

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**

—————◆—————
PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE QUESTION PRESENTED

At the end of ten years of capital federal habeas corpus proceedings in the district court, respondent Clair suddenly complained about and sought replacement of his court-appointed public defender with a new appointed lawyer. The district court refused, explaining that “it appears Petitioner’s counsel is doing a proper job” and that “[n]o conflict of interest or inadequacy of counsel is shown,” and thereupon issued its ruling denying habeas corpus relief. On appeal, however, the Ninth Circuit appointed a replacement lawyer, vacated the judgment, and remanded for further proceedings to allow the new lawyer to raise additional claims for relief. The Ninth Circuit explained that no showing of ineffectiveness of counsel was required, for it was enough that Clair had expressed “dissatisfaction” and had alleged that the public defender was failing to pursue potentially important evidence.

The Question Presented is:

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.

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OPINIONS BELOW

The unpublished memorandum opinion of the Ninth Circuit Court of Appeals, vacating the district court's denial of respondent Clair's petition for writ of habeas corpus, is captioned *Clair v. Ayers* (Case Nos. 05-99005, 08-75135). The unpublished opinion of the district court, denying relief, is captioned *Clair v. Brown* (Case No. CV 93-1133 GLT). Both opinions are reproduced in the appendix to the petition for writ of certiorari at Petn. App. 1-6, 21-91.¹

◆

JURISDICTION

The Ninth Circuit issued its judgment on November 17, 2010, and denied the State's request for re-hearing and suggestion for hearing en banc on January 13, 2011. The State petitioned for certiorari on April 12, 2011, which this Court granted on June 27, 2011. This Court has jurisdiction under 28 U.S.C. §1254(1).

¹ The abbreviation "Petn. App." refers to the pertinent opinions and decisions reproduced in the appendix to the petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: “In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense.”

The relevant portions of the following statutes involved in this case—18 U.S.C. §3006A, 18 U.S.C. §3599, 28 U.S.C. §2244, and 28 U.S.C. §2254—are reproduced in the Appendix to the Petition for Writ of Certiorari at Petn. App. 92-102. The relevant portions of 28 U.S.C. §2111, 28 U.S.C. §2261, and Rules 60 and 63 of the Federal Rules of Civil Procedure are reproduced in the appendix to this brief on the merits.



STATEMENT OF THE CASE

A. Clair’s Offense: The Murder of Linda Rodgers

In 1984, Linda Rodgers resided, as a live-in babysitter, at the home of Margaret Hessling. Respondent Kenneth Clair was a transient who squatted in a neighboring vacant house. Petn. App. 23.

In early November, Clair was arrested for burglarizing the Hessling house. Clair knew that Hessling’s boyfriend was the source of the information leading to his arrest. Petn. App. 23-24.

When Clair was released from jail on November 15, 1984, he met up with his girlfriend, Pauline Flores, and headed to Hessling's house. About a block away, he told Flores to wait for him. Clair entered the house, then beat, stabbed, and strangled Linda to death. He left her bound, half-naked body on a bed with a sexual device between her thighs. Clair departed, taking various items, including jewelry and beer, with him. Petn. App. 24.

Minutes later, Clair caught up with Flores, who had walked away after getting tired of waiting. She noticed blood on his right palm. Clair told her he had finished "beating up a woman" and lied to her about where he got the beer. Subsequently, Flores recorded a conversation with Clair in which he made numerous incriminating statements. Petn. App. 24-25.

During this conversation, Flores told Clair that the police were asking her about the jewelry she had seen him with that night. Clair did not deny having the jewelry, but rather asked Flores, "How come you think I didn't give you none of it?" When she asked him what he had done with the jewelry, he told her he had thrown it away. Flores expressed concern to Clair that she was involved in the crime. He responded that no one could prove that they were there (at the murder scene). Clair advised Flores to make up an alibi and have her parents "cover for you." He asked her how anyone was "gonna prove I was there." Clair assured Flores there were no fingerprints and nobody had seen him enter or leave the house. He also told her she did not "need to know" about what had happened. Flores reminded Clair that she had seen

him come out of the house with “speakers, the jewelry, and the Goddamned six pack of Budweiser. That’s not fucking funny. You murdered a girl.” Clair replied: “Will you leave that alone, please? You don’t have to rub that in my motherfuckin’ soul.” Petn. App. 53-54.

B. Clair’s State Court Trial and Appellate Proceedings

Clair was convicted of the first degree murder of Linda Rodgers in 1987. The jury also found, as a “special circumstance,” that Clair had murdered Ms. Rodgers during a burglary; but it rejected the special-circumstance allegation that the murder had occurred during an attempted rape. The jury returned a verdict of death. The California Supreme Court affirmed Clair’s death sentence in 1992. *People v. Clair*, 2 Cal.4th 629, 7 Cal.Rptr. 2d 564 (1992).

C. Clair’s Federal Court Proceedings

Clair initiated federal habeas corpus proceedings in 1993 by filing a request for appointment of counsel and for stay of execution. Dist. Doc. 1² The court granted both requests. Dist. Doc. 16. Clair filed an initial petition for writ of habeas corpus in 1994. Dist. Doc. 71. After exhausting state remedies in 1995,

² The abbreviation “Dist. Doc.” refers to the district court docket entries for *Clair v. Ayers*, 93-01133 reproduced in the Joint Appendix.

he filed an amended petition in the district court that same year. Dist. Docs. 95, 106. In 1998, the district court substituted Ms. Linda Griffis and Ms. Julie Langslet as petitioner's counsel. Dist. Doc. 195. Although the precise date is not clear from the district court's docket, it is undisputed that the district court appointed the Federal Public Defender to represent Clair.

1. Events Leading to Clair's June 16, 2005, Motion for Substitution of Counsel

Clair's counsel successfully moved for an evidentiary hearing and sought discovery. In August 2004, the federal district court conducted a two-day evidentiary hearing regarding five separate issues. The post-hearing briefing was substantially completed on January 31, 2005, and the parties began awaiting the court's decision. Dist. Docs. 374-375, Petn. App. 22-23.

