No. 18-____

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD SMITH,

***Petitioner*,**

v.

LaSHANN EPPINGER, Warden,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Brandt, Esq.
ROBINSON & BRANDT, P.S.C.
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
jmbrandt@robinsonbrandt.com
Counsel for Petitioner

22 August 2018

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SUPREME COURT OF THE UNITED STATES

EDWARD SMITH,

***Petitioner*,**

v.

LaSHANN EPPINGER, Warden,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Edward Smith respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Smith encloses his affidavit of indigence in support of this motion.

Dated: 22 August 2018

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt
ROBINSON & BRANDT, P.S.C.
629 Main Street
Suite B
Covington, KY 41011
(859) 581-7777 voice
jmbrandt@robinsonbrandt.com
Counsel for Petitioner

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Edward Smith, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$"0"	$"0"	$"0"	$"0"
Self-employment	$"0"	$"0"	$"0"	$"0"
Income from real property (such as rental income)	$"0"	$"0"	$"0"	$"0"
Interest and dividends	$"0"	$"0"	$"0"	$"0"
Gifts	$"0"	$"0"	$"0"	$"0"
Alimony	$"0"	$"0"	$"0"	$"0"
Child Support	$"0"	$"0"	$"0"	$"0"
Retirement (such as social security, pensions, annuities, insurance)	$"0"	$"0"	$"0"	$"0"
Disability (such as social security, insurance payments)	$"0"	$"0"	$"0"	$"0"
Unemployment payments	$"0"	$"0"	$"0"	$"0"
Public-assistance (such as welfare)	$"0"	$"0"	$"0"	$"0"
Other (specify): State Pay	$ 20.00	$"0"	$ 20.00	$"0"
Total monthly income:	$ 20.00	$"0"	$ 20.00	$"0"

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
"N/A"	"N/A"	"N/A"	$ "0"
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
"N/A"	"N/A"	"N/A"	$ "0"
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
"N/A"	"N/A"	$ "0"	$ "0"
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value "N/A"

☐ Other real estate
Value "N/A"

☐ Motor Vehicle #1
Year, make & model "N/A"
Value "N/A"

☐ Motor Vehicle #2
Year, make & model "N/A"
Value "N/A"

☐ Other assets
Description "N/A"
Value

	You	Your spouse
Transportation (not including motor vehicle payments)	$ "0"	$ "0"
Recreation, entertainment, newspapers, magazines, etc.	$ "0"	$ "0"
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ "0"	$ "0"
Life	$ "0"	$ "0"
Health	$ "0"	$ "0"
Motor Vehicle	$ "0"	$ "0"
Other: _____	$ "0"	$ "0"
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ "0"	$ "0"
Installment payments		
Motor Vehicle	$ "0"	$ "0"
Credit card(s)	$ "0"	$ "0"
Department store(s)	$ "0"	$ "0"
Other: _____	$ "0"	$ "0"
Alimony, maintenance, and support paid to others	$ "0"	$ "0"
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ "0"	$ "0"
Other (specify): hygiene, postage, & legal copies	$ 20.00/mo	$ "0"
Total monthly expenses:	$ 20.00/mo	$ "0"

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
"N/A"	$ "0"	$ "0"
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
"N/A"	"N/A"	"N/A"

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ "0"	$ "0"
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ "0"	$ "0"
Home maintenance (repairs and upkeep)	$ "0"	$ "0"
Food	$ "0"	$ "0"
Clothing	$ "0"	$ "0"
Laundry and dry-cleaning	$ "0"	$ "0"
Medical and dental expenses	$ "0"	$ "0"

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated and earn minimal "state pay" for prison labor that is insufficient to meet even my own basic needs

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 17, , 20 18

Edward Smith

(Signature)

QUESTIONS PRESENTED

When a district court denies a state inmate's petition for writ of habeas corpus under 28 U.S.C. § 2254, the inmate may appeal only if the district or circuit court grants him a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A). The court of appeals may not skip ahead, decide the merits of the issue at bar to conclude that the issue was not debatable and, thus, deny COA. *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017).

In this case, Petitioner filed an application for COA, with the question being whether the district court erred in denying his motion to amend. Directly contrary to *Buck* and other case law of this Court, the Sixth Circuit failed to address whether the district court's ruling was debatable and, instead, short circuit any chance of appeal by affirming the district court's decision to deny relief (albeit on different grounds), treating the application as a request for leave to file a second habeas petition, and denying it. Thus, the first question presented to the Court is whether the Sixth Circuit failed to follow this Court's clear precedent as to the standard of review for whether a COA should be granted by failing to review whether the district court decision was debatable.

