

179. *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2002).

180. A judgment becomes final when one of the following occurs: (1) when the chance to appeal the district court’s judgment expires; (2) “when the time expires for filing a petition for certiorari contesting the appellate court’s affirmation of the conviction”; or (3) when the Supreme Court of the United States “affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari.” *Clay v. United States*, 537 U.S. 522, 522–25 (2003).



remedies"<sup>181</sup>— precisely what a collateral attack is.<sup>182</sup> That final judgment is the habeas judgment, as well as the criminal judgment, which the habeas petition collaterally attacked. Because the Rule 60(b) motion, as provided in the example above, operates as a second or successive collateral attack, it makes sense as to why the *Crosby* holding and the AEDPA limitations apply.<sup>183</sup>

Suppose one uses the same example provided in the above paragraph, but instead of a Rule 60(b) motion the petitioner files a timely Rule 59(e) motion. Because the Rule 59(e) motion suspends the finality of the habeas judgment,<sup>184</sup> it is not a second or successive collateral attack. Rather, the Rule 59(e) motion in this example serves as "part and parcel of the petitioner's 'one full opportunity to seek collateral review [as essentially provided under the AEDPA].'"<sup>185</sup> Because a Rule 59(e) motion "does not seek collateral relief, it is not subject to the statutory limitations [of the AEDPA] on such relief."<sup>186</sup> Based on the collateral versus non-collateral attack distinction discussed above, the holding of *Crosby* should not be applied to motions under Rule 59(e).

## 2. Powers of the District Court

Another distinction to consider is the power afforded to district courts by each rule. Rule 59(e) was adopted "to mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment."<sup>187</sup> Indeed, that

181. *Curry*, 307 F.3d at 666.

182. *See supra* note 66 and accompanying text (for a brief definition and discussion of a collateral attack).

183. As should be made abundantly clear, this Author does not disagree with the holding of *Crosby*. Rather, it is the application of that holding to motions under Rule 59(e) with which this Author disagrees.

184. *See, e.g., Blystone*, 664 F.3d at 414 (wherein the court noted that Rule 59(e) suspends the finality of judgments, whereas a Rule 60(b) motion applies to final judgments). This is significant because this decision was made well after the 2009 revision to the Federal Rules of Appellate Procedure, which provide that a Rule 60(b) motion may toll the appeal time if filed within 28 days. Instead, the court focused upon the fact of what a Rule 60(b) motion seeks to do, that is, attack a *final* judgment.

185. *Id.* (quoting *Urinyi*, 607 F.3d at 320).

186. *Curry*, 307 F.3d at 665.

187. *White v. New Hampshire Dep't. of Empl. Sec.*, 455 U.S. 445, 450 (1982) (quoting Advisory Committee Note, *1946 Amendment to Fed. R. Civ. P.* 56, 5 F.R.D. 433, 476 (1946)); *see also* *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 47-

power under Rule 59(e) “is distinct from the power explicitly granted by Rule 60 to reopen cases well after final judgment has been entered.”<sup>188</sup> If the second or successive limitations applied to Rule 59(e), the district court would be unable to use Rule 59(e) to “correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings.”<sup>189</sup> Instead of having the district court correct flaws pursuant to Rule 59(e) in recent judgments, a petitioner would likely have to get authorization from the “appropriate court of appeals for an order authorizing the district court to consider” the motion, as required under 28 U.S.C. § 2244(b)(3)(A).<sup>190</sup> That not only infringes on the power possessed by district courts, but also creates a judicially inefficient process of litigation. As the court in *Blystone* stated, “we are unwilling to suppose that Congress [by legislating the AEDPA] meant to deny the District Court the first opportunity to rework its newly issued judgment.”<sup>191</sup> The ability of a district court to review recent judgments is simply a matter of judicial efficiency. Why appeal a matter or move the court of appeals for consideration when a motion

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48 (1943) (discussing the Court’s power to reconsider its decisions, reopen any part of a case for further evidence, or grant re-argument).

188. *In re Saffady*, 524 F.3d 799, 803 (6th Cir. 2008).

189. *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986), *accord* *York v. Tate*, 858 F.2d 322, 326 (6th Cir. 1988).

190. 28 U.S.C. § 2244(b)(3)–(4) states in relevant part the following:

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

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection.

(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.

(E) The grant or denial of an authorization 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.

(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.

