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Circuit Court Interpretations of What Constitutes a Successive Habeas Corpus Motion under the Anti-Terrorism and Effective Death Penalty Act of 1996

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CIRCUIT COURT INTERPRETATIONS OF WHAT CONSTITUTES A SUCCESSIVE HABEAS CORPUS MOTION UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.[1]

I. INTRODUCTION

The United States Courts of Appeal are divided over the question of what constitutes a successive habeas corpus appeal under the Antiterrorism and Effective Death Penalty Act of 1996 ("ADEPA").[2] Specifically, the circuit courts have split over the issue of whether a prisoner's second habeas corpus petition should be considered successive, and, therefore, prohibited if the prisoner was forced to use his first petition to merely re-establish the right to appeal his sentence or conviction because his lawyer failed to file a timely notice of appeal.[3] This Note addresses this division by examining the Fourth Circuit's decision in the *Goddard* [4] case and the Fifth Circuit's ruling in the *Orozco-Ramirez* [5] case.[6]

Habeas Corpus allows a prisoner to challenge his imprisonment on the grounds that they are in custody in violation of the Constitution or laws of the United States.[7] The United States Congress passed ADEPA in April 1996 with the purpose of attempting to inject finality into criminal

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[1] *See* Antiterrorism and Effective Penalty Act of 1996, 28 U.S.C. §§2241-2261.

[2] *See* 28 U.S.C. §§ 2241-2261; *Compare* In re: Goddard 170 F.3d 435 (4th Cir. 1998) (holding first post conviction appeal to re-instate right of direct appeal not second or successive); Shepeck v. United States, 150 F.3d 800 (7th Cir. 1998) (determining habeas corpus motion re-establishing appeal rights allows subsequent motion for direct appeal); United States v. Scott, 124 F.3d 1328 (10th Cir. 1997) (holding motion reinstating direct appeal does not render first subsequent motion successive), *with* United States v. Orozco-Ramirez, 211 F.3d 862 (5th Cir. 2000) (holding first appeal following re-establishment of right to appeal as successive); Pratt v. United States, 129 F.3d 54 (1st Cir. 1997) (ruling second habeas corpus motion successive when first motion sought out of time appeal).

[3] *See, e.g. Orozco-Ramirez*, 211 F.3d at 862 (holding habeas corpus motion successive when following motion re-establising appeal rights); *Goddard*, 170 F.3d at 345 (allowing one collateral attack once appeal rights re-established.

[4] 170 F.3d 435 (4th Cir. 1998).

[5] 211 F.3d 1328 (5th Cir. 2000).

[6] *See Orozco-Ramirez*, 170 F.3d at 345 (applying strict ADEPA interpretation to successive habeas corpus petitions); *Goddard*, 170 F.3d at 345(holding re-establishing appeal rights does not preclude one post-conviction attack).

[7] EDWIN CHEMERINSKY, FEDERAL JURISDICTION 837-38 (Aspen Law and Business 1999) (outlining purpose for applying writ of habeas corpus).

decisions by severely limiting not only habeas corpus' scope, but also curtailing prisoners' access to it.[8] ADEPA prohibited prisoners from having successive habeas corpus petitions from being heard in United States District Court unless the court received permission from the United States Courts of Appeals.[9] Under ADEPA §2241, a prisoner must file a motion with the United States Court of Appeals requesting that the district court be allowed to hear the successive appeal.[10] The United States Court of Appeals, however, can only grant the district court permission to hear a successive habeas corpus petition in two scenarios.[11] The prisoner must either demonstrate that his claim is rooted in a new rule of constitutional law that applies retroactively, or that his claim is based upon facts that could not have been previously discovered, and those facts demonstrate clear and convincing evidence that no reasonable factfinder would have found the applicant guilty of the offense.[12]

In addition to prohibiting successive habeas corpus petitions, ADEPA further limited habeas corpus through the imposition of a one year statute of limitations for prisoners to raise habeas corpus claims.[13] ADEPA stipulates additionally that a prisoner in state custody cannot be granted habeas corpus relief merely because a state court misapplied constitutional principles.[14] Where a misapplication of constitutional principles has occurred, habeas corpus relief can only be granted where a state court has ruled contrary to, or made an unreasonable application of, federal law established by the Supreme Court of the United States.[15] Furthermore, ADEPA provides greater deference to a trial court's factual determinations by presuming that all factual issues determined at trial are correct.[16] This presumption is rebuttable only if the prisoner demonstrates through clear and convincing evidence that those facts are incorrect.[17]

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[8] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat 1241.

[9] 28 U.S.C. §2244 (mandating dismissal of successive habeas corpus petitions unless court approves under narrow exceptions).

[10] 28 U.S.C. §2241 (requesting United States Court of Appeals' permission to have successive petition heard).