Concerns as to the finality of criminal cases have led to statutes such as the Anti-terrorism and Effective Death Penalty Act limiting the filing of second or successive federal habeas petitions. *Rhines v. Weber*, 533 U.S. 269, 276, 125 S. Ct. 1528 (2005). The circuit courts appear to agree that, when a motion to amend a petition for habeas corpus is filed before the district court's judgment, the motion is not to be treated as a second or successive habeas petition that requires pre-certification. See, e.g., *Ching v. United States*, 298 F.3d 174, 176-81 (2d Cir. 2002); *Johnson v. United States*, 196 F.3d 803, 803-06 (7th Cir. 1999).

In *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005), the Court held that a Rule 60(b) motion that seeks to add a new ground for relief should be construed as a second or successive habeas action. *Id*. at 532. The Sixth Circuit appears to have concluded that *Gonzalez* necessarily applies to motions to amend. See *Clark v. United States*, 764 F.3d 653, 658 (6th Cir. 2014) ("When a habeas petitioner files a motion attacking the merits of a conviction or sentence after the adjudication of her habeas petition is complete—meaning that the petitioner has lost on the merits and has exhausted her appellate remedies—the motion, irrespective of its characterization, is really a second or successive habeas petition."). But *Gonzalez* did not review or address a motion to amend, does not purport to apply to a motion to amend, and the logic behind *Gonzalez* does not carry the same weight when taken to the context of motions to amend.

In this case, Petitioner sought to amend his § 2254 petition after an adverse judgment. The district court denied relief using an unknown "good cause" standard for which it cited no authority. Citing *Gonzalez*, the Sixth Circuit treated the post-judgment motion to amend as a second or successive petition even though the petition did not raise a new claim. Accordingly, the second question presented is whether the *Gonzalez* logic leads to a conclusion that a post-judgment motion to amend that does not raise a new claim may be treated as a second or successive petition and transferred to the circuit court under the strict criteria of § 2244(d).

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward Smith respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the Sixth Circuit are unpublished. *Smith v. Eppinger*, No. 17-3952, 2018 U.S. App. LEXIS 7751 (6th Cir., Mar. 27, 2018) (order denying request for certificate of appealability), Pet. App. 2a; *Smith v. Eppinger*, No. 17-3952, 2018 U.S. App. LEXIS 14965 (6th Cir., Jun. 1, 2018) (order denying request for petition for rehearing and rehearing en banc), Pet. App. 1a. The district court opinions denying Smith's habeas petition and his motion to amend are also unpublished. *Smith v. Brigano*, No. 1:01-cv-00814, 2017 U.S. Dist. LEXIS 114171 (S. D. Ohio, Jul. 21, 2017), Pet. App. 7a.

JURISDICTION

The court of appeals entered its judgment on March 27, 2018. Pet. App. 2a. The court of appeals denied Smith's timely petition for rehearing and rehearing en banc. Pet. App 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV.

The federal courts should grant habeas relief under 28 U.S.C. § 2254 if the state's prior adjudication of the claim was:

> contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States [or that the decision] was based on an unreasonable determination of the facts.

28 U.S.C. § 2254(d)(1), (d)(2).

Congress adopted a one-year limitation period for a state inmate to file a habeas petition which ordinarily runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

As amended by the Antiterrorism and Effective Death Penalty Act of 1996, that section provides in relevant part:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offenses.

28 U.S.C. § 2244(b).

A state prisoner whose petition for writ of habeas corpus is denied by a federal district court may appeal only if "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1).

"A certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

STATEMENT OF THE CASE

When the district court denies habeas relief, the courts repeatedly wrestle with what is "debatable" for the purposes of determining whether to certify an issue for appeal under 28 U.S.C. § 2253(c). This Court has recently held that when a court of appeals sidesteps the process by first deciding the merits of an appeal and then justifying its denial of a COA based upon its adjudication of the merits, it is in essence deciding an appeal without jurisdiction. *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017).

