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No. 10-1265

IN THE

Supreme Court of the United States

MICHAEL MARTEL, WARDEN,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

JOHN R. GRELE
LAW OFFICES OF
JOHN R. GRELE
149 Natoma Street
Third Floor
San Francisco, CA 94105

DAVID W. FERMINO
149 Natoma Street
Third Floor
San Francisco, CA 94105

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
CATHERINE M.A. CARROLL
ARON B. GOETZL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022

QUESTIONS PRESENTED

1. Whether the legal standard guiding the discretionary replacement of counsel appointed to represent a capital defendant under 18 U.S.C. § 3599 is whether, under all the circumstances, replacement is warranted "in the interests of justice."

2. Whether the court of appeals correctly found an abuse of discretion in this case, where the district court denied respondent's request for replacement of counsel without making any inquiry into the circumstances underlying the request.

3. Whether, where new counsel had already been appointed at the outset of respondent's appeal (without objection by the State), the court of appeals properly tailored its remedy by remanding the case to allow the district court to decide whether respondent should be permitted to amend his habeas petition or supplement the record before the entry of judgment.

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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

The State characterizes the question presented as whether "a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence." Pet. Br. i. While the answer to that question is plainly "no," the question itself has nothing to do with the facts of this case or the court of appeals' holding.

The court below decided only that the district court had abused its discretion by denying Kenneth Clair's request for new counsel "without investigation." Pet.

App. 2. In vacating the district court's judgment, the court of appeals correctly held that 18 U.S.C. § 3599, which creates a mandatory right to appointment of counsel for indigent defendants in capital criminal trials and habeas proceedings, confers discretion on the district court to substitute new counsel "in the interests of justice." *Id.* Unlike the test the State presses for the first time in its merits brief in this Court, the "interests of justice" standard is firmly rooted in the governing statute and familiar to courts, and affords the district court broad discretion to consider both the defendant's claimed need for new counsel and any countervailing considerations advanced by the government. Indeed, in the district court, the State itself contended that substitution of counsel is a "matter … of trial court discretion," to be exercised in "the interests of justice." JA 29.

The court of appeals' application of ordinary abuse-of-discretion principles was equally straightforward. Contrary to the State's characterization, the court did not hold as a matter of law that Clair was "entitled" to new counsel. It held only that a proper exercise of discretion required the district court to make some minimal inquiry into Clair's *pro se* allegations. That is an unremarkable application of the familiar principle that a court may not purport to exercise discretion without first informing itself of the relevant facts. Pet. App. 5.

The primary source of the State's dissatisfaction appears to be the remand the court of appeals ordered. The court's order, however, simply provided a tailored remedy to an idiosyncratic "conundrum" created by highly unusual facts. Pet. App. 6. As the State suggests (Pet. Br. 57-58), an appropriate remedy might ordinarily be a limited remand for the district court to conduct a proper inquiry into whether new counsel should be appointed. Here, however, such a remedy

would have been pointless in light of the way the particular case had already progressed. The district judge who presided over Clair's case had retired the day after denying Clair's habeas petition and his request for new counsel. Moreover, based on confirmation from Clair's counsel at the very outset of the appeal that their previous "attorney-client relationship ha[d] broken down to such an extent that substitution of counsel [would be] appropriate," Appellant's Response to Court's Sept. 15, 2005 Order at 1, Dkt. 9, *Clair* v. *Ayers*, No. 05-99005 (9th Cir. Oct. 24, 2005) ("FPD Letter"), the court of appeals itself had previously ordered that new counsel be appointed for appeal, and the district court had done so. JA 13-14. The State did not object to those orders. By the time the court of appeals decided Clair's case, the substituted lawyer had been representing Clair for almost five years. There would have been no point in remanding for a new district judge to determine whether the interests of justice would have warranted a similar substitution before the entry of the district court's judgment in 2005.

Instead, the court reasonably allowed Clair's existing counsel a chance to ask the district court to amend Clair's habeas petition *nunc pro tunc*, as if he had been substituted into the case shortly before the district court was ready to rule, rather than shortly after. Pet. App. 6. On remand, the State could oppose any such request, and the district court would have discretion to grant or deny it. *Id.* Whatever the appropriate remedy might be in a case that does not present these unique facts (or that is subject to AEDPA, which Clair's case is not), the court of appeals did not err in crafting this particular remedy here.

STATEMENT

Although the court of appeals' decision was narrow, evaluation of the rulings at issue requires familiarity with parts of the unusual history of this case.

A. Clair's Trial And Conviction

In November 1984, Linda Rodgers was found dead in the California home of Kai Henriksen and Margaret Hessling, where Rodgers had been living with her daughter and caring for Hessling's four children. Pet. App. 23-24. Hessling found Rodgers' body in the master bedroom beaten, stabbed, and strangled, her body naked from the waist down. *Id.* at 24.

Kenneth Clair was a homeless man who had been squatting in a nearby vacant house. Pet. App. 23-24. In August 1985, Clair was charged with Rodgers' murder. The prosecution sought the death penalty on the grounds that the murder occurred during a burglary and during an attempted rape. *Id.* at 25.

The main evidence against Clair in his July 1987 trial came through the testimony of Pauline Flores, Clair's girlfriend at the time of Rodgers' murder. Flores had suffered serious head injuries about two weeks before the murder, was taking pain medication at the time, offered an inconsistent version of the facts at Clair's preliminary hearing, and later recanted her story. Pet. App. 51-52; JA 36-42. She had, however, also worked with police to record a conversation she had with Clair in January 1985. In that conversation, Clair directly denied committing the murder, but also made evasive statements that the district court deemed "capable of being regarded as admissions of involvement in the murder" (an interpretation Clair disputed). Pet. App. 25; *see also id*. at 52-54.

The jury convicted Clair of murder, rejecting the allegation that it occurred during an attempted rape, but agreeing that it occurred during a burglary and imposing a sentence of death. Pet. App. 25-26. The California Supreme Court affirmed the conviction and sentence, *People* v. *Clair*, 828 P.2d 705 (Cal. 1992), and this Court denied review, *Clair* v. *California*, 506 U.S. 1063 (1993).

B. Clair's Federal Habeas Petition

Clair commenced federal habeas proceedings, and the district court appointed counsel to represent him, as required by 18 U.S.C. § 3599(a)(2). Counsel filed an initial petition in September 1994. Pet. App. 21-22.

In October 1995, after the California Supreme Court denied state post-conviction relief, Clair filed an amended federal habeas petition. *See* Dkt. 106, *Clair* v. *Woodford*, No. 2:93-cv-01133 (C.D. Cal. Oct. 16, 1995) (reprinted at ER 1498-2058).[1] Among other grounds, Clair argued that he had received ineffective assistance of counsel because his trial lawyer, who had presented essentially no affirmative defense, failed to investigate or present evidence that two of Hessling's young children, who had witnessed the murder, had told police that the killer was white (whereas Clair is black). ER 1754-1766. Clair further argued that trial counsel had unreasonably failed to investigate or introduce evidence that Kai Henriksen, who had a previous conviction for voluntary manslaughter and had pled guilty to assaulting a woman just months before Rodgers' murder, was involved with a violent motorcycle gang and was trafficking drugs out of the house where Rodgers

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[1] Citations to "ER" refer to the Excerpts of Record filed in the court of appeals.

was murdered. ER 1517-1518, 1692, 1754-1756, 1774-1775, 1778. Clair also alleged violations of the State's obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), claiming that the prosecution had failed to make required disclosures regarding the children's statements, Henriksen's alleged drug activities, prior domestic disturbances at Henriksen's house, and other evidence that might have impeached the credibility of Flores or other witnesses. ER 1615-1649.

The pleadings were not complete until July 1998. Pet. App. 22-23. During this time, two associates of the firm that represented Clair moved to the Office of the Federal Public Defender ("FPD"), and the court approved a request to substitute the FPD as court-appointed counsel. JA 1-2. Through the FPD, Clair sought an evidentiary hearing and discovery, which the court granted in part. Pet. App. 22-23.[2] The hearing was held in August 2004, and the parties completed post-hearing briefing on January 31, 2005. *Id.*

C. Clair's Requests For New Counsel

By 2004, Clair's relationship with the FPD had begun to deteriorate. Before the evidentiary hearing in August, Clair independently enlisted private investigator C.J. Ford to look into his case. JA 56-57.[3] Clair instructed his counsel to cooperate, but the FPD provided

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[2] The court ordered a hearing on an issue of juror misconduct and on Clair's claims that trial counsel had unreasonably failed to introduce certain evidence in the guilt phase or to investigate or present important mitigation evidence in the penalty phase. ER 76-77.