[11] *Id.* (explaining conditions for successive appeal).

[12] *Id.* (outlining scenarios where permission for successive appeal granted).

[13] 28 U.S.C. §2255. The statute of limitations runs from the latest of the following times: 1) the time at which the judgment of the conviction becomes final, 2) the time in which an impediment to making a motion that was created by the government is removed, 3) the time at which the right of a habeas corpus appeal was initially recognized by the Supreme Court and 4) the time where the factual predicate of the claim presented could have been discovered through reasonable diligence. *Id.*

[14] 28 U.S.C. §2254 (d).

[15] *Id.*

[16] 28 U.S.C. §2254 (e).

[17] *Id.*

Part One of this note explains the circumstances that first led Mervyn Goddard, and later Javier Orozco-Ramirez, to file motions with the United States Court of Appeals requesting the district courts be allowed to hear the habeas corpus claims.[18] Part One also explains how in these two cases the Fourth and Fifth Circuit reached opposite conclusions when faced with very similar factual scenarios.[19] Part Two places ADEPA in historical context and examines its relationship to recent Supreme Court decisions that have significantly narrowed the writ of habeas corpus' scope.[20] Part Three analyzes the *Goddard* and *Orozco-Ramirez* decisions and places them within the context of other circuit court interpretations of what constitutes a successive habeas corpus appeal.[21]

II. MERVYN GODDARD AND JAVIER OROZCO-RAMIREZ

The issue in both *Goddard* and *Orozco-Ramirez* was whether or not a subsequent habeas corpus petition was considered successive under ADEPA when the first petition was used merely to reinstate a prisoner's right to a direct criminal appeal.[22] In August 1993, Mervyn Goddard pled guilty to three counts of federal drug offenses.[23] Four months following his conviction, Goddard was sentenced to 120 months in prison followed by ten years of supervised release.[24] Goddard failed to appeal his sentence.[25] In March 1996, Goddard filed a pro se §2255 motion in district court.[26] The motion claimed that Goddard's lawyer ignored his instructions to appeal his sentence.[27]

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[18] *See Orozco-Ramirez*, 211 F.3d at 863-64; *Goddard*, 170 F.3d at 435-37. (explaining how both petitions lost right of appeal through ineffective assistance of counsel).

[19] *Compare Orozco-Ramirez*, 211 F.3d at 866-70 (holding first appeal following re-establishment of right to appeal as successive), *with Goddard*, 170 F.3d at 437-38 (holding first post conviction appeal to re-instate right of direct appeal not successive).

[20] *See* 142 Cong. Rec. H3599-01 (April 18, 1996) (stating recent events obligated ADEPA's passage); *e.g.* Brecht v. Abrahamson 507 U.S. 619 (1993) (limiting harmless error review to constitutional errors causing substantial or injurious effect on jury verdict); Teague v. Lane, 489 U.S. 288 (1989) (barring retroactive application of new laws to habeas corpus cases nonexistent before appeal); Sumner v. Mata, 449 U.S. 539 (1981) (establishing deference to state courts' findings of fact); Stone v. Powell, 428 U.S. 465 (1976) (excluding 4th Amendment claims from habeas corpus relief).

[21] *See* Note.1 *supra.*

[22] *See generally Orozco-Ramirez*, 211 F.3d at 863; *Goddard*, 170 F.3d at 435.

[23] *Goddard*, 170 F.3d at 436. Mervyn Goddard violated drug laws under 21 U.S.C. §§ 841 and 846.

[24] *Id.*

[25] *Id.*

[26] *Id.* A §2255 motion is a habeas corpus petition for those prisoners in federal custody. 28 U.S.C. §2255.

[27] *Goddard*, 170 F.3d at 436.

The District Court granted his motion ruling that Goddard failed to file a timely appeal because he had received ineffective assistance of counsel.[28] It thus granted Goddard ten days to note an appeal.[29] The District Court, however, denied Goddard's appeal and imposed his original sentence.[30] The Fourth Circuit later affirmed this ruling.[31]

In March 1998, Goddard filed another §2255 motion in district court asserting that he had received ineffective assistance of counsel during his original 1993 sentencing hearing.[32] The District Court ruled that this motion was successive and that, under ADEPA, the District Court could only consider it if the court received authorization from the United States Court of Appeals.[33] The court therefore, dismissed the case without prejudice, and Goddard filed a §2244 motion seeking the Fourth Circuit's permission for his second §2255 motion to be heard on the merits.[34] In March 1999, the Fourth Circuit ruled that when a defendant used his first post-conviction motion, as Goddard did, only for the purpose of reinstating their right of appeal, the subsequent post conviction motion was not successive.[35]