In this case, when the district court denied Smith's motion to amend, he appealed and sought a certificate of appealability from the U.S. Court of Appeals for the Sixth Circuit. Smith wished to argue on appeal that the district court erred by rejecting the amended claim. The question before the Sixth Circuit, then, was whether the district court's decision was debatable and worthy of further review. But the circuit court did not review any question for whether the district court's action was debatable. Instead, it jumped to the *merits* of the matter, affirming the district court's end result (although doing so on alternative grounds). Pet. App. 4a ("[T]he district court should have construed Smith's motion to amend as a second or successive habeas petition and transferred the petition to this court."). The Sixth Circuit even went so far as to review the matter as an application for leave to file a second § 2254 petition (a request Smith never made), denying on the merits of that argument as well. Pet. App. 4a-5a.

In resolving claims raised under 28 U.S.C. § 2254 in an original filing and with those filings that follow, the courts often struggle with what qualifies as a "second or successive" petition—a term of art that Congress did not define. See *Magwood v. Patterson*, 561 U.S. 320, 331-32, 130 S. Ct. 2788 (2010). When a state inmate moves to amend a habeas petition after the

original filing has been denied, an important question arises as to whether the claim presented is completely new and should be treated as a second or successive § 2254 petition or one that is properly submitted as a motion to amend. This question does not appear to have been addressed or resolved by *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005), in which the Court found that under some circumstances, a Federal Rule Civil Procedure 60(b) motion should not be treated as a new habeas corpus application that is subject to the rules for second or successive petitions. *Id*. at 533.

In this case, Smith's original § 2254 petition argued that the state trial court wrongly admitted testimony of what Smith's employee found when searching a storage unit at the direction of an off-duty FBI agent. Smith's original claim asserted that his Fourth Amendment rights were violated. In his motion to amend, he sought leave to argue that the exact same set of facts meant the same error occurred (wrongful admission of evidence) but under different constitutional protections. The district court denied the claim, finding no "good cause" for allowing the amendment. Pet. App. 7a (adopting report at Pet. App. 9a). On review for whether a certificate of appealability should issue, the Sixth Circuit affirmed the denial—albeit on different reasoning—with the assumption that the Court's decision in *Gonzalez* governed and that, under that lens, Smith's motion to amend must be treated as an unauthorized second or successive petition even though it did not seek to raise a new claim. Pet. App. 4a.

1. In 1999, a jury convicted Smith of murder with a firearm specification. The trial court imposed a prison term of 15 years to life, plus three years for the firearm specification. The Ohio Court of Appeals reversed his judgment of conviction. *State v. Smith*, 130 Ohio App. 3d 360, 720 N.E.2d 149, 158 (Ohio Ct. App. 1998). The state appealed, and the Ohio Supreme Court

dismissed the appeal as not involving a substantial constitutional question. *State v. Smith*, 85 Ohio St. 3d 1406, 706 N.E.2d 788 (Ohio 1999) (table). On remand, a jury again convicted Smith of murder with a firearm specification, and he was again sentenced to 15 years to life, plus three years for the firearm specification. The Ohio Court of Appeals affirmed, and the Ohio Supreme Court denied leave to appeal. *State v. Smith*, No. C-990689, 2000 Ohio App. LEXIS 5082, 2000 WL 1643583, at *1 (Ohio Ct. App. Nov. 3, 2000), appeal denied, 91 Ohio St. 3d 1460, 743 N.E.2d 400 (Ohio 2001) (table).

2. In 2001, Smith filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Ground Seven of the petition argued that the trial court abused its discretion by allowing the testimony of an FBI agent not assigned to the case and interested only because he was a cousin of the victim. In support of his argument the agent's testimony was wrongly admitted, Smith cited the Fourth Amendment.

In 2004, the magistrate judge issued a report and recommendation, concluding that the court of appeals would not have found plain error and, instead would have found that any such error did not prejudice Smith's defense. Pet. App. 44a. The district court adopted the report and recommendation over Smith's objections. Pet. App. 11a-12a. Smith requested a certificate of appealability ("COA") from the Sixth Circuit. The court of appeals denied that request.

3. In 2017, Smith filed motions to amend. In one of them, he sought to amend Ground Seven of his original habeas petition to rely on a different constitutional right. See Pet. App. 8a (magistrate judge's report). The magistrate judge recognized that the amendment could be interpreted as simply seeking to add citations, stating that the motion appeared to seek to amend "to include additional *citations and/or* arguments." Pet. App. 8a (emphasis added). But the

magistrate judge considered the standard to be whether Smith showed "good cause for his failure to include the additional citations or arguments in his initial petition." Pet. App. 9a.