[3] Although someone originally agreed to pay Ford on Clair's behalf, Ford ultimately worked for Clair *pro bono*. JA 56-57.

no assistance and indeed resisted Ford's efforts. JA 57, 65-66; ER 217. Ford nonetheless was able to locate a potential alibi witness the FPD had never interviewed, and he obtained a declaration from Flores recanting key portions of her trial testimony. JA 36-42, 57-58.

On March 16, 2005, Clair wrote to the district court expressing concern that the FPD "no longer … ha[d] [his] best interest at hand" and saying that he no longer wanted them to handle his case. JA 24; *see* JA 19-25. As examples, Clair complained that his lead counsel had admitted she had never read his principal post-hearing brief; that the FPD had failed even to try to locate the potential alibi witness that Ford later found; that they had turned away offers of assistance; and that they were focusing on penalty issues rather than sufficiently contesting the reliability of the guilt-phase verdict. JA 20-25. He alleged that the FPD had repeatedly dismissed his efforts to participate in planning litigation strategy, and that when he raised questions about the conduct of his case, his lead counsel challenged him to fire her. JA 22. As a result of these and other incidents, Clair felt that he and his counsel were not "on the same team." JA 23.

The court directed counsel on both sides to address Clair's letter. JA 18. The State responded that "[w]hat the trial court does with respect to appointing counsel is within its discretion, providing the interests of justice are served." JA 29. It argued, however, that "nothing in [Clair]'s letter require[d] a change of appointed counsel," because the FPD lawyers were "doing their job as required," substitution would cause unwarranted delay, and there was no danger to Clair's due process rights. JA 29-31. The FPD informed the court that "[a]fter meeting with Mr. Clair, counsel understands that Mr. Clair wants the [FPD] to continue

to serve as his counsel in this case at this time." JA 27. Based on that representation, the court decided on April 29, 2005 that it would "take no further action on the matter at this time." JA 33.

Meanwhile, Ford continued his investigation. His most significant discoveries concerned the physical evidence that had been collected from the scene of Rodgers' murder.[4] In the early 1990s, one of Clair's original habeas attorneys had asked to review the evidence, but the police department apparently claimed it had been lost or destroyed. ER 220-221, 234. In the ensuing years of litigation, Clair's counsel never probed or challenged that claim. ER 234. When Ford took the matter up, he learned after persistent inquiry that the police did have the evidence after all. After reviewing that evidence in late May 2005, Ford informed Clair that substantial biological material and fingerprints appeared to be available, but that further analysis would be required to determine whether the evidence was in suitable condition for testing or comparison purposes. JA 58-59, 67; ER 218, 237-238.

Three weeks later, on June 16, 2005, Clair wrote to the court to renew his request for new counsel. JA 62-70.

[4] At trial, the parties had stipulated that none of the physical evidence implicated Clair. ER 3131-3134. According to the stipulation, fingerprints found at the scene did not match Clair, Rodgers, Henriksen, or Hessling, but were either unsuitable for further comparison or came from objects that had gone through the U.S. mail; testing of cigarette butts found at the scene showed they might have been smoked by Rodgers, but had not been smoked by Clair; and hairs recovered on or near the body were inconsistent with Clair. *Id.* There was also testimony at trial that vaginal swabs of the victim yielded no sperm, and that Clair's blood was not found at the scene.

In addition to reiterating many of his previous complaints, Clair explained that since he sent his previous letter "there ha[d] been many more things revealed to [him] that ha[d] created a conflict of interest[]" with the FPD, that there had been a "total break down of communication" with the FPD, and that he was "no longer able to trust anybody within that office." JA 62-63. In particular, Clair informed the court that, despite Ford's discovery, the FPD was making no effort to analyze the previously missing physical evidence or to present it to the court. JA 67-69.

Ford submitted his own letter to substantiate Clair's assertions. JA 56-60. That letter described Ford's investigation, including his success in locating the physical evidence and the lack of assistance from the FPD. JA 58. Ford stated that he had found blood, hair, and other physical evidence that needed to be analyzed to determine if it could be subjected to DNA testing, and fingerprints that "did not belong to Kenneth Clair, the victim, or the owners of the house" and thus could have belonged to the "real perpetrator." *Id.* Ford said that although he had been trying without success to convince the district attorney's office to analyze the evidence, Clair's attorneys were neither assisting nor investigating themselves. JA 58-60.

The district court did not ask counsel to respond to Clair's or Ford's letters, nor did it make any other inquiry into their allegations. Indeed, on June 24, 2005, the court rejected Ford's letter without filing it, citing a local rule prohibiting communication with the court by letter. JA 4-5, 53-55. On June 30, 2005, the court denied Clair's request for new counsel, stating only:

> It does not appear to the Court that a change of counsel is appropriate. It appears that

> Petitioner's counsel is doing a proper job. No conflict of interest or inadequacy of counsel is shown.

JA 61. The same day, the court denied Clair's habeas petition on the merits. JA 5; Pet. App. 20-91.[5] The next day, the district judge retired. Pet. App. 4.

D. Clair's Appeal And Further Proceedings

The FPD filed a notice of appeal on Clair's behalf, and Clair himself filed a notice seeking review of the denial of his request for new counsel. JA 6. The court of appeals treated the matter as one appeal and ordered the FPD to respond to Clair's *pro se* appeal. JA 6, 12.

On October 21, 2005, the FPD informed the court that it had consulted with Clair and that "the attorney-client relationship ha[d] broken down to such an extent that substitution of counsel [would be] appropriate." FPD Letter at 1. The court construed the FPD's letter as a motion for appointment of new counsel and granted the motion, without objection or comment by the State. JA 13. In January 2006, the district court appointed John Grele as substitute counsel, again without objection or comment by the State. JA 14; Pet. App. 6.

Through Grele, Clair sought relief from judgment in the district court in June 2006 under Federal Rule of Civil Procedure 60(b). JA 7.[6] He asked that the

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[5] The court issued a certificate of appealability on Clair's penalty-phase ineffective assistance claims. Pet. App. 91.

[6] Because Clair had already filed a notice of appeal, he filed an application in the district court for leave to file the Rule 60(b) motion, in accordance with circuit practice at the time. *Cf.* Fed. R. Civ. P. 62.1 (adopted in 2009).

judgment denying his habeas petition be vacated so he could have time and funding to do what the FPD had refused to do: have the fingerprints and biological material analyzed and tested. ER 222-239. He argued that such testing could link someone else to the crime or support additional ineffective assistance or *Brady* claims. ER 225-226, 228, 234-235.[7]

Because the district judge presiding over Clair's habeas case had retired, the case was reassigned. *See* Notice of Reassignment, Dkt. 423, *Clair* v. *Woodford*, No. 2:93-cv-01133 (C.D. Cal. July 6, 2006). Less than three months later, in September 2006, the court declined to entertain Clair's Rule 60(b) motion. JA 8; Pet. App. 14. Because Clair could not yet demonstrate the significance of the newly available evidence, the court concluded that he had "fail[ed] to specify the claims [the evidence] would buttress or introduce" and thus could not satisfy the standard for relief under Rule 60(b). Pet. App. 15-18. As to Clair's contention (ER 230-231) that the FPD's failure to pursue the evidence constituted extraordinary circumstances warranting relief under Rule 60(b), the court noted the previous judge's statement that "no justification for a change of counsel had been provided," and held that Clair was not prejudiced by the denial of new counsel because "no … new

[7] To support the Rule 60(b) motion, Clair submitted declarations of Grele and Ford. The Ford declaration and portions of the Grele declaration were redacted and filed under seal to exclude privileged discussions. The State complains (Pet. Br. 8, 11 n.9, 61 n.28) that these "secret filings" contained "information never disclosed to the State." A review of the sealed declarations—which are in the record available to the Court (ER 3508-3523)—confirms that they contain no information unknown to the State except the work product and mental impressions of Clair's counsel and investigator.

evidence exist[ed]" that would have warranted further proceedings. Pet. App. 18-19. Clair appealed, and on April 9, 2007, the court of appeals ordered the district court to enter a decision on the merits of the Rule 60(b) motion. JA 9; *supra* n.6. On May 21, 2007, the district court denied the motion and granted a certificate of appealability. Pet. App. 9-11.