191. *Blystone*, 664 F.3d at 415.

under Rule 59(e) could resolve it? Motions under Rule 59(e) provide a useful and efficient means of addressing potential judicial errors in a more expedient manner. As the Supreme Court previously stated, Rule 59(e) motions help “further the important goal of avoiding piecemeal appellate review of judgments.”<sup>192</sup> In some ways it is the policy considerations of respecting the “levels” of the judiciary and practical advocacy that demonstrate the clear distinctions and technical—but consequential—characteristics of Rule 59(e) motions. Based on the distinct power of district courts found in Rule 59(e), and the risk of furthering judicial inefficiency, the AEDPA generally should not apply.

### 3. Filing Deadlines

As stated earlier, a motion under Rule 59(e) tolls the period for filing an appeal.<sup>193</sup> Traditionally, a Rule 60(b) motion did not do so. However, under the recently amended Federal Rules of Appellate Procedure, timely motions filed under either Rule 59(e) or Rule 60(b) may toll the time for filing an appeal if filed within twenty-eight days after a judgment or ruling.<sup>194</sup> Although motions filed under either rule may toll the time for filing an appeal, one cannot forget the filing deadlines under the FRCP. As discussed in Part I.B, a Rule 59(e) motion must be filed within twenty-eight days of a judgment or ruling.<sup>195</sup> Conversely, Rule 60(b) motions must be filed within a “reasonable time,” or depending on the particular grounds for relief, no later than one year.<sup>196</sup> This distinction in filing deadlines reinforces that each motion is designed for different situations, specifically when a judgment is final and needs to be reopened (Rule 60(b)) versus a recently entered judgment or ruling (Rule 59(e)). Although not dispositive on the issue, the deadlines for filing such

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192. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177 (1989).

193. *Blystone*, 664 F.3d at 414 (citing *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008)).

194. *Banks v. Chicago Bd. of Educ.* 750 F.3d 663, 667 (7th Cir. 2014); *Carranza v. United States*, 526 F. App'x 882, 884–85 (10th Cir. 2013) *cert. denied*, 134 S. Ct. 702 (2013) *reh'g denied*, 134 S. Ct. 1370 (2014); *Vantassel v. Rozum*, 469 F. App'x 110, 111 (3d Cir. 2012); *Green v. Drug Enforcement Admin.*, 606 F.3d 1296, 1300 (11th Cir. 2010) (per curiam) (“Untimely motions under Rules 59 and 60 will not toll the time for filing an appeal.”) (quoting *Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir. 1996)).

195. If such a motion is filed beyond that 28-day period, it is often converted into a Rule 60(b) motion. See, e.g., *Banks*, 750 F.3d at 667 (discussing *Banks*' untimely filed motion under 59(e) that became a 60(b) motion).

196. FED. R. CIV. P. 60(c)(1).

motions further reinforce the legal differences and purposes for those motions.

#### 4. Less-Narrow v. Enumerated Reasons

Another important distinction to point out is the reasons and grounds for filing motions under Rule 59(e) and 60(b). A Rule 59(e) motion “cannot be used to present new arguments that could have been raised prior to judgment.”<sup>197</sup> Thus, “[s]uch motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence.”<sup>198</sup> Although Rule 59(e) motions possess some boundaries as to why relief should be granted, Rule 60(b) motions are even more limited as to the grounds for filing it. Rule 60(b) itself provides a list of enumerated reasons that a party may assert as to why a court should relieve a party from a final judgment.<sup>199</sup> Although it maintains a “catch all” provision for “any other reason that justifies relief,”<sup>200</sup> this provision is often overshadowed by the enumerated reasons listed before it. Further, this catch-all provision is reserved for only a showing of “extraordinary circumstances.”<sup>201</sup> The fact that Rule 60(b) possesses enumerated grounds for relief is not, by itself, a compelling enough distinction when comparing it to a Rule 59(e) motion. However, to see the importance of the distinctions between the rules, one must look at the mechanics of motions filed under these two rules and their effect in a civil action, no matter how nuanced the distinctions first appear. Nonetheless, the different grounds for granting the motions, specifically that Rule 60(b) has explicitly enumerated grounds, arguably reinforces the distinctions between the rules. Those distinctions mean that the holding of *Crosby* should not be equally applied to Rule 59(e) motions, as it is to

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197. *Howard*, 533 F.3d at 475 (citing *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007)).

198. *Blystone*, 664 F.3d at 415 (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)).

199. FED. R. CIV. P. 60(b)(1)–(5).

200. FED. R. CIV. P. 60(b)(6).

201. *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (“We have interpreted Rule 60(b)(6)’s ‘any other reason’ language to mean any other reason than those contained in the preceding five enumerated grounds of Rule 60(b)”) (internal citations omitted); see *Crosby*, 545 U.S. at 535 (“[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show ‘extraordinary circumstances’ justifying the reopening of a final judgment . . . such circumstances will rarely occur in the habeas context”).