4. Smith sought COA from the Sixth Circuit, asking the court of appeals to review whether the district court's decision denying his motion to amend was at least debatable. Directly contrary to law and this Court's precedent, rather than reviewing for whether any aspect of the district court's decision was debatable and deserving of further review, the Sixth Circuit jumped to the merits, finding that the district court correctly denied relief (albeit on other grounds), and refused to issue a COA as a result. Pet. App. 4a. Furthermore, the Sixth Circuit treated Smith's appeal as an application under § 2244 seeking leave to file a second § 2254 petition. Pet. App. 4a. On the assumption that the Court's decision in *Gonzalez* applied to a motion to amend, the court of appeals concluded that Smith's motion to amend, which raised a new constitutional citation in support of an original argument, must be treated as a second or successive petition. Pet. App. 4a. The Sixth Circuit then reached the merits of a § 2244 application that Smith did not file, denying relief. Pet. App. 5a.

6. Smith now timely petitions this Court for review. He is currently in custody at Grafton Correctional Institution in Grafton, Ohio serving a term of 15 years to life imprisonment with eligibility for parole in 18 years (the 15-year minimum sentence for murder plus three years consecutive for the gun specification).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit failed to apply the standard of review required by this Court's precedent and 28 U.S.C. § 2253(c). When Smith filed an application for COA to the court of appeals, the Sixth Circuit was required to determine whether the district court's decision to deny relief was debatable. It did not do so. Instead, the court of appeals reached the merits and (while finding alternative grounds for doing so) affirmed the district court's denial of Smith's request for relief. Pet. App. 4a-5a. This flagrant disregard for § 2253(c) and failure to follow this Court's clear direction in *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017), are reasons enough to grant this petition. The Court should grant this petition to address this important question of federal law that the Sixth Circuit has resolved in directly conflict with this Court's relevant decisions. See Sup. Ct. R. 10(c).

When Smith moved to amend his § 2254, the district court denied the request, finding that he had not shown good cause to file a motion to amend with citations that it felt could have been submitted with the initial habeas petition. Affirming the district court ultimate decision to deny the motion to amend (on alternative grounds), the Sixth Circuit appears to have assumed this Court's reasoning from *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005), applies to motions to amend. Pet. App. 4a. And because Smith's motion to amend sought to add *a new citation* in support of claim previously raised in the original habeas, the Sixth Circuit read *Gonzalez* to mean that his motion to amend was a second habeas petition that was barred from resolution in the district court. Pet. App. 5a. This Court should grant the petition to settle the important federal questions of whether *Gonzalez* applies here and, if so, how, including whether it applies here to mean that the amendment at issue is necessarily a prohibited petition.

I. The Court should Grant the Petition, as the Sixth Circuit Failed to Apply this Court's Clear Precedent by Failing to Address whether the District Court's Decision Denying Smith's Motion to Amend was Debatable and, Instead, Jumping to the Merits of the Claim and Affirming the Denial of Relief.

A. A Circuit Court Errs by Determining whether to Issue a Certificate of Appealability based upon the Merits of the Underlying Claim.

To demonstrate that the issuance of a certificate of appealability is appropriate, a defendant need only make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). An applicant has made a "substantial showing" where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4, 103 S. Ct. 3383 (1983)).

Whether the underlying claim will ultimately succeed is not the question before the circuit court. See *Miller-El v. Cockrell*, 537 U.S. 322, 348, 123 S. Ct. 1029 (2003). In *Miller-El*, the state had submitted that the petitioner was not going to be able to win the appeal on the merits. The Court responded, "That may or may not be the case. It is not, however, the question before us." *Id*. Instead, the "inquiry asks only if the District Court's decision *was debatable*." *Id*. (emphasis added).

"[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 338. The Count has emphasized that § 2253 "sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course." See *Buck*, 137 S. Ct. at 774. A court errs by failing to apply that two-step

process or by jumping to the question of whether the issue has merit and, thus, could succeed on appeal. *Id*. "[W]hen a reviewing court * * * inverts the statutory order of operations and 'first decid[es] the merits of an appeal, * * * then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage." *Id*. (citing *Miller-El*, 537 U.S. at 336-37). When the court of appeals sidesteps the question of whether the issue is debatable and justifies "'its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Id*. at 773 (citing *Miller-El*, 537 U.S. 336-37).