On June 4, 2007, Clair moved for reconsideration of the denial of his Rule 60(b) motion, advising the district court that he was pursuing discovery in state court and that, through those proceedings, the State had finally agreed to disclose additional documents relating to Clair's case and the physical evidence. ER 172-173, 176.[8] Clair asked for time and resources to examine the supposedly forthcoming evidence and determine what claims for relief it might support. ER 170-177. On June 19, 2007, before any such examination could be done, the district court denied Clair's motion for reconsideration. ER 1-3. Clair appealed. JA 10-11.

Clair's counsel later learned by chance that the State had begun DNA testing of physical evidence collected from the scene of Rodgers murder, without notice

[8] Clair also informed the court that the State had recently revealed that it had conducted DNA analysis on evidence collected from a separate homicide that occurred a few miles away on the night before Rodgers' murder. ER 176. The circumstances of that homicide and the condition of the female victim's body were similar to those in this case, including a similar puncture wound on the victim's neck. Because of the similarities, police had suspected Clair in the other homicide, even though he had been in jail when that homicide occurred. Police files disclosed through state-court discovery in 2007 and 2008 revealed that police had compared Clair's DNA to samples taken from the scene of the other homicide, and that Clair had been excluded as a suspect. Opp. App. 15-17, 58-63.

to Clair. Opp. App. 12-15, 59-64.[9] The State verbally reported to Clair's counsel that a glove found near Rodgers' body had been tested and yielded a male profile that did not match Clair. *Id.* at 12-14, 61. It further reported that vaginal swabs from Rodgers' body had been tested and yielded two male profiles that did not match Clair. *Id.*; *see also id.* at 72-73.[10] After further motions practice in state court, the State disclosed the underlying data, lab notes, and reports. From that evidence, Clair's counsel also learned more about the additional fingerprints found at the murder scene that did not match Clair, Rodgers, or any other resident of the house. In particular, he learned that those prints, which had not been compared against the available databases, were usable and—contrary to the stipulation entered at trial—came from objects that had *not* traveled through the U.S. mail. *Id.* at 17-18, 60-61; *see supra* n.4.

Based on these new disclosures and test results, Clair filed a new state-court petition, alleging actual innocence as well as improper suppression of evidence and other errors.[11] He submitted an identical petition to the federal court of appeals, asking that it be filed as a

[9] When the State conducted this *ex parte* testing, Clair's counsel was attempting to document the condition of the evidence to determine whether it had been contaminated or subject to tampering. Opp. App. 13. Because DNA testing consumes biological materials in a manner that may preclude further analysis, Clair objected to any further testing without an agreement. *Id.*

[10] In January 2008, Clair's counsel obtained an unsigned copy of the written report indicating that the DNA testing had been performed in October 2007. Opp. App. 13-14, 62; *see id.* at 66-73.

[11] Without holding a hearing, the California Supreme Court summarily denied Clair's state habeas petition on August 24, 2011. *In re Clair*, No. S169188.

protective placeholder petition under *Pace* v. *DeGuglielmo*, 544 U.S. 408, 416 (2005). *See* Opp. App. 1-29 (docketed as *Clair* v. *Ayers*, No. 08-75135 (9th Cir.)). The application sought a remand to the district court for purposes of introducing the new evidence into the district court record. Clair also asked the court of appeals to consider the protective petition in its disposition of his pending appeal from the judgment denying habeas relief.

E. The Court Of Appeals' Decision

The court of appeals consolidated Clair's appeals. On November 17, 2010, the court issued the order under review here, vacating and remanding the district court's orders denying Clair's habeas petition and his request for new counsel. On the same day, the court denied Clair's motions relating to the protective petition as moot and transferred that petition to the district court.

The sole issue addressed in the court of appeals' unpublished opinion was whether the district court had "abused its discretion by denying without investigation [Clair's] June 2005 request that the court replace his appointed counsel with new counsel." Pet. App. 2. Interpreting 18 U.S.C. § 3599, the court determined that "when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted." *Id.* at 3. The court held that the district court had abused its discretion by denying Clair's request for substitution of counsel without first making any "inquiry into the truth of Clair's allegations or their potential impact on the case before it." *Id.* at 4; *see also id.* at 4-5. "[B]y failing to exercise its discretion at all," the court held, "it abused it." *Id.* at 5.

The court accordingly vacated the district court's denial of Clair's request for new counsel. Pet. App. 5. In light of the procedural history, however, the question of "how to correct on remand the district court's abuse of discretion" presented a "conundrum," because Clair already had new counsel and the district judge had retired. *Id.* at 6. To address that unusual situation, the court found that the "most reasonable solution" was to "treat Clair's current counsel as if he were the counsel who might have been appointed had the district court properly exercised its discretion in response to Clair's request for new counsel." *Id.* On remand, counsel would consult with Clair to determine "what actions and submissions to the district court, if any, would be appropriate before the district court rules anew on Clair's habeas petition, and then proceed accordingly." *Id.* The district court in turn would "consider any such submissions, including any requests from counsel to amend the petition to add claims based on or related to the alleged new physical evidence, as if they had been made prior to the ruling on the writ that we have vacated and shall make all further determinations that may be required in accordance with applicable law." *Id.*

SUMMARY OF ARGUMENT

The decision under review addressed only one issue: whether "the district court abused its discretion by denying without investigation [Clair's] June 2005 request that the court replace his appointed counsel with new counsel." Pet. App. 2. The court of appeals did not hold that, on these facts, Clair was actually entitled to new counsel. Nor did it hold that Clair was necessarily entitled to assert new claims for habeas relief. It held only that the district court abused its discretion by denying Clair's request for new counsel "without making some inquiry into Clair's allegations." *Id.* at 4.

The State does not deny that Clair's request for substitution of counsel called for the district court to make a discretionary determination that is subject to review for abuse of discretion. Instead, the State focuses on the substantive standard to be applied in evaluating such a request. It contends that a trial court's discretion should be restricted by a novel three-part test, under which existing counsel may be replaced only upon a showing that he fails to meet the statutory qualifications, suffers from an actual conflict of interest, or has completely abandoned his client. But there is no basis in the appointment-of-counsel statute for limiting the court's discretion in this way.

The court of appeals correctly interpreted 18 U.S.C. § 3599 to permit substitution of counsel in capital habeas cases when, in view of all relevant circumstances, substitution serves "the interests of justice." That standard, drawn from a parallel statute that applies in non-capital cases, is familiar, workable, and consistent with the history and purposes of the statutory framework. Applying it here, the court reasonably found that "when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted." Pet. App. 3. The district judge's decision instead on the eve of his retirement to deny Clair's request without making any such inquiry, even if only by ordering counsel to respond, was an abuse of discretion.

In criticizing the court of appeals' analysis, the State appears to conflate what the court did at the outset of Clair's appeal with the remedy it later ordered after finding an abuse of discretion. Shortly after Clair appealed in 2005, the court of appeals asked counsel to address Clair's renewed request for substitution. The

FPD confirmed the breakdown in its relationship with Clair, and the court ordered the appointment of new counsel on appeal. The State did not object to the appointment of new counsel at that time. Now, however, it attacks the court of appeals' *later* decision (in 2010) as if the court had held that Clair was "entitled" to new counsel when he sought it in the district court, and had ordered substitution on that basis. *E.g.*, Pet. Br. 15 (court of appeals "was wrong to require substitution"); *id.* at 17 (court erroneously "allow[ed] substitution"); *id.* at 46 (criticizing panels' "peremptory decision to grant Clair new counsel"). That is not what happened. Rather, the court found an abuse of discretion in the district court's treatment of Clair's request and crafted a reasonable remedy that was tailored to the unusual procedural history of this case. It did not purport to decide what the "interests of justice" would have required in this case in June 2005 or what remedy should apply in any other case.