Rule 60(b) motions, because such motions should not be treated the same.

### *B. Fairness and Existing Limitations*

In addition to the legal distinctions between Rule 59(e) and Rule 60(b) motions, the existing statutory limitations on habeas relief, as well as basic fairness, further dissuade the application of *Crosby*. As the United States Court of Appeals for the Third Circuit stated in *Blystone*, “a Rule 59(e) motion is part of the one full opportunity for collateral review that AEDPA ensures each petitioner.”<sup>202</sup> This is significant, namely because the AEDPA already provides sufficient safeguards against litigious parties under its “second or successive” limitation. The Supreme Court has reinforced the importance of a petitioner’s first habeas petition, stating that “dismissal of a *first* habeas petition is at issue, since such dismissal denies the petitioner the protections of the Great Writ entirely.”<sup>203</sup> Indeed, “[t]he writ of habeas corpus plays a vital role in protecting constitutional rights.”<sup>204</sup> A policy of simple fairness necessitates that a petitioner’s timely Rule 59(e) or Rule 60(b) be treated according to their existing legal distinctions. This fairness is derived from the fact that petitioners essentially receive one complete attempt at seeking habeas relief before the AEDPA’s restrictions rightly or wrongly take effect.

Furthermore, one cannot forget about the screening process provided under the Prisoner Litigation Reform Act, which generally applies to civil actions outside of the habeas context.<sup>205</sup> The point of mentioning those limits is because they demonstrate the various screening measures that generally apply to prisoner litigation. With these screening measures already in place, it seems unnecessary to impose additional restrictions upon prisoner filings. Moreover, permitting motions under Rule 59(e) to proceed outside of the AEDPA framework neither encourages prisoners to file meritless

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202. *Blystone*, 664 F.3d at 413; *Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2003) (“As we have previously noted, while AEDPA restricts the writ of habeas corpus, it nonetheless ‘ensures every prisoner one full opportunity to seek collateral review.’ And, it is only after the prisoner has used the allowance of one habeas petition attacking the judgment that the second or successive petition rule restricts his ability to lodge further such attacks.”) (quoting *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (internal quotation marks removed)).

203. *Lonchar v. Thomas*, 517 U.S. 314, 315 (1996) (referring to habeas corpus).

204. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

205. 42 U.S.C §1997e (2013).

and frivolous claims nor hampers the policy goal of limiting such claims. One cannot forget that prisoners often proceed *pro se* in such situations, and require a more liberal interpretation of their filings under *Haines v. Kerner*.<sup>206</sup> Finally, a motion to reconsider under Rule 59(e) is not always likely to proceed by improper means, such as creative labeling. As one court stated, “In addressing a post-judgment motion, it is well settled that ‘a court is not bound by the label that the movant fastens to it’ . . . . A court may therefore ‘disregard the movant’s taxonomy and reclassify the motion as its substance suggests.’”<sup>207</sup> Rather, the same restrictions, such as timeliness of the motion,<sup>208</sup> scope of the arguments<sup>209</sup> and effects on an appeal<sup>210</sup> still remain. As shown above, a Rule 59(e) is “part and parcel” of the same habeas proceeding. Therefore, the application of *Crosby* and the AEDPA to Rule 59(e) motions, whether they assert a claim or not, is unnecessary in light of the existing limitations in not only the habeas context, but also in the general prisoner litigation context. Thus, such a motion should remain outside the purview of the AEDPA as applied under *Crosby*.

### C. History and Purpose

In addition to the reasons stated above, one final consideration that supports the different treatment of the motions is the historical purposes behind Rules 59(e) and 60(b). As discussed *supra*, Rule 59(e) was originally derived from the common law principle that

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206. 404 U.S. 519, 520 (1972) (per curiam).

207. *Logan v. Woods Hole*, No. 1:06-CV-10938, 2010 WL 2025126, at \*9 (D. Mass. Feb. 22, 2010) (quoting *Vasapolli v. Rostoff*, 39 F.3d 27, 36 (1st Cir. 1994) (treating Rule 60(b)(6) motion as motion under Rule 59(e)).

208. See, e.g., *Logan*, 2010 WL 2025126, at \*10 (“A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. Rule 6(b)(2), Fed. R. Civ. P., further instructs that, A court must not extend the time to act under . . . Rule 60(b), except as those rules allow.”) (internal quotation marks and citation omitted) (emphasis in original); *United States v. Marin*, 720 F.2d 229, 231 (1st Cir. 1983) (finding that Rule 60(b)(1)–(3)’s one year time period is “an absolute bar to relief from the judgment”); accord *Gonzalez v. Walgreens Co.*, 918 F.2d 303, 305 (1st Cir. 1990) (Appellants’ “failure to file their Rule 60(b)(3) motion within one year of the judgment is an absolute bar to relief from the judgment”) (internal quotation marks omitted); *Talano v. Nw. Med. Faculty Found., Inc.*, 273 F.3d 757, 762 (7th Cir. 2001) (“When a motion to alter or amend a judgment under Rule 59(e) . . . is filed more than 10 days after entry of judgment[, it] automatically becomes a Rule 60(b) motion.”) (internal quotation marks omitted).