One year after the *Goddard* decision, the Fifth Circuit, presented with very similar facts, reached the opposite conclusion in the *Orozco-Ramirez* case.[36] Like Mervyn Goddard, Javier Orozco-Ramirez was sentenced to prison in 1993 after he pled guilty to committing federal drug offenses in the United States District Court for the Northern District of Texas.[37] He was sentenced to 180 months imprisonment and four years of supervised release.[38] Like Goddard, he failed to file a timely notice of appeal of his sentence.[39]

In January 1995, however, Orozco-Ramirez filed a habeas corpus motion under §2255 for the purpose of challenging his sentence.[40] Like Goddard, Orozco-Ramirez claimed that he had received ineffective assistance of counsel because his lawyer failed to file a timely notice of

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[28] *Id.*

[29] *Id.* Goddard appealed his conviction claiming judicial errors in determining the quantity of drugs in his possession for the purpose of determining his sentence. *Id.* He claimed additionally, ineffective assistance of counsel. *Id.*

[30] *Id.*

[31] *Goddard*, 170 F.3d at 436.

[32] *Id.*

[33] *Id.*; *See also* 28 U.S.C. §§2255 and 2244 (b) (3).

[34] *Goddard*, 170 F.3d at 436.

[35] *Id.* at 435.

[36] *Orozco-Ramirez*, 211 F.3d at 862.

[37] *Orozco-Ramirez*, 211 F.3d at 863. Orozco-Ramirez pled guilty to distribution of heroin and conspiracy to distribute heroin. *Id.*; *Goddard*, 170 F.3d at 436 (describing Goddard's offense and sentence).

[38] *Id.*

[39] *Id*; *See Goddard*, 170 F.3d at 436 (stating no timely appeal of sentence filed).

[40] *Orozco-Ramirez*, 211 F.3d at 862.

appeal after having been asked to.[41] In January 1996, a magistrate court recommended, and the district court accepted, that Orozco-Ramirez receive an out of time appeal.[42] Two days following this decision Orozco-Ramirez filed a notice of his intention to appeal his 1993 conviction and sentence.[43]

Orozco-Ramirez obtained a new lawyer and, on direct appeal, raised matters regarding the quantity of drugs that formed the basis of his sentence in 1993.[44] The Fifth Circuit, however, affirmed the sentence.[45] One year later, Orozco-Ramirez filed a pro se and in forma pauperis §2255 motion to vacate his 1993 conviction and sentencing.[46] His claim asserted that he received ineffective assistance of counsel at his sentencing, ineffective assistance of counsel that rendered his guilty pleas involuntarily, and ineffective assistance of counsel regarding the handling of his out of time appeal.[47] The magistrate court recommended the second §2255 motion's dismissal because it constituted a successive motion under ADEPA.[48] The District Court agreed and Orozco-Ramirez filed a §2244 motion asking the Fifth Circuit to allow his motion to be heard.[49] In contrast to the Fourth Circuit's decision in the *Goddard* case, the Fifth Circuit held that Orozco-Ramirez's claims that he had received ineffective assistance of counsel at trial rendered his second §2255 motion as successive and was, therefore, ineligible to be heard on the merits.[50]

III. ADEPA AND HABEAS CORPUS IN A HISTORICAL CONTEXT

The circuit split outlined in the *Goddard* and *Orozco-Ramirez* cases illustrates that neither ADEPA nor the United States Supreme Court clearly articulated what constitutes a successive appeal.[51] What is clear, however,

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[41] *Id*; *See Goddard*, 170 F.3d at 436 (stating Goddard's ineffective assistance of counsel claim).

[42] *Orozco-Ramirez*, 211 F.3d at 863.

[43] *Id.*

[44] *Id*,

[45] *Id.* at 864.

[46] *Id.*

[47] *Orozco-Ramirez*, 211 F.3d at 864.

[48] *Id.* at 864.

[49] *Id.*

[50] *Compare Orozco-Ramirez*, 211 F.3d at 868-70 (holding motion containing previous claims successive, *with Goddard*, 170 F.3d at 438 (holding ineffective assistance of counsel claim not successive). The court ruled, however, that Orozco-Ramirez claims of ineffective assistance of counsel during his out of time were not successive. *Id.* at 438.

[51] *See Orozco-Rameriz*, 211 F.3d at 867 (stating ADEPA does not define "successive"); *Goddard*, 170 F.3d at 438 (describing differing interpretations of successive petition); Stewart v. Martinez-Villareal, 523 U.S. 937 (1998) (proclaiming motion not successive merely because second or subsequent); Slack v. McDaniel, 120 S.Ct. 1618 (determining petition filed after mixed petition dismissed before any claims adjudicated non-successive); 28 U.S.C. §2255. This section merely states that a successive motion must be certified by the United States Court of Appeals without elaboration. *Id.*