The State attacks that remedy as inconsistent with AEDPA and with the district court's disposition of Clair's Rule 60(b) motion. But Clair's case is not subject to AEDPA, and nothing in the court of appeals' order allows him or any other defendant an "end-run" around it. The court of appeals held only that there was no point in revisiting the "new counsel" issue on remand where in fact new counsel had long since been appointed for other reasons. It then afforded Clair an opportunity for that counsel to *ask* the district court to permit amendment of Clair's habeas petition before the entry of judgment, under the same legal standards and constraints that would have applied if the district court had decided to make the substitution when Clair sought it in that court. Nothing in the district court's resolution of Clair's Rule 60(b) motion renders that resolution

unreasonable, because the district court rejected that motion on an undeveloped record and under the even more stringent standard that governs the reopening of final judgments. The court of appeals' order thus appropriately balances the various interests at issue in this case, protecting both the statutory right to counsel conferred on Clair by Congress and the State's ability to raise on remand its arguments that there is no basis for further proceedings in the district court.

ARGUMENT

I. THE "INTERESTS OF JUSTICE" STANDARD GOVERNS MOTIONS FOR SUBSTITUTION OF APPOINTED COUNSEL IN CAPITAL PROCEEDINGS

Section 3599 of Title 18 provides a statutory right to appointment of counsel for indigent defendants in capital cases. 18 U.S.C. § 3599(a). This right applies in habeas corpus proceedings as well as in capital trials, reflecting Congress's "determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and … the unique and complex nature of the litigation.'" *McFarland* v. *Scott*, 512 U.S. 849, 855 (1994) (alteration in original); *compare* 18 U.S.C. § 3599(a)(1) *with id.* § 3599(a)(2).

Section 3599 on its face permits substitution of appointed counsel "upon motion of the defendant." 18 U.S.C. § 3599(e). The court of appeals sensibly held that such a motion, like countless other matters pertaining to the conduct of litigation, is committed to the district court's sound discretion, to be exercised in "the interests of justice." Pet. App. 2-3. That standard is faithful to the structure, history, and purpose of the statutory framework; it is familiar to courts; and it is easily administrable. The State now proposes a novel

and more complicated three-part test, apparently intended to limit the discretion of trial courts and to reduce the chance that a defendant might obtain new counsel. While the three factors the State emphasizes may well be relevant to a court's application of the "interests of justice" standard, however, there is no basis for concluding that they are the *only* factors a court may consider in exercising its discretion.

A. The "Interests Of Justice" Standard Is Consistent With The Structure, History, And Purpose Of Section 3599

The text of Section 3599(e) is silent as to the standard under which a motion for substitution of counsel should be evaluated. Other features of the statutory framework, however, confirm that the "interests of justice" is the appropriate substantive standard. In particular, a parallel provision in Section 3006A provides for the discretionary appointment of counsel for indigent defendants in misdemeanor criminal trials and for habeas petitioners in non-capital cases. 18 U.S.C. § 3006A(a)(2). That provision permits substitution of counsel "in the interests of justice" at "any stage of the proceedings." *Id.* § 3006A(c). The court of appeals correctly held that the same standard should apply to motions under Section 3599(e). As the court explained, Congress's establishment of a statutory right to the appointment of specially qualified counsel in Section 3599 shows "the importance that [Congress] placed on 'quality legal representation' for capital habeas defendants." Pet. App. 3. It seems self-evident that Congress must also have intended to provide such defendants with "at least as much opportunity to replace counsel" as it provides non-capital defendants who have no such statutory right. *Id.*

This interpretation follows the approach this Court adopted in *McFarland*. There, the Court considered "how a capital defendant's right to counsel … shall be invoked" under the predecessor to Section 3599. 512 U.S. at 854-855. As in this case, the statute's "express language" did not specify an answer. *Id.* at 854. The Court accordingly construed the statute "in light of its related provisions." *Id.* at 854-855.[12]

Taking that approach here makes particular sense in light of the history of Section 3599. Before enactment of the predecessor to Section 3599 in 1988, appointment of counsel for indigents in *all* habeas cases, capital or otherwise, was subject to trial court discretion under Section 3006A. At that time, Section 3006A provided, as it does today, that motions for substitution of counsel would be determined "in the interests of justice." 18 U.S.C. § 3006A(c) (1982). Any request for substitution of appointed counsel in a capital case would thus have been evaluated under that standard.

Congress made appointment of counsel mandatory in capital cases when it enacted the predecessor to Section 3599, codified at 21 U.S.C. § 848(q), in the Anti-Drug Abuse Act of 1988. *See* Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4393-4394.[13] Like Section 3599, Section

[12] "When interpreting a statute, we examine related provisions in other parts of the U.S. Code." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008) (citing *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 88-97 (1991), and *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 717-718 (1995) (Scalia, J., dissenting)).

[13] Section 848(q) was recodified at 18 U.S.C. § 3599, without other change, by the Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 230, 231.

848(q) provided that appointed counsel could be replaced upon motion of the defendant, but did not state what standard would apply to such a motion. Nothing in the new provision, however, purported to depart from the "interests of justice" standard that had long applied to motions for new counsel. Nor is there anything to suggest any legislative intent to make it more difficult to obtain substitution of counsel in capital cases than it had been under Section 3006A.[14] To the contrary, Congress created special mandatory rules for capital cases in order to be *more solicitous* of capital defendants' greater need for the assistance of well-qualified counsel. It strains credulity to argue, as the State apparently does, that in the same Act Congress silently made it more difficult for a capital defendant to seek substitution of counsel if the need arose. The only reasonable conclusion is instead the one adopted by the court of appeals: Congress surely intended capital habeas petitioners to have at least as much opportunity to substitute counsel as they used to have (and as non-capital habeas petitioners continue to have) under Section 3006A.

That analysis also serves the purposes of Section 3599 as reflected in other provisions of the statute. Section 3599 imposes more stringent qualification requirements for appointed counsel in capital cases, 18 U.S.C. § 3599(b)-(d); permits higher rates of compensation, *id.* § 3599(g); and entitles petitioners to reasonably necessary investigative, expert, and other services, *id.* § 3599(f). As this Court recognized in *McFarland*, Congress enacted these provisions—which far exceed

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[14] The legislative history of Section 848(q) sheds no direct light on Congress's failure to include a standard to govern substitution-of-counsel motions in capital proceedings. *See Harbison* v. *Bell*, 129 S. Ct. 1481, 1489 (2009).

the constitutionally required minimum—to "promot[e] fundamental fairness in the imposition of the death penalty." 512 U.S. at 859; *see id.* at 855-856. The Court reiterated that interpretation in *Harbison* v. *Bell*, 129 S. Ct. 1481 (2009), construing Section 3599 broadly in light of the "basic purpose of the statute," "the breadth of the representation contemplated," and the importance of counseled post-conviction proceedings to death-sentenced prisoners. *Id.* at 1487 & n.6, 1490. Construing Section 3599(e) to permit substitution of appointed counsel in the interests of justice is the only sensible approach in light of the concern with "fundamental fairness" that Congress manifested in every aspect of the mandatory capital counsel-appointment statute. *McFarland*, 512 U.S. at 859; *see also, e.g.*, *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989) (adopting "the most reasonable interpretation of [a] statute in light of its manifest purpose").[15]

Finally, the "interests of justice" standard has the added advantages of familiarity and administrability. District courts and courts of appeals regularly apply the "interests of justice" standard in adjudicating motions for appointment or substitution of counsel under

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[15] The State seeks to rely on *Harbison* by arguing creatively that, because Congress intended to emphasize continuity of appointed counsel where possible, it must also have meant to foreclose *substitution* of counsel except in the narrowest circumstances. Pet. Br. 14-15, 31, 32. *Harbison*, however, emphasized the need for continuity of counsel because "Congress did not want condemned men and women to be *abandoned* by their counsel at the last moment … ." 129 S. Ct. at 1491 (quoting *Hain* v. *Mullin*, 436 F.3d 1168 (10th Cir. 2006) (en banc)) (emphasis added). That concern with ensuring the continuous assistance of appropriate counsel strongly supports allowing substitution if and when it becomes necessary "in the interests of justice."