209. See *supra* Part I.A–B.

210. See *supra* Part I.B.

imposed a duty on a judge to set aside a jury verdict and grant a new trial where that judge remained unsatisfied with the verdict.<sup>211</sup> Rule 60(b), however, has its roots in the theory that a party should have the opportunity to obtain relief from a final judgment.<sup>212</sup> The key similarity between these two rules, including their predecessors, is the discretionary power a district court has over the civil actions before it. Moreover, the ultimate relief, when simply construed, is to alter or vacate a judgment.

However, relying solely on such a simple analysis is misguided. On the one hand, Rule 59(e) was rooted in the unilateral authority a court possessed to affect the verdict of a jury.<sup>213</sup> It relates to a principle of judicial oversight that attempts to correct the flaws and temperaments that a juror, or any person, may possess which affect their ability to render justice. On the other hand, Rule 60(b) is grounded in a party's request for judicial action and intervention regarding a judgment, and focuses upon issues of finality and justice.<sup>214</sup> Those historical nuances and distinctions are evident in the rules as they are currently interpreted. The fact that much of the rules' historical principles and purposes managed to appear in today's versions reinforces the following point: that those nuances and distinctions, many from at least the 1600s, are important enough to preserve today. Because of that preservation, these rules must be treated differently and thus warrant their current effects and consequences in the habeas-AEDPA context.

In addition to the history and purpose of Rules 59 and 60, one cannot forget about the history and purpose of habeas corpus and the AEDPA. As discussed earlier, the AEDPA limits the ability of prisoners to repeatedly (and often frivolously) attempt to attack their convictions.<sup>215</sup> The problem with interpreting the AEDPA's purpose too broadly, however, is that such an interpretation may bar prisoners from raising legitimate concerns in the habeas process. And, as previously stated, the Great Writ is a fundamental privilege and staple of American law.<sup>216</sup> Indeed, the Supreme Court pointed out that "the Framers [of the United States] considered the [Great Writ] a vital instrument for the protection of individual liberty[, which] is evident from the care taken to specify the limited grounds

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211. See *supra* Part I.A.

212. See *supra* Part I.A.

213. See *supra* Part II.

214. *Id.*

215. *Id.*

216. See *supra* Part II.A.

for its suspension [under Article One of the Constitution].”<sup>217</sup> Therefore, it could be said that the AEDPA has a history and purpose directed toward restricting access to the courts (at least by prisoners), while the Great Writ has a history and purpose of creating an avenue for access to the same. At the very least, the Great Writ serves as a means to access courts in pursuit of protecting one’s individual liberty.

These conflicting histories and purposes result in limiting the AEDPA’s application to Rule 60(b) motions. To reconcile both restrictive and access-based histories, proper Rule 59(e) motions in the habeas context must be excluded from the AEDPA. Applying the AEDPA to both motions would overly obstruct an inmate’s access to potential habeas relief. That would insufficiently acknowledge and credit the history and purpose behind the Great Writ. However, limiting the AEDPA’s application to Rule 60(b) motions, rather than including proper Rule 59(e) motions, adequately preserves the history and purposes at issue. The AEDPA still preserves its history and purpose of restricting repetitive collateral attacks by inmates when they file improper Rule 60(b) and Rule 59(e) motions. By excluding proper Rule 59(e) motions, an inmate’s one true attempt at habeas relief is not infringed upon. Thus, such an arrangement strikes a balance that preserves the history and purposes behind both the AEDPA and the Great Writ.

#### CONCLUSION

This Article has demonstrated that motions under Rule 59(e) and Rule 60(b) maintain important distinctions with a difference. Although some argue that both motions provide the same relief, the history, purposes, and effects of filing either motion in the habeas context show why they should not be treated the same. These differences are not merely nuanced and inconsequential. Rather, they can have very serious consequences for litigants in the habeas context, many of whom are *pro se* inmates that lack any legal education. Moreover, such litigants usually receive only one chance under the AEDPA to use the Great Writ before being essentially foreclosed from seeking it again. Accordingly, placing further restrictions on this attempt at collateral relief, including the application of *Crosby*, should not be allowed when that litigant files a proper Rule 59(e) motion.

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217. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).