But, on March 16, 2005, Clair sent to the district court a letter stating that he no longer wanted to be represented by the Federal Public Defender. He complained that counsel "displayed a degree of messiness" in the briefing, failed to locate an alibi witness, failed to impeach his trial attorney at the evidentiary hearing, and discouraged others from assisting him and publicizing his case. Clair claimed his counsel were only trying to save his life, rather

than trying to show his innocence and secure his outright release from prison. J.A. 19-25.³

Upon receipt of Clair's letter, the district court on March 28 ordered both parties to state their positions regarding Clair's request to relieve counsel. Dist. Doc. 399, J.A. 18. The State's position was that Clair had shown no cause to dismiss counsel. Dist. Doc. 401, J.A. 28-32. The Federal Public Defender advised the court that Clair had met with counsel and that he had agreed that the Public Defender should continue to represent him while purporting to reserve the right to take action later. Dist. Doc. 402, J.A. 26-27. The district court decided to take no further action. Dist. Doc. 400, J.A. 33.

This did not, however, put an end to the matter. By letter dated June 16, 2005, Clair renewed his request to remove the Federal Public Defender as his counsel and asked for appointment of new counsel. Clair's second letter reiterated his prior complaints and added a new one. Clair repeated complaints about the "messiness" of the briefing filed by his counsel, his counsel's rejection of offers to publicize his case, and his counsel's failure to locate an alibi witness named Curtis Lee. But Clair also then claimed that counsel had never examined the evidence collected at the Rodgers crime scene until May 25, 2005, when counsel had met with Orange

³ The abbreviation "J.A." refers to the relevant records reproduced in the Joint Appendix.

County law enforcement at the behest of a private investigator working on Clair's behalf. Clair asserted that there were unmatched fingerprints at the scene and other evidence that had never been tested. He attributed this alleged failure by his counsel to a strategy that focused only on the sentencing phase of his trial. Dist. Doc. 407, J.A. 66-69⁴

On June 30, 2005, after considering Clair's renewed request, the district court denied it as follows: "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." Dist. Doc. 407, J.A. 61. The same day, the district court denied all thirty-nine claims alleged in Clair's petition for writ of habeas corpus. Dist. Doc. 408-409, Petn. App. 20-91.⁵

2. Rule 60(b) Proceedings

Clair's appointed counsel, the Federal Public Defender, filed a notice of appeal from the denial of Clair's petition. Dist. Doc. 412. Meanwhile, Clair filed

⁴ The court also received and returned without filing a letter on Clair's behalf from a private investigator, C.J. Ford. Dist. Doc. 406, J.A. 53-60.

⁵ Significantly, the district court rejected a claim that Clair's trial counsel ineffectively failed to investigate and use the testimony of purported alibi witness, Curtis Lee. The district court also found that Lee's potential testimony was not sufficiently definite to support an alibi. Petn. App. 61.

a pro se notice of appeal from the denial of his motion to change counsel. Dist. Doc. 410. In response to an inquiry from the Ninth Circuit, the Federal Public Defender asserted that there had occurred a breakdown in the attorney-client relationship with Clair sufficient to justify substitution. CA Doc. 4.⁶ The Ninth Circuit deemed the Federal Public Defender's response a motion to withdraw. CA Docs. 9, 11; Dist. Doc. 422. The Ninth Circuit granted the motion and appointed Mr. John Grele to be Clair's new counsel. CA Doc. 18.

While Clair's appeal was pending, his new counsel unsuccessfully pursued post-conviction relief from the district court under Federal Rule of Civil Procedure 60(b). [hereinafter Rule 60(b)]. He relied on two grounds: (1) newly discovered evidence and (2) the district court's allegedly erroneous denial of Clair's June 16, 2005, request for new federal habeas counsel. This motion included sealed information never disclosed to the State. Dist. Docs. 424-426, 428-429, 435, 461; Petn. App. 14-19.

The district court declined to entertain the Rule 60(b) motion. It explained, first, that Clair had not specified the relationship of the physical evidence to any claims in his habeas petition or to otherwise articulate its significance. Second, it found that the

⁶ The abbreviation "CA Doc." refers to the Court of Appeals docket entries for *Clair v. Ayers*, 05-99005 reproduced in the Joint Appendix.

district court's previous order denying Clair's motion for new counsel was not a summary denial, but a specific finding that Clair had not justified substitution.⁷ The district court described Clair's relationship with the Federal Public Defender as a "friction[]." The court noted that Clair was "avoid[ing] the prohibition of claims for inadequate assistance of habeas counsel. . . ." The district court characterized Clair's June 16 request as amounting to no more than a request for new counsel after the case was already under submission. According to the district court, "the only basis for granting the request would be the discovery of new evidence requiring reopening the case. . . ." However, "no new evidence exists. . . ." The district court found no error and no prejudice. Dist. Doc. 435, Petn. App. 14-19.

The Ninth Circuit ordered the district court to consider the Rule 60(b) motion and also whether the State should have access to the sealed filings. CA Doc. 34, Dist. Doc. 440, Petn. App. 12-13. The district court denied the motion on its merits. The court reiterated that Clair failed to explain how any particular testing or investigation would advance any claim in a way that was not done or was not possible in the previous proceedings. "At most, the Court views the motion as a request to retry some claims with a new focus, and

⁷ The State notes that the district court judge, the Honorable Gary L. Taylor, retired the day after he denied Clair's habeas corpus petition. The judge who heard the Rule 60(b) motions was the Honorable Christina A. Snyder.

the need for finality in judgments strongly militates against granting the request.” In light of this conclusion, the district court deemed moot the question of disclosing the sealed filings to the State. Dist. Doc. 447, Petn. App. 8-11.