Section 3006A, and have developed clear standards for evaluating such requests.[16] To take other examples from the criminal context, courts regularly consider the "interests of justice" in determining whether to release intercepted communications or evidence to an aggrieved party, 18 U.S.C. § 2518; in deciding whether to declare a mistrial where the United States fails to produce Jencks Act materials, *id.* § 3500; in setting the schedule for payment of a fine as part of a criminal sentence, *id.* § 3572; and in determining whether to address the merits of a habeas petition before dismissing it as time-barred, *Day* v. *McDonough*, 547 U.S. 198, 210 (2006). Courts of appeals, in turn, are equally familiar with reviewing applications of the standard for abuses of discretion in a wide variety of contexts.[17] Given the

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[16] The court below has considered "three elements when reviewing a district court's denial of a substitution motion [under Section 3006A]: 1) the timeliness of the motion; 2) the adequacy of the district court's inquiry into the defendant's complaint; and 3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense." *United States* v. *Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005). Other courts look to similar considerations. *See United States* v. *John Doe No. 1*, 272 F.3d 116, 122-123 (2d Cir. 2001) (noting consensus among circuit courts as to factors relevant to evaluating district court's exercise of discretion in denying a motion to substitute counsel in criminal cases); *see also, e.g., Arellano* v. *Borg*, 1995 WL 525252, at *2 (9th Cir. Sept. 6, 1995) (unpublished) (listing factors); *United States* v. *White*, 451 F.2d 1225, 1226 (6th Cir. 1971) (reviewing denial of motion for substitution of counsel for abuse of discretion under 18 U.S.C. § 3006A); *United States* v. *Declet*, 432 F. Supp. 622, 623-624 (S.D.N.Y. 1977) (finding "interests of justice" would be "best served by the substitution of counsel" under 18 U.S.C. § 3006A).

[17] *See, e.g., United States* v. *Brown*, 595 F.3d 498, 522 (3d Cir. 2010) (reviewing district court's decision to reject plea agreement

ubiquity of the "interests of justice" standard, there is no basis for concluding that Congress silently prescribed some new and different standard for Section 3599.

B. The State's Proposed Standard Has No Basis In The Text, History, Or Purpose Of Section 3599

In the district court, the State recited as an established and uncontroversial proposition that substitution of counsel is a "matter … of trial court discretion," based on "the interests of justice." JA 29. The State now repudiates that standard and argues for a novel three-part test it never advanced in the courts below or even in its petition for certiorari. That test would permit substitution only where counsel fails to meet the statutory qualifications, labors under an actual conflict of interest, or "abandons" his client by completely failing even to review the record. Pet. Br. 35-38. Each of these factors may well be relevant in determining whether a capital defendant's court-appointed counsel should be replaced in a given case. But the State's new position that these are the only factors a court may consider has no basis in the statute and makes no practical sense.

"in the interests of justice" for abuse of discretion); *United States* v. *Boal*, 534 F.3d 965, 968 (8th Cir. 2008) (same as to district court's decision to adjust restitution payment schedule "as the interests of justice require" under 18 U.S.C. § 3665(k)); *United States* v. *Tarango*, 396 F.3d 666, 675 (5th Cir. 2005) (same as to district court's decision "that the interests of justice warranted granting [defendant] a new trial"); *United States* v. *I.D.P.*, 102 F.3d 507, 514 (11th Cir. 1996) (same as to district court's determination whether transfer of juvenile to adult status would be "in the interests of justice" under 18 U.S.C. § 5032).

1. The State cites no language in Section 3599 or Section 3006A to support its exclusive three-factor test, and there is none. To the contrary, the text refutes the State's claim. Section 3599(e) provides that appointed counsel may be replaced by "*similarly qualified* counsel" (emphasis added). It thus assumes that appointment of new counsel may be permitted even where a defendant already has appointed counsel who is "similarly qualified" under subsections (b), (c), and (d). Likewise, nothing in the statutory history of Section 3599 supports the State's new position. To the contrary, as discussed above, the statute's roots in Section 3006A support the continued use of that provision's "interests of justice" standard. *Supra* pp. 20-21.[18]

Nor has any court adopted or even suggested anything like the exclusive three-part test advanced by the State, and for good reason. The State's position would require litigation focused on such questions as precisely when a court-appointed attorney has "completely abandoned" his client or fallen short of the statutory qualifications. These determinations are not necessarily straightforward, and they may not address the real causes for concern in a given case.[19] Given Congress's

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[18] Congress has repeatedly rejected attempts to weaken the protections of Section 3599. *See, e.g.*, 139 Cong. Rec. S2316, S2321 (daily ed. Mar. 3, 1993); *id.* at S842, S846 (daily ed. Jan. 27, 1993); 137 Cong. Rec. S3192, S3220 (daily ed. Mar. 13, 1991); *id.* at S1069, S1073 (daily ed. Jan. 23, 1991); 136 Cong. Rec. S9238, S9240 (daily ed. June 28, 1990); 135 Cong. Rec. S7288, S7293 (daily ed. June 22, 1989); *cf. Wright* v. *West*, 505 U.S. 277, 305-306 (1992) (O'Connor, J., concurring) (discussing failed attempts to amend federal habeas statute).

[19] For example, while the State argues that a lawyer's "abandonment" of his client would not justify replacement except in the

focus in Section 3599 on "promoting fundamental fairness in the imposition of the death penalty," *McFarland*, 512 U.S. at 859, it makes no sense to constrict the district court's discretion or misdirect the courts' and the parties' efforts in undertaking what will always be a highly case-specific inquiry. That is especially true because a habeas petitioner seeking replacement of his attorney will quite likely be appealing to the trial court, as Clair did here, without yet having the assistance of other counsel.

Indeed, the State's view of the district court's discretion is so narrow that it would render Section 3599(e)'s express provision for substitution of counsel virtually meaningless. Under the State's test, a district court presiding over a capital case would be precluded from substituting counsel except in cases where, in effect, the defendant or habeas petitioner had been completely "denied his statutory right to counsel." Pet. Br. 17; *see also id.* at 33, 35, 41. Such a deprivation, however, would automatically trigger a right to appointment of new counsel under Section 3599(a)(2) because the defendant or habeas petitioner would effectively have none, contrary to the statutory mandate. In that case, the language of Section 3599(e) permitting

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"extreme circumstance" in which counsel did not even review the record in the case (Pet. Br. 38), it is far from clear why other forms or degrees of "abandonment" could not also suffice. *Cf. Maples* v. *Thomas*, No. 10-63 (argued Oct. 4, 2011). Similarly, determining whether appointed counsel meets the statutory qualifications of Section 3599 is hardly a bright-line exercise, where the statute permits appointment of an attorney whose "background, knowledge, or experience would … enable him or her to properly represent the defendant" even if objective qualifications are not met. 18 U.S.C. § 3599(d).

the court to "replace[]" an existing attorney with "similarly qualified counsel" would be superfluous, contrary to basic rules of statutory construction. *See, e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476-477 (2003).

2. Lacking support in Section 3599 or its history or purpose, the State relies mainly on general principles of comity, federalism, and finality underlying the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Pet. Br. 19-21, 26-31. AEDPA has little bearing here, however, because it does not govern habeas petitions filed, as Clair's was, before its effective date. JA 1; *see, e.g.*, *Bradshaw* v. *Stumpf*, 545 U.S. 175, 182 (2005). In addition, the predecessor to Section 3599 was enacted before AEDPA and then reenacted without change after AEDPA had been adopted. Thus, nothing in or about AEDPA sheds much light on how Congress intended courts to apply Section 3599.

Moreover, this Court made clear in *Holland* v. *Florida*, 130 S. Ct. 2549 (2010), that AEDPA's general purposes do not contravene "basic habeas corpus principles," including longstanding equitable and discretionary protections. *Id.* at 2562. Rather, "[t]he importance of the Great Writ, … along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Id.*

Nor does any specific provision of AEDPA support the State's position. Section 2254(i), cited by the State (Pet. Br. 26), provides only that ineffectiveness or incompetence of counsel during post-conviction proceedings "shall not be a ground for *relief*." 28 U.S.C. § 2254(i) (emphasis added). Clair has not sought and did not

receive habeas *relief* on account of the performance of his appointed habeas counsel. He sought appointment of substitute counsel, before judgment on his habeas petition, to pursue previously undisclosed evidence that his existing counsel had allegedly refused to investigate.[20]

The State attempts to read Section 2254(i) more broadly, on the theory that Congress must have "had something more in mind" when it enacted Section 2254(i) than simply barring "relief" based on ineffectiveness or incompetence of counsel, because "an ineffectiveness claim was already not cognizable as a basis for habeas relief under this Court's controlling precedent." Pet. Br. 28. But Congress regularly codifies decisions of this Court, and did so throughout AEDPA.[21] There is no basis for the assertion that in framing Section 2254(i) Congress intended to do anything more than codify the holding of *Pennsylvania* v. *Finley*,

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[20] For this reason, the State's reliance on *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), *Post* v. *Bradshaw*, 422 F.3d 419 (6th Cir. 2005), and similar cases is misplaced. *See* Pet. Br. 28-29. Unlike those decisions, this case involves the adjudication of a pre-judgment motion for new counsel, not a post-judgment motion attacking the district court's decision on the merits. Clair thus is not "ask[ing] for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5.