is that over the past thirty years both Congress and the Supreme Court have increasingly limited habeas corpus' scope.[52] Congress passed ADEPA in response to a series of terrorist attacks on Americans during the 1980s and 1990s.[53] The most notable of these terrorist attacks were the bombings of Pan Am flight 103 over Lockerbie, Scotland in 1988, the World Trade Center in New York City during February1993, of the Murrah Federal Building in Oklahoma City in April 1995.[54] ADEPA, however, had little to do with preventing terrorism.[55] Rather, ADEPA focused primarily upon curbing what many conservative members of Congress perceived to be a rampant abuse of habeas corpus by prisoners who filed delayed or repetitive petitions.[56] This perceived abuse was curtailed through ADEPA §§ 2254 and 2255.[57] Although § 2254 limits habeas corpus motions for prisoners in state custody and § 2255 limited habeas corpus motions for those in federal custody, the two sections are substantively identical.[58] Both sections prohibit prisoners from having a successive habeas corpus motion heard on the merits in district court without United States Court of Appeals authorization.[59]

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[52] *See, e.g.* Brecht v. Abrahamson 507 U.S. 619 (1993) (limiting harmless error review's scope); Teague v. Lane, 489 U.S. 288 (1989) (proscribing new laws' retroactive application to habeas corpus claims); Sumner v. Mata, 449 U.S. 539 (1981) (deferring to state court factual determinations); Stone v. Powell, 428 U.S. 465 (1976) (excluding fourth amendment claims from habeas corpus motions); 28 U.S.C. §§ 2241-2261.

[53] 142 Cong. Rec. H3599-01 (April 18, 1996) (noting Representative Pryce's statement). During debate in the House of Representatives Pryce argued:

> So as we near the one year anniversary of the Oklahoma City bombing, I urge the house to. . .send a clear signal to would be terrorists that their, cowardly, destructive acts will not be tolerated by the American people or this institution. For the victims of Oklahoma City and victims of other tragic events. . . I urge your support.

Id.

[54] *Id.*

[55] *Id.* (noting Representative Gekas's statement during floor debate). Gekas argued:

> When we see the World Trade Center tragedy and other terrorism . . . we need the death penalty . . .we have before us a habeas corpus procedure that (allows) a killer who viciously kills hundreds of people in one act (to) sit in his sell sit in his cell and file paper after paper, habeas corpus and other documents to prevent the ultimate punishment.

Id. Not every member of Congress shared this view: *See* 142 Cong. Rec. H3599-01 (April 18, 1996) (expressing dissenting view of Representative Watt). Watt argued that "We are about to perpetuate a fraud on the American People, because this bill is not any longer about terrorism . . .we are unfortunately using these two terrorist acts as the predicate for undoing some important constitutional protections." *Id.*

[56] *Id.*

[57] 28 U.S.C. §§ 2254 and 2255.

[58] *Id.*

[59] *Id.*

There are only two ways in which the United States Court of Appeals will allow a successive motion to be heard on the merits.[60] The first way is if the prisoner demonstrates that his claim is based upon a new rule of constitutional law that applies retroactively.[61] The Supreme Court defined a new rule of constitutional law in its *Teague* [62] decision as, "one that breaks new ground or imposes new obligations on the States of Federal government".[63] A case announces a new rule, "if the result was not dictated by precedent existing at the time the defendant's conviction became final."[64] A new rule can only be applied retroactively, according to the *Teague* decision, if the rule places a primacy on private individual conduct beyond lawmakers' ability to prescribe, or the rule adopts a procedure "implicit in the concept of ordered liberty."[65] Therefore under ADEPA there are, "essentially no new rules can be asserted on habeas corpus claims."[66] A prisoner can thus only be granted habeas corpus when his petition asserts claims based upon clearly established constitutional rights.[67]

The second way the United States Court of Appeals will authorize a successive petition's hearing on the merits is when the factual basis for the prisoner's claim, "could not have been discovered previously and those facts establish clear and convincing evidence that no reasonable factfinder would have found the prisoner guilty of the offenses for which they were convicted."[68] If the United States Court of Appeals fails to grant the district court authorization to hear the successive motion on the merits, ADEPA prohibits the prisoner from appealing the decision to the Supreme Court.[69]

Article III of the United States Constitution grants Congress the power to limit the federal courts' jurisdiction over habeas corpus motions.[70] ADEPA and other past limitations placed upon the federal courts' habeas corpus jurisdiction were designed to inject finality into an appellate process that Congress believed not only delayed sentences from

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[60] 28 U.S.C. §2244.

[61] *Id.*

[62] 489 U.S. 288 (1989).

[63] *Id.* at 301. *See* ERWIN CHEMERINSKI, FEDERAL JURISDICTION 872-888 (1999) (discussing impact and application of *Teague* rules).

[64] *Teague*, 489 U.S. at 301.

[65] *Id.* at 307.

[66] ERWIN CHEMERINSKI, FEDERAL JURISDICTION 880-81 (1999).