3. Ninth Circuit Proceedings and Opinion

Clair now appealed the denial of the Rule 60(b) motion. His sealed documents were transmitted to the Ninth Circuit, again without disclosure to the State. Dist. Docs. 454, 461.⁸

On November 17, 2010, over twenty-six years after Linda Rodgers’s murder, eighteen-years after the California Supreme Court affirmed Clair’s death judgment, and six-years after the district court evidentiary hearing, the Ninth Circuit issued a seven page unpublished per curiam memorandum vacating the denial of Clair’s habeas corpus petition and remanding the case to the district court. CA Doc. 134, Petn. App. 1-6. The panel (Pregerson, Reinhardt, & Wardlaw, JJ) held that the district court abused its discretion when it denied Clair’s request for new counsel on June 30, 2005. The opinion posited that Clair had a statutory right to counsel under 18 U.S.C. §3599(a)(2) [hereinafter §3599]. But it noted that

⁸ Clair also filed a second or successive petition with the Ninth Circuit and a protective petition for writ of habeas corpus. The petitions are reproduced in the appendix to the opposition to the petition for writ of certiorari.

although §3599(e) permitted Clair to move for a change of counsel, the statute did not provide a standard to adjudicate that motion. To fill that void, the Ninth Circuit borrowed the “interests of justice” standard for substitution of counsel for non-capital cases under 18 U.S.C. §3006A [hereinafter §3006A] and applied it to Clair’s request. The panel assumed that Congress intended for capital petitioners to have the same opportunity as non-capital petitioners to replace counsel. Characterizing the district court’s ruling as a denial of Clair’s request “without explanation,” the panel opined that the district court had failed to ascertain whether the “interests of justice” required new counsel since the court had not inquired into Clair’s allegations.

The Ninth Circuit panel found it significant that Clair had sent two letters to the district court complaining about his counsel. The opinion noted that Clair’s first letter alleged that his counsel had been inattentive, but that the district court had inquired and Clair had agreed to continue his current representation for the time being. Nonetheless, in the Ninth Circuit’s view, Clair’s second letter should have also prompted a judicial inquiry because Clair had added a “serious additional allegation” that his counsel had failed to examine and present “important physical evidence” located by a private investigator.⁹

⁹ It is not clear from the memorandum whether this “important physical evidence” was the evidence referred to in Clair’s secret filings with the court.

Without elaboration, the panel speculated that this allegation “implicated the fairness of the proceedings” because the evidence was “potentially of great importance” as Clair’s conviction “was based upon circumstantial evidence” and occurred before modern forensic techniques, such as DNA testing. Accordingly, the panel ruled, the district judge should have inquired to determine whether Clair’s counsel was providing “meaningful assistance.”

The panel acknowledged that Clair was not alleging that the Federal Public Defender was constitutionally ineffective. Nonetheless, it held that the district court had failed to properly exercise its discretion with respect to Clair’s statutory right to move for new counsel. According to the panel, the district court’s action had precluded the possibility that new counsel could have taken action to incorporate the new evidence into Clair’s petition.

In view of its finding that the district court had abused its discretion, the Ninth Circuit panel perceived that its earlier decision allowing the Federal Public Defender to withdraw had created a “conundrum” as to the remedy on remand. Since the district judge who denied Clair’s request had retired and new counsel had already been appointed, the Ninth Circuit vacated the denial of Clair’s petition and retroactively granted his 2005 motion for new counsel. The appeals court ordered that Clair’s new counsel on appeal be treated as if he had been appointed in 2005 and that the district court should consider any appropriate submissions counsel might

choose to make, including motions to amend the petition with claims based on the alleged new physical evidence, as if they had been filed prior to the district court ruling denying Clair's petition for writ of habeas corpus. Petn. App. 6.



SUMMARY OF ARGUMENT

Capital prisoners have a statutory entitlement to counsel when they file petitions for writ of habeas corpus in federal court. They also have the right to move for substitute counsel. The issue in this case is the applicable legal standard when capital inmates request a new attorney on habeas.

1. Clair was convicted in 1987 for murder, the key evidence against him being a recording of his own evasive and incriminating statements. Over eighteen years later on the eve of a dispositive ruling on a federal habeas corpus petition that the Federal Public Defender had litigated on Clair's behalf for over seven years, Clair sought to replace his court-appointed counsel. Clair complained only that the public defender had been inattentive to his case and had declined to scientifically test recently-discovered items from the crime scene. The district court denied the request, explained that Clair's counsel had acted appropriately and that Clair had not shown a conflict of interest or any inadequacy in his legal representation. The district court denied Clair's habeas corpus petition on the same day.

The Ninth Circuit, however, held that the district court abused its discretion when it denied Clair's request for new counsel without further inquiry about his concerns. The panel vacated the judgment denying habeas corpus relief and remanded the case to allow new court-appointed counsel to pursue further remedies, including possibly presenting brand new unspecified claims for relief. In essence, the Ninth Circuit reopened Clair's habeas case and enabled him to present new claims without complying with the rules for successive petitions.

2. The Ninth Circuit's decision was erroneous because Clair's complaints were insufficient to justify substitution of habeas counsel. Clair was not constitutionally entitled to legal representation on habeas corpus or to effective assistance by counsel appointed in his case. However, he was statutorily entitled to representation. For capital cases, Congress has established a special system for the long-term appointment of qualified counsel to prepare and litigate habeas corpus petitions in death penalty cases and to represent condemned inmates in subsequent federal and state actions. Substitution of counsel based merely on disagreement with counsel's performance—or on criticism of counsel's tactics and strategy—is contrary to Congressional intent and inconsistent with this Court's holdings that the Sixth Amendment right to effective assistance of counsel does not apply to collateral review. Also, since these appointments are intended to be continuous and to include representation in state forums, unnecessary

grants of substitution motions threaten to disrupt state proceedings, thus undermining principles of comity and federalism. Further, Clair's last minute change in counsel perversely charted a path for an end-run around the successive-petition prohibition of the Anti-Terrorism and Effective Death Penalty Act [AEDPA], including the limitation on raising new claims under Rule 60(b).

In light of the statutory structure for the appointment of qualified counsel in capital cases, and in view of well-settled principles of habeas corpus jurisprudence culminating in AEDPA reforms aimed at minimizing delay and repetitious federal proceedings, motions to substitute counsel must be limited to ensuring that the capital habeas corpus petitioner receives qualified and functioning counsel. Accordingly, substitution motions should be granted only when such counsel is completely denied. That is, substitution is permissible only where federal counsel fails to meet statutory qualifications, labors under a disabling conflict of interest, or has completely abandoned representation of the client. It should not be based on disagreements between counsel and client regarding strategy and tactics.

Clair never alleged or made the appropriate showing. Instead, he questioned only how his unconflicted and active counsel litigated the case. The Ninth Circuit was wrong to require substitution, and most egregiously wrong in vacating the district court's denial of habeas corpus relief from the state judgment.