B. In this Case, the Sixth Circuit Acted without Jurisdiction and Contrary to this Court's Precedent, Affirmed the District Court's Denial of Smith's Motion to Amend and Denied Smith a Certificate of Appealability on the Conclusion that He Could Not Succeed before that Court.

In response to Smith's application for COA, the Sixth Circuit's duty was to review whether the district court decision was debatable and worthy of further review. See *Slack*, 529 U.S. at 484. But at no time did the Sixth Circuit use the word debatable or rule on whether the district court's decision was worthy of further review. And rather than review whether the district court's reasoning were debatable, the Sixth Circuit almost as if the case were already on appeal by affirming the district court's ruling (albeit on different grounds, discussed next) that had denied the motion to amend. Pet. App. 4a-5a. By finding that the district court should have concluded that Smith's motion to amend was a prohibited second habeas petition, and then concluding that a second habeas petition would not have succeeded, the court of appeal did precisely what this Court held a circuit court could not do—inverts the process and adjudicates the merits. See *Buck*, 137 S. Ct. at 774.

To highlight, the Sixth Circuit did not review at any point whether the district court's decision to deny Smith's motion to amend was debatable—whether, for example, the addition of a "citation" to an argument was not the presentation of a new claim but truly an amendment, whether it may be that justice required allowing the amendment, and/or whether the amendment related back to an original filing (since it arose from the very same facts and claimed error). Instead, the court of appeals conclusively found that Smith could not succeed in that court because his claims were not based upon a retroactively-applicable new rule of constitutional law or new evidence that could not have been discovered earlier in the exercise of due diligence. Pet. App. 4a-5a.

In sum, the Sixth Circuit wrongly inverted the statutory order of operation, affirmed the district court's decision, and justified denial of a COA based upon a ruling on the merits, failing to reach a decision on whether the ruling was debatable. See *Buck*, 137 S. Ct. at 774 (citing *Miller-El*, 537 U.S. at 336-37). The decision improperly sidestepped the question of whether the issue is debatable and essentially decided Smith's appeal without jurisdiction. See *id*. at 773 (citing *Miller-El*, 537 U.S. 336-37). The Court should grant this petition to accept the case and correct the Sixth Circuit's ruling that conflicts with this Court's precedent. See Sup. Ct. R. 10(c).

II. The Court should Grant the Petition to Settle an Important Federal Question as to whether this Court's Decision in *Gonzalez* Applies to Lead to a Conclusion that a Motion to Amend a Habeas Petition Filed after an Adverse Judgment that Does Not Raise a New Claim is Nevertheless an Unauthorized Second or Successive Petition.

A. The Underlying Pressure toward "Finality"

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court has no authority to issue a writ of habeas corpus unless the highest state court decision

"was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Congress enacted AEDPA to advance the finality of criminal convictions. See *Rhines v. Weber*, 544 U.S. 269, 276, 125 S. Ct. 1528 (2005). To that end, it adopted a tight time line, a one-year limitation period ordinarily running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Given AEDPA's "finality" and "federalism" concerns, see *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479 (2000), the courts very narrowly interpret any exception that would allow a claim filed after the deadline to be reviewed on the merits. See *Mayle v. Felix*, 545 U.S. 644, 657-59, 125 S. Ct. 2562 (2005). The concern with motions to amend are that the petitioner may add a claim based upon new facts, and the Habeas Corpus Rules address that circumstance.

Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Corpus Rule") 2(c) provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See also Advisory Committee's Note on subd. (c) of Habeas Corpus Rule 2, 28 U.S.C., p. 469 ("In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important * * *."); Advisory Committee's Note on Habeas Corpus Rule 4, 28 U.S.C., p. 471 ("'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error.") (internal quotation marks omitted)).

B. The *Gonzalez* Addressed Rule 60(b) Motions, Not Motions to Amend.

In *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005), the Court held that a true Rule 60(b) motion attacks "some defect in the integrity of the federal habeas proceedings." *Id*. at 532. But if the same motion that presents new claims or "attacks the federal court's previous resolution of a claim on the merits," it is properly construed as an application for authorization to file a second or successive § 2254 petition. *Id*.