[67] *Id.*

[68] *Teague* 489 U.S. at 301.

[69] *Id.*

[70] U.S. CONST. Art. III § 2. It reads, "the supreme court shall have appellate Jurisdiction , both as to Law and Fact, with such Exceptions, and under such regulations as Congress shall make." *Id.*

being carried out, but also unduly congested the federal courts.[71] Congress originally intended habeas corpus to apply only to those prisoners in federal custody and did not intend to include prisoners in state custody.[72] In 1867, Congress expanded habeas corpus and allowed the federal courts jurisdiction over all cases where an individual had his liberty restrained in violation of either the Constitution or any other United States' treaties or laws.[73]

By the middle of the twentieth century, the Supreme Court expanded habeas corpus when it allowed prisoners in state custody to challenge their state court convictions and sentences in federal court.[74] In *Brown v. Allen*[75] the Supreme Court ruled that a person convicted in state court who had fully litigated their constitutional claims at the state level may raise constitutional issues on a habeas corpus claim in federal court.[76] The Court reasoned that this extension of habeas corpus was necessary because too often state courts failed to protect a defendant's federal constitutional rights.[77] By the late 1960s, the Court expanded habeas corpus further and allowed federal prisoners to submit habeas motions on constitutional issues that had been decided previously at trial.[78] The Court stated that because constitutional rights were of such fundamental importance, the federal courts must provide a mechanism of relief.[79]

This expansion has not lasted, however, because over the past thirty years, the Supreme Court has steadily reduced the scope and availability of

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[71] *See* 142 Cong. Rec. H3599-01 (expressing congressional frustration with habeas corpus procedure as justification for ADEPA): *See e.g.* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (holding federal courts' habeas corpus jurisdiction revocable under Habeas Act of 1867); Ex parte Yerger, 75 (8 Wall.) 85 (1869) (declaring 1868 Habeas Act did not deprive courts from hearing petitions under 1789 Habeas Act). WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, (Vintage Books 1998) (describing limits placed on habeas corpus in wartime).

[72] *See* Felker v. Turpin, 518 U.S. 651 (1996) (tracing habeas corpus' legislative and judicial history in United States); Ex parte Dorr, (3 How.) 103 (1845) (declaring writ of habeas corpus availability exclusively for federal prisoners); Habeas Act of Feb. 5 1867, ch. 28, 14 Stat. 385 (allowing habeas corpus for all prisoners whose incarceration violated state or federal law).

[73] *See Felker*, 518 U.S. at 659 (tracing expansion of habeas corpus during nineteenth century); Habeas Act of Feb. 5 1867, ch. 28, 14 Stat. 385. Prior to the 1867 Act, the only way in which a federal court could issue a writ of habeas corpus was if it was necessary for the prisoner to testify. Habeas Act of Sept. 24, 1789, ch. 20 §14.

[74] *See* Waley v. Johnston, 316 U.S. 101 (1942); Brown v. Allen, 344 U.S. 433 (1953) (establishing state prisoners right to argue federal constitutional claims in federal court).

[75] 344 U.S. 433 (1953).

[76] *Id.* at 511.

[77] *Id.*

[78] *See* Kaufman v. United States, 394 U.S. 217 (1969) (stating constitutional issues appropriate for federal prisoners to re-litigate in habeas corpus claims).

[79] *Id.* at 226.

habeas corpus claims.[80] ADEPA essentially codified these common law reductions.[81] In 1991, five years prior to ADEPA's enactment, the Supreme Court introduced similar standards designed to prevent perceived habeas corpus abuse.[82] Like Congress, the Court was concerned with the finality of judgments.[83] The Court held in its *McCleskey* [84] decision that a prisoner may not file a successive habeas corpus motion that presented a new legal issue unless he could show cause as to why that issue was omitted from the previous motion.[85] Once the prisoner demonstrates cause, the government must prove that the successive habeas corpus motion represents an abuse of the writ.[86] The government can prove this by merely demonstrating that the new motion presented new legal issues.[87] Once this is established, the prisoner must explain why the new claim was omitted from the earlier petition and demonstrate actual prejudice.[88] Alternatively, the prisoner can argue that the successive petition's dismissal would constitute a fundamental miscarriage of justice.[89] The Court reasoned that allowing prisoners to continuously file successive habeas corpus motions that included new claims engendered "perpetual disrespect for the finality of convictions and disparages the entire criminal justice system."[90]

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[80] *See Brecht*, 507 U.S. at 619 (limiting scope of harmless error review); *Teague*, 489 U.S. at 539 (prohibiting retroactive application of new laws to habeas corpus claims); *Sumner*, 449 U.S. at 539 (establishing deference towards state courts' factual determinations); *Stone*, 428 U.S. at 465 (excluding 4th amendment claims from habeas corpus motions).