3. Alternatively, the Ninth Circuit’s decision was manifestly erroneous under the “interests of justice” standard for replacement of counsel in non-capital cases under §3006A. Clair failed to show that substitution of counsel was necessary to prevent a denial of due process in his habeas corpus proceedings since his complaints were either groundless or irrelevant to any claims cognizable in his federal habeas corpus proceedings. As a matter of due process, his statutorily appointed counsel provided him sufficient representation. *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987).

Finally, the Ninth Circuit’s decision also anomalously endowed a capital habeas corpus litigant with greater latitude to substitute counsel than that possessed under the Constitution by defendants in criminal trials. For instance, Clair was granted new counsel even though he never alleged that his counsel was constitutionally ineffective even under prevailing Sixth Amendment-based standards for substitution of counsel at trial. Thus, the Ninth Circuit’s decision gave more deference to Clair’s request than a trial court would be expected to give to a similar request by a defendant at trial—totally contrary to a basic premise of habeas jurisprudence that the trial is the “main event” and that habeas corpus is a “secondary and limited” review.



ARGUMENT**I. SUBSTITUTION OF COUNSEL IS AVAILABLE IN CAPITAL HABEAS CORPUS CASES ONLY WHEN THE PETITIONER SHOWS COUNSEL LACKS STATUTORY QUALIFICATIONS, SUFFERS FROM A DISABLING CONFLICT OF INTEREST, OR HAS TOTALLY ABANDONED HIS CLIENT**

Settled habeas corpus policies promoting comity and finality, governing habeas corpus statutes including AEDPA, and the realities of capital litigation lead to the conclusion that a court may substitute habeas counsel under §3599 providing for appointment of counsel in capital cases only when the petitioner promptly seeks substitution and demonstrates that he has been denied his statutory right to counsel because (1) counsel lacks the specific statutory qualifications for appointment, (2) counsel is impaired by a disabling conflict of interest, or (3) counsel has abandoned the client. It is not enough for a petitioner, such as respondent Clair, simply to express disapproval of counsel and counsel's strategy or performance. To allow substitution on such grounds, as the Ninth Circuit erroneously did here, would extend to capital inmates an open invitation to file "Clair Motions" seeking new counsel to raise new claims in derogation of settled restrictions on successive petitions and to impermissibly delay carrying out state-court judgments.¹⁰ Furthermore, it

¹⁰ Although this is not an equitable tolling case, petitioners could also use such motions as a tactic to gain additional time to

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would be inconsistent with this Court's long-established jurisprudence that habeas prisoners, including capital prisoners, are not entitled to the equivalent of the Sixth Amendment right to effective assistance of counsel.

A. Settled Habeas Corpus Principles and Governing Habeas Corpus Statutes Allow Only the Narrowest Grounds for Motions to Substitute Appointed Counsel

As the Ninth Circuit correctly noted, §3599 contains no explicit standard for substitution of appointed counsel in capital federal habeas corpus proceedings governed by 28 U.S.C. §2254 [hereinafter §2254]. Petn. App. 2-3. Nonetheless, the “statutory and jurisprudential limits applicable in habeas corpus cases,” narrowed even more tightly by the policies underlying the habeas reforms enacted in AEDPA, and the unique nature of capital litigation dictate the strictest of standards for motions to replace counsel under §3599. See *Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (AEDPA successive-petition restrictions inform exercise of court's discretion to recall mandate in non-AEDPA case); *Felker v. Turpin*, 518 U.S. 651, 662-663 (1996) (AEDPA and its successive-petition restrictions inform Court's exercise of its original habeas corpus

file petitions for writ of habeas corpus after the expiration of AEDPA's period of limitations.

jurisdiction); *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (“Any solution to this problem must therefore be compatible with AEDPA’s purposes.”); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (Court has filled gaps in habeas statutes by determining whether proposed rule advances or inhibits considerations underlying habeas jurisprudence).

1. Traditional Habeas Principles Against Protracted and Repetitious Litigation, Strengthened by AEDPA Policy, Require Tight Restrictions on Substitution-of-Counsel Motions under §3599

By 1996, an “evolutionary process” of history, judicial precedent, equitable principles, and statutory law, already restricted repetitive habeas filings under the rubric of the “abuse of the writ” doctrine. See *Felker v. Turpin*, 518 U.S. at 664. Even before AEDPA, that is, courts vigilantly guarded against procedural stratagems, including motions to relieve counsel, that sought to avoid “abuse of the writ” restrictions on successive petitions. *E.g.*, *United States v. Rich*, 141 F.3d 550, 551-552 (5th Cir. 1998) (pre-AEDPA Rule 60(b) motions subject to abuse-of-writ doctrine); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993); *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) (rejecting motion to relieve counsel, same considerations applied to pre-AEDPA petitions under abuse-of-writ doctrine).

AEDPA has only reinforced the federal policy against delay and abuse of the writ. 28 U.S.C. §2244. The purpose of AEDPA is “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and to further traditional policies limiting the writ in view of ‘the principles of comity, finality, and federalism’ . . .” *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) [citations omitted]; *Holland v. Florida*, 130 S.Ct. 2549, 2562 (2010). AEDPA considerations are particularly crucial in fixing the proper judicial response when capital petitioners pursue, as Clair did here, motions for new counsel aimed at re-opening their cases in order to circumvent AEDPA’s bar against successive petitions. See *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (Rule 60(b) motion to vacate judgment is a successive petition if used to raise new claims); *Calderon v. Thompson*, 523 U.S. at 553-554 (motion to recall mandate based on new claims deemed a successive petition).¹¹

The proper scope of the writ for habeas corpus must account for the capital case petitioner’s unique incentive to delay his federal case and to delay the execution of the state court’s judgment. *Barefoot v. Estelle*, 463 U.S. at 887-888, 894-895; *Rhines v. Weber*, 544 U.S. at 277-278; *Evans v. Chavis*, 546 U.S. 189,

¹¹ It is of no consequence that Clair’s petition was filed pre-AEDPA. *Calderon v. Thompson*, 523 U.S. at 554, 558 (although AEDPA does not govern case, its objects and general habeas principles inform the exercise of judicial discretion).