[21] *See, e.g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 129 S. Ct. 2308, 2324-2325 (2009) (Alito, J., concurring) (discussing AEDPA codification of the exhaustion requirement of *Rose* v. *Lundy*, 455 U.S. 509 (1982), and the cause-and-prejudice rule of *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992)); *see also, e.g.*, 42 U.S.C. § 2000e-2(m) (codifying the "mixed-motive" framework of *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 258 (1989)); Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (codifying "business necessity" and "job related" concepts of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)).

481 U.S. 551 (1987). Indeed, the State elsewhere concedes as much. Pet. Br. 26 ("[Section] 2254(i) … codified this Court's holdings that ineffectiveness of habeas counsel is not a ground for habeas relief."). Moreover, the State's reading of Section 2254(i) proves too much. Section 2254(i) applies to any "proceeding under section 2254," including non-capital habeas cases in which substitution of counsel is subject to Section 3006A. *See* 28 U.S.C. § 2254(i), (h). In non-capital cases, Section 3006A by its terms permits substitution of counsel "in the interests of justice." 18 U.S.C. § 3006A(c). Under the State's reading, however, Section 2254(i) would foreclose substitution of counsel even where Section 3006A would expressly allow it.

The State's reliance on 28 U.S.C. § 2261(e) is also misplaced. That provision is part of Chapter 154's "opt in" scheme, which provides special rules for federal-court review of state-court judgments in capital habeas cases if a State meets certain conditions, including the appointment of "competent counsel in State post-conviction proceedings." 28 U.S.C. § 2265(a)(1)(A); *see also id.* § 2261(b); *Lindh* v. *Murphy*, 521 U.S. 320, 327 (1997). Section 2261(e) provides that the absence of such "competent counsel" may not be a basis for habeas relief. Its second sentence, on which the State relies, merely negates any possible implication that Congress intended to preclude trial courts from removing and replacing incompetent counsel. It does not purport to govern appointment or substitution of counsel outside Chapter 154, or even to limit the occasions for substitution of counsel within that context. If anything, the second sentence of Section 2261(e) reinforces that a petitioner in a case "arising under section 2254," but subject to the Chapter 154 special rules, retains the protections that otherwise apply outside Chapter 154—

including the opportunity to seek substitution of counsel in the interests of justice under Section 3599.

3. The State challenges the "interests of justice" standard on the ground that it "endow[s] a capital habeas corpus litigant with greater latitude to substitute counsel than that possessed under the Constitution by defendants in criminal trial." Pet. Br. 16. This case, however, involves a *statutory* right to counsel in federal capital proceedings, conferred by Section 3599(a) and protected by Section 3599(e), that far exceeds what the Constitution requires. Most obviously, the statutory right to counsel extends to habeas proceedings, while the Sixth Amendment right does not. *See Finley*, 481 U.S. at 557. Congress has also established statutory qualifications for appointed counsel that exceed the standard of constitutionally adequate assistance under the Sixth Amendment. *See* 28 U.S.C. § 3599(b)-(d). And it expanded the scope of the right to appointed counsel and related services beyond what the Sixth Amendment requires in criminal trials. *Id.* § 3599(e)-(g). It is therefore unsurprising that the same statute gives capital defendants and habeas petitioners a right to seek substitution of counsel that likewise exceeds what the Constitution would require.[22]

[22] The State accordingly errs in contending (*e.g.*, Pet. Br. 16) that the "interests of justice" could not warrant substitution of counsel where Clair's letter did not evince any harm to his Due Process or Sixth Amendment rights, for the underlying statutory right at issue goes well beyond the protection those constitutional provisions confer. Moreover, the State's argument is unworkable. A court faced with a pre-judgment request for new counsel cannot predict whether a failure to replace counsel would result in a judgment that violates the Due Process Clause or the Sixth Amendment right to counsel.

Moreover, as to these statutory rights, Congress has treated all federal capital proceedings in precisely the same way. Section 3599 on its face equates the statutory right to counsel of a capital petitioner in federal collateral proceedings with that of a capital defendant in a criminal trial. *Compare* 18 U.S.C. § 3599(a)(1) *with id.* § 3599(a)(2). A single subsection, Section 3599(e), governs substitution of counsel in both contexts. The same words in Section 3599(e) cannot be given a "different meaning for each category" of case to which they apply. *Clark* v. *Martinez*, 543 U.S. 371, 378-380 (2005). Rather, as a matter of basic statutory interpretation, the court's discretion under Section 3599(e) to replace counsel appointed in federal habeas proceedings under Section 3599(a)(2) must be the same as its discretion to replace counsel appointed in a capital trial under Section 3599(a)(1).

4. Finally, California and its amici States predict a flood of "Clair motions" filed by habeas petitioners seeking unwarranted delays in the proceedings against them by claiming entitlement to new counsel on manufactured or trivial grounds. *E.g.*, Pet. Br. 20-22, 30-31; Florida Br. 1, 17-18, 22-23. This argument rests on a caricature of the decision below. The court of appeals did not hold that the interests of justice *require* appointment of new counsel on the facts of this case or any other. It held rather that the issue was committed to the sound discretion of the district court, which must decide, *after due inquiry*, whether substitution of counsel is appropriate "in the interests of justice." Far from "entitling" a capital defendant to new counsel, that discretionary standard permits the district court to take account of all the considerations the State has advanced against granting a motion for substitution, including the State's interest in finality, the prospect of

unreasonable delay, lack of evidence of a serious breakdown of the attorney-client relationship, and any likelihood that substitution would be pointless in light of the status of proceedings or the weakness of the defendant's claims. Indeed, courts regularly deny substitution (or appointment) of counsel on exactly the sorts of grounds the State advances.[23] And neither California nor the amici States cite any evidence that applying the "interests of justice" standard would aggravate the delaying tactics they envision, even though the "interests of justice" standard has long governed appointment and substitution of counsel in non-capital cases under Section 3006A, and applied expressly in capital

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[23] *See, e.g.*, *United States* v. *McDaniel*, 995 F. Supp. 1095, 1096-1097 (C.D. Cal. 1998) (denying substitution of counsel under the Section 3006A "interests of justice" standard where motion was filed on eve of trial after multiple continuances, and evidentiary hearing failed to substantiate defendant's allegations of conflict and failure of communication); *see also, e.g.*, *Hunter* v. *Delo*, 62 F.3d 271, 275 (8th Cir. 1995) (no abuse of discretion where court "investigated [petitioner]'s assertions, gave him every opportunity to justify his dissatisfaction, and concluded that there was no good cause for the appointment of new counsel"); *Prime*, 431 F.3d at 1154 (affirming district court's denial of a substitution motion in light of "1) the timeliness of the motion; 2) the adequacy of the district court's inquiry into the defendant's complaint; and 3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense"); *Felder* v. *Goord*, 564 F. Supp. 2d 201, 220 (S.D.N.Y. 2008) (denying habeas claim that trial court should have ordered substitution of counsel after considering, "the timeliness of the defendant's motion," "the adequacy of the trial court's inquiry into the defendant's complaint about counsel," "whether the attorney/client conflict was so great that it had resulted in 'a total lack of communication preventing an adequate defense,'" and "whether the defendant substantially and unjustifiably contributed to the communication breakdown").

cases before enactment of the predecessor to Section 3599.[24]

II. THE COURT OF APPEALS CORRECTLY APPLIED THE ABUSE-OF-DISCRETION STANDARD

Clair's request for new counsel thus required the district court to make a discretionary determination, based on all the relevant circumstances, whether appointment of new counsel was necessary or appropriate "in the interests of justice." While the State challenges the applicability of that standard, it does not dispute that the district court's denial of Clair's request, like most "issues involving … supervision of litigation," was subject to review for abuse of discretion. *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988); *see also United States* v. *Taylor*, 487 U.S. 326, 335-336 (1988); Pet. Br. 47 & n.23, 53. Nor does the State identify any sound reason for disturbing the court of appeals' straightforward application of that familiar standard of review.