[81] *See Felker*, 518 U.S. at 664 (tracing relationship between legislative actions and judicial rulings regarding habeas corpus); McCleskey v. Zant, 449 U.S. 467 (1991) (outlining burden placed upon judicial branch by repetitive habeas corpus motions).

[82] *See McCleskey*, 499 U.S. at 467 (describing negative effects of petitioners abusing habeas corpus). The Court stated that these effects included a, "heavy burden on scarce judicial resources" and threatens courts' ability, "to resolve primary disputes." *Id.* at 491. The Court further reasoned that habeas corpus review gave litigants an incentive to withhold claims "for manipulative purposes." *Id.* Lastly, the Court stated that successive habeas corpus motions "extends the ordeal for society and the accused." *Id.* at 492.

[83] *See McCleskey*, 499 U.S. at 467; 142 Cong. Rec. H3599-01 (expressing concerns over numerous habeas corpus motions).

[84] 499 U.S. 467 (1991).

[85] *Id.* at 494.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *McCleskey*, 499 U.S. at 494-95.

[90] *Id.* at 491-92.

IV. DEFINING SUCCESSIVE HABEAS CORPUS MOTIONS UNDER *GODDARD* AND *OROZCO-RAMIREZ*

While ADEPA does not define what a successive habeas corpus motion is, the Supreme Court and the United States Court of Appeals have attempted to inject some clarity into the discussion.[91] The Supreme Court has held that a habeas corpus motion was not successive merely because it was numerically second or subsequent to a previous motion.[92] The Court reasoned that a § 2254 or § 2255 motion could not be considered successive if the previous motion was dismissed for reasons such as failing to exhaust state remedies, failure to pay a court filing fee, or because the motion raised an unripe legal issue.[93] This list, however, may not be definitive because, as the *Goddard* and *Orozco-Ramirez* cases illustrate, the federal courts disagree over the question of whether a § 2255 motion is to be considered subsequent when a prior motion was used merely to re-instate a prisoner's right of appeal.[94]

In its *Goddard* opinion, the Fourth Circuit held that when a defendant used his first post conviction appeal solely to reinstate their right to a direct appeal, their first subsequent post-conviction motion is not successive.[95] According to the Fourth Circuit, Goddard's first § 2255 motion was a restorative measure designed to place him in, "the same position as if his lawyer had originally filed a timely notice of appeal."[96] The court logically concluded that it was meaningless to restore a prisoner's rights to a direct appeal of their conviction and sentence if a subsequent motion that requested an appeal was considered successive

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[91] *See Stewart*, 523 U.S. at 637 (outlining scenarios where subsequent motion not successive under ADEPA). In re Cain, 137 F.3d 235 (4th Cir. 1998) (holding motion successive if containing claims that petitioner could have raised in earlier motion); Carlson v. Pitcher, 137 F.3d 416 (6th Cir. 1998) (stating under ADEPA, § 2254 motion subsequent to motion dismissed for failure to exhaust not successive); Benton v. Washington, 106 F.3d 162 (holding § 2255 motion dismissed for failure to pay filing fee does not render subsequent motion successive); Chambers v. United States, 106 F.3d 472 (2d Cir. 1997) (ruling that motion mislabeled as §2255 motions does not render next motion successive).

[92] *Stewart*, 523 U.S. at 642-44.

[93] *Id.*

[94] *Compare Goddard*, 170 F.3d at 435; (holding § 2255 motion not subsequent because first motion re-instated right of appeal); *Shepeck*, 150 F.3d at 800 (ordering §2255 motion to permit appeal rests number of collateral attacks to zero); *Scott*, 124 F.3d at 1328 (ruling second motion not subsequent when first reinstated right of appeal); *with Orozco-Ramirez*, 211 F.3d at 862 (declaring defendant's second motion claiming ineffective counsel successive under ADEPA); *Pratt*, 129 F.3d at 54 (requiring joining all attacks on judgment and reinstatement claim in first § 2255 motion).

[95] *Goddard*, 170 F.3d at 435.

[96] *Id.* at 437. The court noted that Goddard's predicament was not his fault. Rather, his lawyer, "bungled the job" by not realizing there was still time to file an appeal after Goddard had requested one. *Id.*

because such a philosophy unfairly limited the prisoner's post conviction remedies.[97] Furthermore, the court stressed that to rule Mervyn Goddard's second § 2255 motion as successive placed him at an extreme disadvantage to those prisoners whose lawyers complied with their appeal requests.[98]