203 fn. 1 (2006) (Stevens, J., concurring) (“[W]hile prisoners on death row often have an incentive to adopt delaying tactics, those serving a sentence of imprisonment presumably want to obtain relief as promptly as possible.”). This Court has repeatedly applied habeas doctrines and rules to protect the State’s strong interest in enforcing its judgment against manipulation of court processes by capital petitioners. See, e.g., *Gomez v. United States Dist. Ct. for Northern Dist. of California*, 503 U.S. 653, 654 (1992) and cases cited therein; *Sawyer v. Whitley*, 505 U.S. 333, 341 & fn. 7 (1992); *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (capital petitioners who are dilatory about researching and preparing habeas claims are not entitled to stay of execution). Congress’s enactment of AEDPA, including its provisions for expedited review of capital cases, also represents the national Legislature’s intent to curtail protracted capital litigation. H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995) (“[C]apital defendants and their counsel have a unique incentive to keep litigation going by any possible means.”).

It is also vital to limit the use and abuse of substitution motions in habeas corpus proceedings and capital habeas proceedings because of their tendency to delay litigation. Already ubiquitous in criminal trials, substitution motions will exert a particularly deleterious effect in habeas cases if they were to metastasize there. See, e.g., *United States v. White*, 174 F.3d 290, 296 (2nd Cir. 1999) (“It would be an understatement to observe that disputes like the

one between White and [his counsel] arise frequently, and such disagreements often culminate in a defendant's request for substitute counsel.”); *People v. Roldan*, 35 Cal.4th 646, 681, 110 P.3d 289, 312 (2005) (“Defendants in capital cases often express dissatisfaction with their appointed counsel. . . .”); *United States v. Brumer*, 528 F.3d 157, 160 (2d Cir. 2008) (court must be vigilant that substitution motion is not intended to delay proceedings or disrupt administration of justice).

2. Federal Appointment-of-Counsel Statutes, Informed by Habeas Corpus Principles and Policy, Confirm Tight Substitution-of-Counsel Limits for Capital Cases

In addition, federal statutes governing appointment of counsel reflect Congress's desire to minimize substitution in capital cases. As a matter of constitutional and habeas jurisprudence, condemned prisoners—like ordinary prisoners—are not entitled to representation of counsel in collateral proceedings. Nor are they entitled to effective assistance when counsel is appointed to represent them, or to the “full panoply” of rights that accompany the right to counsel in criminal cases under the Sixth Amendment. *Pennsylvania v. Finley*, 481 U.S. at 559; *Murray v. Giarratano*, 492 U.S. 1, 12 (Rehnquist, C.J., plurality op.), 14 (Kennedy, J., concurring) (1989); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Ohio Adult Parole Authority v. Woodard*, 523

U.S. 272, 284 (1998); *Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Mayle v. Felix*, 545 U.S. 644, 664 fn. 8 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336-337 (2007); *McCleskey v. Zant*, 499 U.S. 467, 495 (1991). Accordingly, capital-case inmates who exercise their statutory entitlement to legal representation should not be entitled to any rights to substitute counsel comparable to the rights of defendants at trial to substitute counsel. See *District Attorney's Office for the Third Judicial District v. Osborne*, ___ U.S. ___, 129 S.Ct. 2308, 2320 (2009).

Congress has enacted appointment-of-counsel statutes that operate consistently with a strict standard for replacing counsel in capital habeas cases. Initially, under §3006A, district courts had discretion to appoint counsel in all cases in which convicted state defendants pursued collateral review under §2254. *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986). When Congress amended Section 408 of the Controlled Substances Act as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (formerly codified at 21 U.S.C. §848(q)), however, capital prisoners became statutorily entitled to appointed counsel. *McFarland v. Scott*, 512 U.S. 849, 850 (1994). Later, in 2006, Congress moved these capital case provisions to their present location at §3599. *Harbison v. Bell*, 556 U.S. 180, 129 S.Ct. 1481, 1485, 1487 fn. 3, 1489 (2009).¹²

¹² §3599 and §3006A are not exclusively habeas corpus statutes. Rather, they apply to appointment of counsel at all
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In this way, Congress singled out the appointment of counsel in capital collateral cases for unique treatment.

Further, Congress explicitly reiterated distinctive treatment for counsel in capital cases in 1996 when it enacted §2254(h) as part of AEDPA. §2254(h) states:

Except as provided in section 408 of the Controlled Substances Act,^[13] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by §3006A of title 18. [emphasis added].

By this reference to section 408 in §2254(h), Congress manifested its intent to create a separate system of specialized rules for appointment of “qualified” habeas counsel in capital cases. *McFarland v. Scott*, 512 U.S. at 854-855. Condemned inmates are absolutely entitled to appointment of counsel under

stages of the criminal proceedings and subsequent post-conviction processes.

¹³ As already noted, section 408 of the Controlled Substances Act was the original location of the appointment of counsel statute now located at §3599. Obviously, it was a drafting mistake that §2254(h) was not amended to conform to the relocation of the appointment of counsel provisions in 2006.

§3599. Compare §3599(a)(2) with §3006A(a)(2) (discretionary appointments). Moreover, “[c]ounsel appointed to represent capital defendants in postconviction proceedings [under §3599] must meet more *stringent* experience criteria than attorneys appointed to represent noncapital defendants under [§3006A]. . . .” *McFarland v. Scott*, 512 U.S. at 854 fn. 2. [emphasis added]; §3599(c). In capital cases, the district court actually appoints counsel and authorizes reasonable investigative expenses prior to the actual filing of the habeas corpus petition, in order to allow time for counsel to investigate claims. *McFarland v. Scott*, 512 U.S. at 855-859. §3599 also authorizes higher compensation to counsel in capital cases and higher payments for reasonably necessary ancillary services. See *Bonin v. Calderon*, 59 F.3d 815, 837 (9th Cir. 1995); compare §3599(g)(1) with §3006A(d). Additionally, unlike non-capital cases, counsel’s appointment in capital cases may extend to state “exhaustion” proceedings and state clemency applications. *Harbison v. Bell*, 129 S.Ct. at 1489 fn. 7, 1491 (construing §3599(e).) Finally, while capital petitioners may ask to replace their appointed counsel, Congress has provided that the district court may substitute appointed counsel in non-capital cases in the “interests of justice.” Compare §3599(e) with §3006A(c).