Where a decision is committed to the district court's discretion, "the exercise of [that] discretion … [must] be informed by an accurate knowledge" of the relevant facts. *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972). "One cannot evaluate … what one has not seen or read." *United States* v. *Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc). Rather, a proper exercise of discretion requires a decisionmaker to undertake an "informed resolution" of the claim before it. *Murphy* v.

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[24] The State's petition cited a string of cases for the proposition that the court of appeals' decision would bring "instability" or "gamesmanship" to the process, but none of the cited decisions addressed a motion for replacement of counsel under the "interests of justice" standard. *See* Pet. 22.

Deloitte & Touche Group Ins. Plan, 619 F.3d 1151, 1164 (10th Cir. 2010). Similarly, considering the relevant facts and "clearly articulat[ing] their effect" is necessary "to permit meaningful appellate review." *Taylor*, 487 U.S. at 336; *see also id.* at 335-337, 342-343; *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1676 (2010); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 n.14 (1975). That is especially so where, as here, the court's determination involves a weighing of multiple competing considerations. *See Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 228-229 (1979); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981).

The district court did none of these things in addressing Clair's June 16, 2005 letter requesting substitution of counsel. When Clair earlier submitted his first letter raising concerns about his relationship with the FPD, the court appropriately directed counsel and the State to respond, and acted (or, rather, decided not to act) only after it had received responses and, in particular, had been advised by Clair's counsel that the matter had been resolved to Clair's satisfaction. JA 33. In sharp contrast, when it received Clair's June 16 letter setting forth additional detail about the deterioration of his relationship with the FPD and new allegations about the FPD's failure to pursue newly discovered physical evidence, the court did not solicit any response from counsel or otherwise undertake to inform itself of the surrounding facts. Instead, it summarily denied Clair's request, offering only a conclusory assertion that the FPD "appear[ed]" to be "doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel [was] shown." JA 61.

That assertion was directly contrary to the allegations in Clair's letter, as supported by Ford's letter (which the court received but may or may not have

read). Clair identified, in specific detail, numerous failures by the FPD to "do[] a proper job," including a "total breakdown" of communication between attorney and client, "conflict[s] of interest," and an unexplained refusal to pursue newly available physical evidence that might bear directly on the identity of Rodgers' killer. JA 62-63, 67-69. The district court's conclusion, it turned out, was also contrary to the views of the FPD, as the court would have learned had it sought counsel's views. The first comment the FPD made to any court following Clair's second letter, only four months after the district court's decision, came in response to an order from the court of appeals and confirmed that "the attorney-client relationship ha[d] broken down to such an extent that substitution of counsel [would be] appropriate." FPD Letter at 1.

Application of abuse-of-discretion review on these facts was straightforward. As the court of appeals determined, "when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted." Pet. App. 3; *see also id.* at 4. That holding merely applied the settled principle that a court's exercise of discretion must rest on due consideration of "all the attending circumstances." *Carlson* v. *Landon*, 342 U.S. 524, 533 (1952); *see also Piper Aircraft*, 454 U.S. at 257; *Morrissey*, 408 U.S. at 484. Confronted with Clair's allegations that the FPD had never looked into the physical evidence collected from the crime scene, and refused to do so even after Ford independently discovered that evidence, the court was obliged to make at least some minimal inquiry by

asking counsel to respond.[25] By failing to seek any response to Clair's allegations so that it could make an informed decision, the court essentially failed to exercise its discretion at all. Pet. App. 5; *see Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 103 (1993) (Scalia, J., concurring in part and concurring in the judgment).[26]

The State emphasizes that Judge Snyder, who was assigned to preside over Clair's habeas case after Judge Taylor's retirement, characterized Judge Taylor's

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[25] That inquiry need not have been onerous. The court could have ordered counsel to submit Clair's and Ford's letters in a form that complied with the local rules and to explain its decision to ignore the physical evidence in spite of Clair's contrary instructions.

[26] Courts have regularly applied this principle in the context of motions for appointment or substitution of counsel, holding that a district court must make enough inquiry to provide a "sufficient basis for reaching an informed decision." *United States* v. *McClendon*, 782 F.2d 785, 789 (9th Cir. 1986); *see also United States* v. *Voigt*, 89 F.3d 1050, 1076 (3d Cir. 1996) (affirming district court's decision not to disqualify counsel on conflict-of-interest grounds where "the record was more than sufficient to enable the district court to make a reasoned and well-informed decision"); *Taylor* v. *Dickel*, 293 F.3d 427, 430 (8th Cir. 2002) ("Failure to provide a hearing, or a thorough explication of the reasons for denying substitute counsel, may constitute abuse of discretion in and of itself."); *United States* v. *Martin-Trigona*, 684 F.2d 485, 490 (7th Cir. 1982) (trial court's "failure to conduct an appropriate inquiry into" need for appointment of counsel was reversible error); *Hunter*, 62 F.3d at 271 ("A district court 'confronted by … an allegation [of irreconcilable conflict] has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction.'"); *Johnson* v. *Gibson*, 169 F.3d 1239, 1254 (10th Cir. 1999) ("The district court is under a duty to 'make formal inquiry into the defendant's reasons for dissatisfaction with present counsel when substitution of counsel is requested.'").

rejection of Clair's renewed request for new counsel as "not a summary denial, but a specific finding that Clair had not justified substitution." Pet. Br. 9. That characterization, however, cannot be supported on this record. Neither Judge Taylor's order nor any other evidence suggests that he knew or considered all of the relevant facts. His decision makes no reference to the "interests of justice" or any other standard, gives no indication that the court made any inquiry into Clair's *pro se* allegations, and provides no record facts or reasoned explanation to support the decision or to permit review.

Relatedly, the State argues at length that "Clair's motion was insufficient on its face to justify substitution of counsel," whether considered under the "interests of justice" standard or the State's alternative tests. Pet. Br. 41 (capitalization altered); *see id.* at 15, 16, 45-53, 56-57. The court of appeals did not reach that question, however, and could not have resolved it in light of the district court's failure to probe the circumstances. Its holding rested only on the district court's "failure to inquire," and Clair's allegations were plainly sufficiently serious to warrant some minimal inquiry. Pet. App. 4.

The State argues that "[t]he district court was not necessarily obligated to conduct further inquiry into Clair's allegations or even to state any findings for the record." Pet. Br. 47 n.23; *see id.* at 40-41, 47-48. But the authorities the State cites are to the contrary. In *United States* v. *Smith*, 282 F.3d 758 (9th Cir. 2002), the court confirmed that "case law favors an inquiry when a party seeks substitute counsel," *id.* at 764, and that "the adequacy of the court's inquiry" is central to abuse-of-discretion review, *id.* at 763. The trial court's failure to conduct such an inquiry concerning the defendant's post-trial motion for substitution of counsel was not an abuse of discretion in that case only because

the court had "already entertained two previous substitution motions" raising identical issues and had already "patiently and exhaustively queried [the defendant]." *Id.* at 763, 765. In *Schell* v. *Witek*, 218 F.3d 1017 (9th Cir. 2000), the issue was not whether the federal habeas court had abused its discretion in denying new counsel, but whether the state trial court's failure to rule on the defendant's motion for new counsel amounted to constitutional error warranting habeas relief. Even in that context, the court held that the state court's "fail[ure] to make an appropriate inquiry" required reversal of the district court's denial of habeas relief and remand for an evidentiary hearing. *Id.* at 1027.[27] None of the cited decisions diminishes the settled principle that "[d]iscretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision *in view of all the attending circumstances*." *Carlson*, 342 U.S. at 532-533 (emphasis added); *see* Pet. App. 4.