The Fourth Circuit's ruling was influenced by the Tenth Circuit's decision in the *Scott*[99] case.[100] The facts in the *Goddard* and *Scott* cases are nearly identical.[101] In the *Scott* decision, the prisoner, Wallie Scott, filed a § 2255 motion with the district court asserting that his lawyer failed to file an appeal.[102] After Wallie Scott's § 2255 motion was granted and he was re-sentenced, the Tenth Circuit affirmed his conviction and sentence on appeal.[103] Scott then filed a second § 2255 motion that asserted he received ineffective assistance of counsel both at his trial and during the appeal.[104] The Tenth Circuit stated, using language the Fourth Circuit adopted later in the *Goddard* case, that the purpose of Scott's first § 2255 motion and appeal was to place him, "back in the position he would have been had counsel perfected a timely notice of appeal."[105] The court argued in its *Scott* opinion that, under the Supreme Court's *Stewart* ruling, a second § 2255 motion that claimed ineffective assistance of counsel during an appeal could not be construed as successive because such a claim could not exist before the appeal was completed.[106]

While the Fourth Circuit's *Goddard* opinion adopted the Tenth Circuit's reasoning in the *Scott* decision, it rejected the First Circuit's *Pratt* ruling that required prisoners to join all other claims concerning their conviction and sentence that could have been raised on direct appeal to their initial § 2255 motion.[107] The Fourth Circuit criticized the rationale behind the *Pratt* decision and argued, "that such an approach diminished

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[97] *Id.*

[98] *Id.* at 438.

[99] 124 F.3d 1328 (1997).

[100] *See Goddard*, 170 F.3d at 437 (noting *Scott* decision's influence); *Scott*, 124 F.3d at 1328 (ruling second § 2255 motion non-successive because first used to re-instate appeal rights).

[101] *Compare Goddard*, 170 F.3d at 436 *with Scott*, 124 F.3d at 1328. Like Mervyn Goddard, Wallie Scott was convicted on federal drug charges. Scott was convicted of conspiracy to possess with intent to distribute cocaine base and possession with the intent to contribute cocaine base. *Scott*, 124 F.3d at 1328. Like, Mervyn Goddard, Wallie Scott's lawyer ignored a request to appeal the conviction and sentence. *Id.*

[102] *Scott*, 124 F.3d at 1328.

[103] *Id.* at 1328.

[104] *Id.*

[105] *See Goddard*, 170 F.3d at 437-39 (allowing one habeas corpus appeal following appeal right's restoration); *Scott*, at 1329 (holding appeal rights re-establishment permits one attack on sentence or conviction).

[106] *Scott* 124 F.3d at 1329.; *see also Stewart*, 118 F.3d at 628 (ruling that first habeas motion dismissed for unripeness does not render second motion successive).

[107] *See Goddard*, 170 F.3d at 438 (*citing Pratt*, 129 F.3d at 54).

the value of a reinstated appeal right."[108] While it agreed with the First Circuit's belief that ADEPA's provisions were "strict", the Fourth Circuit believed that those provisions allowed one collateral attack on a conviction or sentence after a prisoner re-established his direct appeal rights.[109] The Fourth Circuit noted correctly that the First Circuit's approach essentially denied a prisoner's right to counsel because, where a prisoner § 2255 motion already claimed ineffective assistance of counsel, the requirement to join all other claims to that motion forced them to make substantive objections to their conviction and sentence without a lawyer's guidance.[110]

In contrast to the Fourth Circuit, the Fifth Circuit's *Orozco-Ramirez* opinion held that Orozco-Ramirez's claim of ineffective assistance of counsel at trial constituted a successive § 2255 motion under ADEPA.[111] Under the Fifth Circuit's analysis, a § 2255 motion was successive when it raised claims challenging a prisoner's conviction or sentence that could have been raised in an earlier § 2255 motion used solely to reinstate the right of direct appeal.[112] Javier Orozco-Ramirez argued that under the Fourth Circuit's *Goddard* opinion, his first § 2255 motion merely reinstated his right to appeal, so the second § 2255 motion claiming ineffective assistance of counsel at trial could not be considered successive.[113] While the Fifth Circuit conceded that the *Goddard* opinion was "directly on point", the court declined to follow it.[114] The Fifth Circuit explicitly rejected the *Goddard* opinion and stated that the Fourth Circuit's reasoning violated not only ADEPA's spirit, but also the Supreme Court's desire, as expressed in its *Stewart* ruling, to bring finality and res judicata principles to habeas corpus.[115] Furthermore, the court believed that the *Goddard* opinion essentially stood for the proposition that the question of whether or not a subsequent § 2255 motion was successive depended, "upon the first motion's success in gaining an out of time appeal".[116]

Rather than adopt this philosophy, the Fifth Circuit adopted the First Circuit's more stringent reasoning in the *Pratt* opinion.[117] According to the Fifth Circuit, there was nothing inherently unfair in forcing Orozco-Ramirez in join all of his collateral claims in his first § 2255 motion.[118]

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[108] *Goddard*, 170 F.3d at 438.

[109] *Id.*

[110] *See id.* at 438.