The provision for replacement of counsel in §3599(e) does not offer any explicit guidance about when substitution is appropriate. However, Congress’s passage of legislation that defined qualifications

for counsel and that contemplated long-term appointments of indefinite duration for post-conviction representation indicates that Congress intended to minimize the necessity and the occasion for substitution of counsel. Also, Congress was undoubtedly aware, when it originally enacted this legislation in 1988, that this Court had already held that there was no right to effective assistance of appointed counsel on habeas. *Pennsylvania v. Finley*, 481 U.S. at 559; see *Holland v. Florida*, 130 S.Ct at 2561 (Congress is presumed to be aware of prevailing law). Thus, Congress could assume that the professional assistance of appointed counsel under this system would not be subject to attack and would not cause the vacation of an adverse habeas judgment. Cf. *Lawrence v. Florida*, 549 U.S. at 337.

Moreover, when Congress adopted AEDPA in 1996, it evinced an intent that a claim of ineffectiveness of counsel would not constitute a sufficient ground for substitution of counsel in habeas cases such as Clair's. First, Congress amended Chapter 153 of Title 28 of the United States Code by adding §2254(i), which codified this Court's holdings that ineffectiveness of habeas counsel is not a ground for habeas relief. See *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997) (explaining differences between Chapter 153 and Chapter 154 of Title 28).

Second, as part of AEDPA, Congress enacted the "Chapter 154" special expedited-litigation procedures for qualifying capital cases. 28 U.S.C. §2261 et seq. As part of Chapter 154, Congress repeated the language in §2254(i) of Chapter 153 that "[t]he ineffectiveness

or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under §2254.” 28 U.S.C. §2261(e). However, unlike §2254(i) in Chapter 153, Congress tellingly added the following exception for Chapter 154 cases: “This limitation shall not preclude the appointment of different counsel, on the court’s own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.” 28 U.S.C. §2261(e).

This extra sentence in §2261(e) of Chapter 154 represents the only time Congress has spoken to an explicit ground for a motion to substitute collateral counsel. That Congress felt compelled to add this specific crucial exception for substitution motions in separate Chapter 154 cases reflects a legislative intention that claims of ineffectiveness would not ordinarily be grounds for substitution motions under §3599 (or its predecessor, 21 U.S.C. §848(q)), including capital cases not subject to Chapter 154. “Where Congress includes particular language in one section of statute but omits it in another section of same Act, it is generally presumed that Congress acts intentionally and purposely in this disparate inclusion or exclusion.” *Duncan v. Walker*, 533 U.S.

167, 173-174 (2001); *Lindh v. Murphy*, 521 U.S. at 329-336.¹⁴

Even on its own terms, §2254(i)'s bare prohibition of claims based on ineffectiveness or incompetence of habeas counsel also supports the conclusion that Congress did not intend to allow motions for substitution of counsel under §3599 that are based, like Clair's motion, on a disagreement with counsel's strategic and investigative choices. When Congress enacted AEDPA, it was presumably aware that this Court had already held that there was no constitutional right to effective assistance of post-conviction counsel. *Holland v. Florida*, 130 S.Ct at 2561. Thus, because an ineffectiveness claim was already not cognizable as a basis for habeas relief under this Court's controlling precedent, it was unnecessary for Congress to say so. The fact that Congress did say so, in §2254, suggests that it had something more in mind. It is reasonable to infer, therefore, that Congress intended something more—that issues of “ineffectiveness and incompetence” by a petitioner's appointed counsel would not be the subject of litigation in §2254 proceedings, including motions for substitution based on the performance of counsel, and would not be grounds for “relief” from an adverse habeas judgment. See *Gonzalez v. Crosby*, 545 U.S. at 532 fn. 5 (“We note that an attack [Rule 60(b)] based on the movant's own conduct, or his

¹⁴ Clair's non-AEDPA habeas corpus case, of course, is not an expedited “Chapter 154” proceeding.

habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.”); *Post v. Bradshaw*, 422 F.3d 419, 423 & fn. 1 (6th Cir. 2005) (“Our interpretation of §2254(i) as prohibiting more than just habeas relief for constitutionally ineffective counsel is not only a commonsense reading of §2254(i)’s text, but also avoids an interpretation that renders the provision entirely superfluous.”); *Ward v. Norris*, 577 F.3d 925, 933 (8th Cir. 2009); *Franqui v. Florida*, 638 F.3d 1368, 1374 fn. 9 (11th Cir. 2011); see also *Bonin v. Vasquez*, 999 F.2d at 429 (holding in pre-AEDPA case that habeas counsel may not claim own ineffectiveness as “cause” for failure to raise claims in prior petition since petitioner had no right to effective assistance of habeas counsel). This construction of §2254(i) is reinforced by the fact that Congress believed it necessary to include language in its Chapter 154 counterpart, §2261(e), explicitly permitting substitution of counsel based on alleged incompetence or ineffectiveness.¹⁵

¹⁵ This Court’s equitable tolling opinion in *Holland v. Florida*, 130 S.Ct. at 2563, does not affect this analysis. In *Holland*, the petitioner cited his counsel’s failures as “extraordinary circumstances” justifying equitable tolling. The majority opinion noted that “Holland does not argue that this attorney’s misconduct provides a substantive ground for relief, cf. §2254(i). . . .”. *Id.* at 2563. Holland’s claim that he was entitled to equitable tolling was not based just on the ineffectiveness or incompetence of his counsel. Rather, Holland alleged that his lawyer had potentially committed “egregious”