In this case, Smith did not attack the previous resolution of any claim on the merits. Likewise, Smith did not challenge a defect in the integrity of the habeas proceedings as might be appropriate under Rule 60(b). To that end, Smith did not even file a Rule 60(b) motion. He did not seek to challenge either the integrity of the proceedings or a previous resolution of a claim on the merits. He sought amendment of a claim, which is precisely why he filed a motion to amend under Federal Rule of Civil Procedure 15. This is not a subject addressed by *Gonzalez* or the logic of that case's decision. The decision was all about seeking to vacate a judgment. On that limited topic, the Court found that, if the motion to vacate a judgment raised a new claim, it was not really a Rule 60(b) motion despite its title and was instead an attempt to raise a new claim out of time. Conversely, if the motion challenges the integrity of the § 2254 proceedings, the filing was not adding a claim and was not an attempted end-run on the restrictions of § 2244. *Gonzalez* did not mention a motion to amend, and while a motion to amend *might* be filed to seek to raise a new claim, that was not the case here.

In this case, Smith sought to amend to change the citation or authority in support of a previous claim. The facts alleged did not change. The argument did not change. All that changed was the authority in support. The motion was not a true Rule 60(b) disguised as a motion to

amend, because it did not argue that there was an integral defect in how the district court treated the original § 2254 petition. The motion was not a second or successive § 2255 motion disguised as a motion to amend, because it did not add a new claim. This claim proposed in the motion to amend was largely a claim raised before—but one that was not procedurally barred because the legal question was different in light of the changed constitutional authority to support it. Smith's motion to amend was a entirely different animal than what *Gonzalez* addressed and, thus, an entirely different review with a different lens was required.

C. The Sixth Circuit has Wrongly Used *Gonzalez* to Find that a Post-judgment Motion to Amend that Does Not Seek to Add a New Claim but Instead Seeks to Add Citation to Authority in Support of a Previously-raised Claim is an Unauthorized Second or Successive Petition that Must Seek Leave to File from the Court of Appeals.

"A motion to amend is not a second or successive § 2255 motion when it is filed before the adjudication of the initial § 2255 motion is complete—i.e., before the petitioner has lost on the merits and exhausted her appellate remedies." *Clark v. United States*, 764 F.3d 653, 658 (6th Cir. 2014) (citing *Ching v. United States*, 298 F.3d 174, 177-78 (2d Cir. 2002) (Sotomayor, J.); *Johnson v. United States*, 196 F.3d 802, 803-806 (7th Cir. 1999). Although the Sixth Circuit had not recognized this specific rule, see *Oleson v. United States*, 27 Fed. Appx. 566, 571 (6th Cir. 2001), it found in *Clark* that the rule "naturally flows from a more general rule illuminated by the decisions of this court and the Supreme Court." *Clark*, 298 F.3d at 658 (citing *Gonzalez*, 545 U.S. at 532).

To the *Clark* court, that general rule was that "[w]hen a habeas petitioner files [any] motion attacking the merits of a conviction or sentence after the adjudication of her habeas petition is complete—meaning that the petitioner has lost on the merits and has exhausted her

appellate remedies—the motion, irrespective of its characterization, is really a second or successive habeas petition." *Id*. In other words, the Sixth Circuit in *Clark* used *Gonzalez*'s treatment of Rule 60(b) as the framework of how to treat a post-judgment motion to amend if it raises any new claim:

> This rule prevents the use of motions filed after the adjudication of a habeas petition is complete to "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar.

Clark, 298 F.3d at 658-59 (quoting *Gonzalez*, 545 U.S. at 532); see also 28 U.S.C. §§ 2244(b), 2255(h). In support, it cited *Johnson* and *Ching* as having "developed this general rule in the context of motions to amend a § 2255 motion by focusing on whether the adjudication of the respective § 2255 motions was complete." *Id*. at 659.

Most if not all that language is arguably dicta, since the *Clark* court allowed the amendment—even though the district court had entered judgment against the petitioner—finding that the petitioner filed the new claim "before the adjudication of her § 2255 motion was decisively complete." *Id*. at 659. But the *Clark* court nevertheless applied concepts related to Rule 60(b) to deal with the motion to amend filed after an adverse judgment:

> When a party seeks to amend a complaint after an adverse judgment, it thus must shoulder a heavier burden [than if the party sought to amend a complaint beforehand]. Instead of meeting only the modest requirements of Rule 15, the claimant must meet the requirements for reopening a case established by Rules 59 or 60.

Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv., 616 F.3d 612, 616 (6th Cir. 2010) (citing *In re Ferro Corp. Derivative Litig*., 511 F.3d 611, 624 (6th Cir. 2008); *United States ex rel. SNAPP, Inc. v. Ford Motor Co*., 532 F.3d 496, 507 (6th Cir. 2008)). As a result, to the Sixth Circuit, in

post-judgments motions to amend, "'the Rule 15 and Rule 59 inquiries turn on the same factors.'" *Leisure Caviar*, 616 F.3d at 616 (quoting *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002)).

Building on *Clark*, the Sixth Circuit has slid into a practice of using *Gonzalez* as the framework for treating post-judgment motions to amend as Rule 60(b) motions and reviewing for whether second or successive habeas petitions without distinguishing between amendments adding claims and those doing something else. For example, in *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016), the petitioner filed a Rule 60(b) motion and a motion to amend. *Id*. at 319. That court cited *Gonzalez* for the proposition that a motion to amend filed after an adverse judgment must be treated the same as a Rule 60(b) and reviewed for whether it raises a new claim. *Id*. at 322. The *Moreland* court read *Clark* and another case as requiring a

> conclusion that a Rule 60(b) motion or motion to amend that seeks to raise habeas claims is a second or successive habeas petition when that motion is filed after the petitioner has appealed the district court's denial of his original habeas petition or after the time for the petitioner to do so has expired.

Id. at 325. The panel went on to find that the petitioner in that case had filed an unauthorized second or successive habeas petition because one was a new claim and the other sought to supplement a previously and timely-raised claim with new evidence. *Id*. at 319-20.[1] But the *Moreland* decision appeared to suggest a presumption should apply that a post-judgment motion to amend must be treated as a precluded habeas petition—drawing a direct connection between

[1] Smith submits that the *Moreland* court's finding that a motion to amend seeking to add supplemental evidence in support of a previously denied claim should not have been treated as a second or successive habeas claim. But that is not the focus of this petition and not relevant to the second question presented for review.

the motion having been filed after an adverse judgment and the conclusion that the filing was an unauthorized second or successive petition:

> Moreland filed his Rule 60(b) motion and motion to amend long after he appealed the district court's decision denying his original habeas petition. Moreland's motions were therefore second or successive habeas petitions even with respect to the claims that Moreland raised during the pendency of the appeal from the denial of the first habeas petition. The district court lacked jurisdiction to address them when they were originally filed.

Id. at 325.

When it comes to post-judgment motions to amend that clearly seek to add new claims, the *Gonzalez* approach may be appropriate. But in this case, Smith's motion did not seek to add a new grounds for relief. The Sixth Circuit cited *Gonzalez* and *Moreland* in support of a finding that Smith's post-judgment motion to amend was barred even though it sought to supplement a previously and timely-raised claim with additional constitutional citations in support. Pet. App. 4a. The court of appeals viewed Smith's request to add citation to Grounds Seven and Ten as a new argument. But this was not how the magistrate judge had viewed the argument. She had recognized that Smith was adding new "*citations* and/*or* arguments," recognizing that Smith may not be raising new arguments or new claims. Pet. App. 8a (emphasis added).

In sum, the Sixth Circuit wrongly concluded that the *Gonzalez* approach to Rule 60(b) motions mut apply to post-judgment motions to amend. But even if that decision were correct, the Sixth Circuit erred in finding that a post-judgment motion to amend to add different constitutional citations to a claim was a new claim and, thus, an unauthorized second or successive habeas petition. The Court should grant this petition to accept the case and address this important federal question. See Sup. Ct. R. 10(c).

CONCLUSION

Petitioner Edward Smith submits that his petition for writ of certiorari should be granted to address the Sixth Circuit's failure to follow the Court's precedent and to address an important question that will recur in the lower courts and that the Court has not yet resolved. He respectfully asks the Court grant this petition and either order full briefing. In the alternative, he asks that the Court remand the matter to the Sixth Circuit with instructions that it follow the Court's precedent and rule on whether the district court's decision denying his motion to amend was debatable and worthy of further review.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 22 August 2018

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt, Esq.
629 Main Street
Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari, motion for leave to proceed in forma pauperis, and the following appendix were served by U.S. Priority Mail on the date reported and signed below upon Mary Anne Reese, 441 Vine Street, Suite 1600, Cincinnati, OH 45202; and the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

Dated: 22 August 2018

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt

APPENDIX