Indeed, even under the State's novel interpretation of Section 3599, the district court would still be required to inform itself of the facts, just as it must under the "interests of justice" standard. Application of the State's three-part test would require the same elementary steps described above—*i.e.*, making sufficient inquiry into the relevant facts to determine and articulate whether court-appointed counsel met the statutory

[27] The other cited cases (Pet. Br. 40, 48 n.23) similarly concern federal habeas review of state-court decisions and have nothing to do with federal appellate review under the abuse-of-discretion standard. *See Harrington* v. *Richter*, 131 S. Ct. 770, 784 (2011); *Mickens* v. *Taylor*, 535 U.S. 162, 168-176 (2002); *Coleman* v. *Thompson*, 501 U.S. 722 (1991); *Wainwright* v. *Witt*, 469 U.S. 412, 430 (1985); *Wilson* v. *Parker*, 515 F.3d 682, 695 (6th Cir. 2008).

qualifications, labored under a conflict of interest, or had "abandoned" his client. Here, the district court did not undertake those steps, even though Clair's June 16 letter cited a "conflict[] of interest" and essentially alleged abandonment by his counsel. *Supra* pp. 8-10. Thus, even if the district court's discretion were cabined solely by the considerations emphasized by the State, the court of appeals' conclusion—that, on this record, the district court abused its discretion by failing to make sufficient inquiry to inform its exercise—would still be correct.

III. THE REMAND ORDER WAS REASONABLE UNDER THE CIRCUMSTANCES HERE

Much of the State's dissatisfaction with the court of appeals' disposition of Clair's case appears to stem not from the legal questions decided by the court, but from the remedy the court fashioned after finding an abuse of discretion. *See, e.g.*, Pet. Br. 46-48, 54-61. The court of appeals' remedial order, however, was "the most reasonable solution" to an unusual problem posed by the idiosyncratic facts of this case. Pet. App. 6.

In the ordinary case, as the State suggests, the proper course where a district court failed to give adequate consideration to a request for new counsel might well be a remand for the district court to undertake the appropriate inquiry. Pet. Br. 46-47, 56, 57-58. The court of appeals did not hold otherwise. In this particular case, however, such a remand would have made no sense. At the outset of Clair's appeal, the court of appeals, having been advised by Clair and the FPD of a total breakdown in the attorney-client relationship, had already ordered the appointment of new counsel, without objection by the State. That new lawyer had then spent nearly five years acquainting himself with the

complicated facts of the case and litigating it in various respects. In these unique circumstances, it was only sensible to "treat Clair's current counsel as if he were the counsel who *might* have been appointed" at the time Clair made his request in the district court and to remand for the district court to determine not whether new counsel should have been appointed earlier, but whether the original disposition of Clair's habeas petition should be altered in any respect based on whatever arguments current counsel might advance for why it would be appropriate to allow the submission of new evidence or assertion of new claims before judgment. Pet. App. 6 (emphasis added).[28]

Even if AEDPA applied in this case (which it does not), nothing in the court's specially tailored remedial order would permit any "end-run" around that statute's strictures. Pet. Br. 15, 30-31, 46. The court's order does not automatically permit Clair to amend his petition, adduce new evidence, or add new claims. It requires him to apply to the district court for leave to do so. The court of appeals directed the district court to "consider" any such submissions "as if they had been made prior to the ruling on the writ," applying the usual standards prescribed by Federal Rule of Civil Procedure 15(a). Pet. App. 6; *see Mayle* v. *Felix*, 545 U.S. 644, 655 (2005). It will be for the district court to decide in the first instance whether to accept any amendment to Clair's petition or supplementation of the supporting record.

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[28] The court's order to leave current counsel in place was thus consistent with Congress's intent in Section 3599 to "emphasize[] continuity of counsel." *Harbison*, 129 S. Ct. at 1490; *cf*. Pet. Br. 32.

Rule 15(a) does not "entitle" Clair to reopen his case. To amend his petition he would be required to persuade the district court that "justice so requires." Fed. R. Civ. P. 15(a)(2); *see, e.g.*, 1 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 17.2 , at 931-932 (6th ed. 2011). For example, Clair might seek to add a claim that the rediscovered physical evidence, once properly tested and compared, sufficiently demonstrates his "actual innocence" to render his execution unconstitutional. *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). Or he might argue that it supports an amended ineffective-assistance claim based on trial counsel's entry into unfavorable evidentiary stipulations, or an amended *Brady* claim based on the State's failures to make required disclosures. The court could inquire on remand into whether reopening was warranted either because the State suppressed important physical evidence or because Clair's counsel refused to follow up once that evidence was found. The State contends that these claims lack substantive merit, but that is not a contention that this Court can or should address.[29] If the State is correct, the district court will presumably deny any motion to amend as futile. Similarly, the court could deny a motion if it finds "bad faith,

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[29] As discussed, the thrust of Clair's efforts since the district court denied his habeas petition has been to seek an investigation into the physical evidence that the FPD failed to pursue. *Supra* pp. 10-14. Although Clair has informed the lower courts of certain new developments—including DNA test results indicating that one or more unidentified males other than Clair had sexual contact with Rodgers and may have been present at the scene of her murder, and revelations that police suspected a link between Rodgers' murder and a similar homicide that occurred one night earlier while Clair was in jail—the underlying evidence is incomplete, and none of it is in the record below or before this Court.

undue delay, [or] prejudice" to the State. *Bonin* v. *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); *see also Foman*, 371 U.S. at 182; *Stafford* v. *Saffle*, 34 F.3d 1557, 1560-1562 (10th Cir. 1994); *Espey* v. *Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984). The Rule 15 standard thus fully accommodates the State's concerns for finality of state judgments and the possibility of dilatory motives. At the same time, remand and a chance to *seek* amendment will properly ensure that the district court's abuse of discretion in ruling on Clair's substitution request without making due inquiry does not unfairly prevent Clair from advancing substantial claims that might not have been raised before precisely because of the problems with Clair's counsel that ultimately led him to request a change.

The State contends that any attempt by Clair to add new claims based on the newly available physical evidence should be treated as a second or successive petition under AEDPA, 28 U.S.C. § 2244. *See* Pet. Br. 20, 30-31, 46. In the court of appeals, however, the State recognized that if the district court had appointed new counsel when Clair requested it, "[a]ny amendment to the Petition would [have] be[en] subject to the discretion of the court" under the Rule 15 standard for pre-judgment amendments. State's Suppl. Br. 57, Dkt. 83, *Clair* v. *Ayers*, No. 05-99005 (9th Cir. July 14, 2009) (citing Fed. R. Civ. P. 15(a)(2) and *Foman*, 371 U.S. at 182). By adopting that standard, the court of appeals' order does no more than restore Clair as closely as possible to the position he would have been in but for the district court's abuse of discretion.

The State also contends the court of appeals should have pretermitted the district court's consideration of any motion to amend in light of the district court's intervening ruling on Clair's Rule 60(b) motion. Pet. Br. 59-

60. But the district court ruled on that motion without the benefit of any real factual record. By denying Clair's request for new counsel, the district court had cut off Clair's opportunity to investigate the physical evidence and develop the claims it might support. A principal purpose of Clair's motion under Rule 60(b) was thus to seek time and funding to examine the evidence and develop those claims properly. *Supra* pp. 10-12. But the court denied that motion before Clair's counsel had any opportunity to examine the evidence or have it properly analyzed. Moreover, that motion was decided under a different and more stringent standard, and its denial does not foreclose the possibility of relief under Rule 15(a)(2). The district court's denial of the Rule 60(b) motion on an undeveloped record is thus no basis for denying Clair the carefully tailored remedy that is otherwise appropriate in the unusual posture of this case.

For similar reasons, the court of appeals could not meaningfully evaluate whether the district court's abuse of discretion "affected Clair's substantial rights," even if it were required to do so. *Cf.* Pet. Br. 58.[30] Nor could this Court properly make such a determination. The State disputes whether the newly available physical evidence can support a claim for habeas relief, but that question was not before the court of appeals, is not before this Court, and cannot be evaluated on the present record. Remanding for the district court to assess in the first instance whether, in effect, Clair was prejudiced by

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[30] The State erroneously cites (Pet. Br. 58) the harmless error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993). The *Brecht* standard governs whether an error of the trial court was sufficiently prejudicial to warrant habeas relief. It does not address federal appellate review of a district court's decision under the abuse-of-discretion standard.

the district court's uninformed denial of his request for substitution thus was and is the best way to protect both the State's interests and Clair's statutory rights.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

JOHN R. GRELE
LAW OFFICES OF
JOHN R. GRELE
149 Natoma Street
Third Floor
San Francisco, CA 94105

DAVID W. FERMINO
149 Natoma Street
Third Floor
San Francisco, CA 94105

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
CATHERINE M.A. CARROLL
ARON B. GOETZL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022

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