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This limitation on substitution motions based on the effectiveness or incompetence of counsel also makes sense in light of settled habeas doctrine, most recently strengthened by AEDPA, that restricts repetitive litigation and otherwise reduces delay in collateral proceedings. Without this limitation, other prisoners like Clair will use substitution motions as pretexts to interrupt the progress of their cases or to reopen them (as Clair has tried to do) with new claims. In the latter circumstance, of course, the prisoner evades AEDPA's strictures on successive petitions. 28 U.S.C. §2244. The Ninth Circuit's decision in this case, which imposed a full-fledged duty of inquiry on judges when inmates complain about their appointed counsel, is the most extreme example of how successful this strategy can be—Clair

and “extraordinary” misbehavior that was comparable to abandonment of his client. *Id.* at 2564 and cases cited therein; 2568 (Alito, J., concurring). In short, §2254(i) was not particularly relevant to this Court in *Holland* because the allegations for equitable tolling were not claims of mere incompetence or ineffectiveness. In any event, the *Holland* opinion did not have to consider the specific legislative intent regarding the scope of motions to relieve counsel as represented by the difference in wording between §2254(i) and §2261(e). Regardless of whether ineffectiveness of counsel may justify equitable tolling, Congress has made it clear that it did not intend for such allegations to be grounds for substitution of counsel.

was allowed the chance to redo his case after a district court had already denied his first petition.¹⁶

Finally, federalism and comity concerns militate in favor of a narrowed scope for substitution motions. This Court has held that counsel appointed under §3599 may also be authorized to represent defendants to exhaust remedies on their claims in state court and to submit clemency applications to state executives. *Harbison v. Bell*, 129 S.Ct. at 1489 fn. 7, 1490-1491 (“Subsection (e) [of §3599] emphasizes continuity of counsel.”). Multi-jurisdictional, multi-case representation raises the specter that an attorney representing the condemned inmate in a state judicial or executive forum will be vulnerable to substitution motions presented to the federal district judge. A narrow standard for substitution appropriately limits an inmate’s opportunities to disrupt pending state actions with motions for substitution in federal court. And a limited scope to substitution motions best serves Congress’s intent for maintaining long-term appointments in these cases.

In short, this Court’s jurisprudence and the statutory scheme for appointing counsel in capital habeas cases compel a conclusion that a capital

¹⁶ This is just another example of how the Ninth Circuit has elevated the statutory right to counsel in capital habeas cases to a level akin to the Sixth Amendment right to counsel at trial and on appeal. See, e.g., *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003) (capital petitioner has statutory right to competency to assist appointed counsel).

petitioner's motion to substitute appointed counsel should be limited to grounds narrower than allegations of incompetence or ineffectiveness of counsel. This is congruent with the trial being the "main event," while habeas review is "secondary and limited." *McFarland v. Scott*, 512 U.S. at 859; *Barefoot v. Estelle*, 463 U.S. at 887. This Court has already held that a statutory right to counsel on habeas does not include a right to effective assistance of counsel. *Pennsylvania v. Finley*, 481 U.S. at 558-559. Accordingly, dissatisfaction with counsel can hardly constitute cause for replacement. See *Bonin v. Vasquez*, 999 F.2d at 429. Congress has also passed legislation that indicates that allegations of ineffectiveness or incompetence, including instances of dissatisfaction and disapproval of counsel's decisions, will not be adequate grounds for substitution. Furthermore, Congress intended to provide continuous, uninterrupted, long-term representation by qualified counsel for condemned prisoners. *Harbison v. Bell*, 556 U.S. at 1491 ("[T]he work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application."). A standard limiting the grounds and frequency of substitution motions will further Congress's intent.

**B. Substitution of Counsel Under §3599
Is Limited to Instances in Which
Petitioner Diligently Shows
Circumstances Amounting to an
Actual or Constructive Denial of
Representation by Appointed Counsel**

As explained above, governing principles of habeas jurisprudence and the Congressional scheme for appointment of counsel dictate that substitution motions should be made only on very limited grounds. A substitution motion must not be a vehicle for delaying proceedings, for reopening decided cases, or for otherwise avoiding AEDPA's strictures on successive litigation. It should not incorporate Sixth Amendment concepts of effective assistance or otherwise unnecessarily undermine principles of comity, finality, and federalism. And grounds for substitution must not extend to reasons preempted by Congress's plan for the long-range mandatory appointment of qualified counsel.

A capital petitioner is only entitled to protections adequate to protect the statutory right to counsel. See *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. at 2320. Therefore, the right to substitution should apply only in those situations not preempted by Congress's statutory plan. Those situations encompass the presumptively prejudicial circumstances that arise when there has occurred the equivalent of an actual or constructive denial of the statutory right to counsel. See *Mickens v. Taylor*, 535 U.S. 162, 166-167 (2002) (client is

presumed prejudiced when assistance of counsel is denied entirely or during critical stage of proceedings or when counsel actively represents conflicting interests); *Wheat v. United States*, 486 U.S. 153, 159 (1988) (Sixth Amendment circumscribes appointment of counsel in “several important respects”); *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (three categories of cases in which prejudice is presumed including “denial of counsel,” “state interference with counsel’s assistance,” and actual conflicts of interest); *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (actual or constructive denial of counsel is presumed prejudicial).

Accordingly, a motion to replace appointed counsel under §3599 should be entertained only when appointed counsel (1) does not meet the statutory qualifications for appointment or (2) has a disabling conflict of interest or (3) has completely abandoned representing the client.¹⁷

¹⁷ Some lower courts have held “that substitution-of-counsel standards applied in cases in which the Sixth Amendment is implicated should apply” to motions to replace counsel under §3599. *Johnson v. Gibson*, 169 F.3d 1239, 1253 (10th Cir. 1999); *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995); *Murray v. Delo*, 34 F.3d 1367, 1373 (8th Cir. 1994). However, these opinions are conclusory and lack analysis.

1. Lack of Statutory Qualifications under §3599

A valid reason for substitution is when appointed counsel does not actually meet the statutory qualifications of §3599. Congress enacted comparatively “more stringent” qualification standards to ensure adequate representation in federal court for state capital inmates. *McFarland v. Scott*, 512 U.S. at 854 fn. 2. If it turns out that the government has appointed counsel who do not meet those qualifications, they should be replaced because the inmates with those counsel have, in fact, been denied their entitlement to qualified counsel as defined by statute. Cf. *Wheat v. United States*, 486 U.S. at 159 (“an advocate who is not a member of the bar may not represent clients. . .”).

2. Conflict of Interest

The second valid basis for substitution of counsel arises when appointed counsel actively represents conflicting interests and the conflict adversely affects the attorney’s representation of the inmate. In such cases, counsel will not be able to act as an advocate for the client, and the represented inmate will have been completely denied his or her statutory right to counsel. Conflict of interest claims, of course, are fundamentally different from claims of ineffective assistance of counsel. *Mickens v. Taylor*, 535 U.S. at 166-167, 174; *Wheat v. United States*, 486 U.S. at 159-163; *Smith v. Robbins*, 528 U.S. at 287.