[111] *Orozco-Ramirez*, 211 F.3d at 862.

[112] *Id* at 867.

[113] *Orozco-Ramirez*, 211 F.3d at 869.

[114] *Id.*

[115] *Id.* at 870; 28 U.S.C §§2241-2261. *See also Stewart*, 532 U.S. at 673 (outlining Supreme Court's res judicata philosophy regarding habeas corpus); *Goddard*, 170 F.3d at 435 (discussing second appeal's curative effect regarding ineffective assistance of counsel).

[116] *Orozco-Ramirez*, 211 F.3d at 870.

[117] *Id.* at 870 ; *Pratt*, 129 F.3d at 61.

[118] *Orozco-Ramirez*, 211 F.3d at 869.

The court argued prisoners like Orozco-Ramirez's should assert all of his collateral attacks in the initial § 2255 motion "because when filing the motion he cannot know whether or not his claim seeking an out of time appeal will be successful."[119] Furthermore, if the initial § 2255 motion was rejected, a subsequent § 2255 motion is successive if it asserted habeas corpus claims that could have been brought earlier.[120]

The Fourth Circuit's *Goddard* opinion is a more reasonable interpretation of what constitutes a successive § 2255 motion than the Fifth Circuit's *Orozco-Ramirez* ruling because it balances ADEPA's restrictions and the Supreme Court's desire for finality, with the recognition that access to effective counsel is essential to insuring a fair trial and appellate system.[121] The Fourth Circuit correctly recognized that a prisoner bears a substantial burden when he is forced to discern, without the aid of counsel, what habeas corpus claims he may have at his disposal while seeking an out of time appeal.[122] The Fifth Circuit essentially ignored this concern and interpreted far too narrowly ADEPA and the *Stewart* decision's res judicata principles to mean literally "one bite at the apple" no matter that a prisoner was subjected to incompetent legal counsel.[123] The court, furthermore, appears to have wildly overestimated a prisoner's ability to act effectively as his own advocate in the appellate process.[124]

V. CONCLUSION

As this Note has explained, ADEPA has significantly curtailed not only habeas corpus' scope but also the ways in which a prisoner may employ it to attack his conviction or sentence. Under ADEPA § 2255, a prisoner is barred from having a subsequent habeas corpus motion heard on the merits unless it is approved by the United States Court of Appeals. The new motion is approved if it relies on a new rule of constitutional law made retroactively applicable by the Supreme Court, or is based on facts that could not have been previously discoverable. Additionally the United States Court of Appeals must rule that without the constitutional error, the prisoner would be found actually innocent. While ADEPA does not define what constitutes a successive habeas corpus motion, the Supreme

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[119] *Id.* at 870.

[120] *Id.* at 870.

[121] *See Stewart*, 523 U.S. at 637 (expressing need for finality in habeas corpus cases); *Orozco-Ramirez*, 211 F.3d at 862 (requiring that initial motion include all habeas claims as consistent with *Stewart*); *Goddard*, 170 F.3d at 437-38 (proclaiming ADEPA allows one collateral attack following restoration of appeal rights).

[122] *See Goddard*, 170 F.3d at 437-38 (reasoning prisoner should not be penalized for ineffective assistance of counsel).

[123] *See Orozco-Ramirez*, 211 F.3d at 869-71 (stating fairness of requiring prisoners to attach all claims to initial §2255 motion).

[124] *See id.* at 870.

Court, prior to its passage, had stated that initial § 2255 motions that were dismissed for reasons such as failing to pay a court filing fee or raising an unripe legal issue did not render a subsequent § 2255 motion as successive.

Without clear guidance from ADEPA or the Supreme Court, the Federal Courts of Appeals are divided over whether a second § 2255 motion that challenges a prisoner's conviction or sentence is successive when the initial motion merely reinstated his right of appeal that was lost due to ineffective assistance of counsel. The majority of circuits, illustrated most recently by the Fourth Circuit's *Goddard* opinion, have held that in such cases the subsequent motion is not rendered successive and, thus, may be heard on the merits. A minority of circuits, as most recently illustrated by the Fifth Circuit's *Orozco-Ramirez* opinion, disagree with this reasoning and have held that a prisoner must assert all potential claims related to their conviction and sentence in their initial § 2255 motion.

The Fourth Circuit's Goddard decision represents the best interpretation of what constitutes a successive appeal under ADEPA. The Fourth Circuit's interpretation recognizes that while ADEPA was intended to limit the number of post-conviction appeals a prisoner was entitled to, ADEPA was not designed to entirely eliminate his rights. The Fifth Circuit's approach essentially eliminates a prisoner's right to a post-conviction when he receives ineffective assistance of counsel. Such an approach denies a prisoner his due process rights and discriminates against indigent prisoners who were represented by court appointed lawyers.

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