3. Complete Abandonment

The third valid ground for substitution of counsel arises when appointed counsel completely abandons the client. Abandonment is tantamount to a denial of counsel. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (total deprivation of counsel is automatically reversible); see *Holland v. Florida*, 130 S.Ct. at 2568 (Alito, J., concurring); cf. *Harris v. United States*, 367 F.3d 74, 77, 81 (2nd Cir. 2004) (habeas lawyer’s failure must amount to abandonment through either physical or constructive disappearance to justify granting of Rule 60(b)(6) motion).

The meaning of “abandonment” in the context of legal representation on habeas may be deduced by comparing the basic expectation for appointed counsel on a first appeal as of right with the basic expectation for appointed counsel on collateral review. In the former circumstance, even if appellate counsel determines that a client’s appeal-as-of-right case is wholly frivolous, the attorney must still provide a brief to the court and to the client containing references to the parts of the record that arguably support the appeal. The client then has an opportunity to raise any points and the court must examine the record to decide if the appeal is frivolous. *Pennsylvania v. Finley*, 481 U.S. at 553, citing *Anders v. California*, 386 U.S. 738, 744 (1967). Appellate counsel’s failure to fulfill this constitutional entitlement—the *Anders* right—is the equivalent of a denial of counsel on direct review and is presumptively prejudicial. This is not the same as a

claim of ineffective performance of counsel on appeal, which does require a showing of prejudice. *Penson v. Ohio*, 488 U.S. 75, 88 (1988); see also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (differentiating between complete denial of right to counsel of choice and denial of right to effective counsel, since only the latter claims require a showing of prejudice).¹⁸

On the other hand, as already noted, a statutory right of counsel on habeas corpus does not carry with it the “full panoply” of constitutional rights connected with a constitutional right of counsel on appeal. *Pennsylvania v. Finley*, 481 U.S. at 559; see also *Murray v. Giarratano*, 492 U.S. at 12 (Rehnquist, C.J., plurality), 14 (Kennedy, J., concurring) (state is not constitutionally required to provide counsel for condemned inmates). This Court explained in *Pennsylvania v. Finley* that it was sufficient for appointed state habeas counsel to review the record, consult with the client, and report to the court that there were no arguable issues. 481 U.S. at 553. State habeas petitioners do not have equivalent *Anders* rights of briefing of potential arguable issues and judicial review. A habeas petitioner is entitled only to “an independent review of the record by competent counsel. . . .” *Id.* at 558.

¹⁸ This Court, of course, has held that the states have procedural latitude in enforcing the “*Anders*” right. *Smith v. Robbins*, 528 U.S. at 275.

Pennsylvania v. Finley teaches that habeas counsel does not abandon a client as long as counsel independently reviews the record of the case. Conversely, when a petitioner's lawyer fails to meet this obligation, the result is a complete denial of counsel on habeas. This extreme circumstance, which extends far beyond a counsel's ineffective failure to raise a particular claim or to pursue a particular line of investigation, would justify substitution since this severe dereliction amounts to a complete deprivation of a petitioner's statutory right to counsel on habeas.

A qualified attorney who has no conflict of interest and who does not abandon the client satisfies all the requirements of §3599. By the time §3599 comes into play, the condemned inmate has already had the benefit of state trial, appeal, and habeas proceedings. As Congress has recognized, it is inappropriate for federal habeas procedures to duplicate the already-employed state procedures, and accordingly it is unnecessary to provide capital habeas litigants with the same representation required in state trial and appellate proceedings. Thus, substitution of capital habeas counsel is not appropriate when based on allegations of incompetence or ineffectiveness. Rather, the dereliction must rise to a level of total desertion. Congress designed a system for capital habeas petitioners calculated to minimize the possibility that appointed counsel would abdicate their responsibilities as representatives and advocates for their Death Row clients. *McFarland v. Scott*, 512 U.S.

at 854. Qualification standards, higher compensation, reasonable funding, and advance time for preparation of the petition all facilitate assistance of counsel greatly exceeding the standard set in *Pennsylvania v. Finley*.¹⁹

4. The Petitioner Should Request Substitution without Unreasonable Delay

Petitioners also must bring any substitution-of-counsel motion promptly. As noted earlier, substitution motions are frequent sources of trial delay and disruption. See, e.g., *United States v. Moore*, 159 F.3d 1154, 1161 (9th Cir. 1998) (evaluating substitution motion includes balancing inconvenience and delay against Sixth Amendment right to counsel). Similarly, the potential for delay is a frequent consideration in capital habeas litigation. *McFarland*

¹⁹ Substitution motions limited to abandonment are also consistent with the civil nature of habeas corpus proceedings. *Pennsylvania v. Finley*, 481 U.S. at 557; *Harris v. United States*, 367 F.3d at 81. The rights of civil plaintiffs with appointed counsel are not the same as the rights of criminal defendants. There is no right to effective assistance of counsel in civil cases. Ordinarily, mere allegations of ineffectiveness will not justify substitution. See *Lewis v. Lane*, 816 F.2d 1165, 1169-1170 (7th Cir. 1987) (counsel who did no work on case was substituted); *Stevens v. Navistar Int'l Transp. Corp.*, 210 F.Supp.2d 1031, 1032-1033 (N.D.Ill. 2002); *People v. Taylor*, 160 Cal.App.4th 304, 72 Cal.Rptr. 3d 740 (2nd Dist. 2008) (reviewing inapplicability of *Anders* to various civil proceedings). Habeas corpus petitioners are entitled to no greater rights than any other civil plaintiffs.

v. *Scott*, 512 U.S. at 858 (stay of execution will be denied if petitioner is dilatory); *Rhines v. Weber*, 544 U.S. at 269 (discretion is limited by “timeliness concerns reflected in AEDPA”); *Barefoot v. Estelle*, 463 U.S. at 880 (federal habeas cannot be used to delay execution indefinitely). Unlike preconviction trial motions, the equities against inconvenience and delay in a capital habeas proceeding should carry far more weight in comparison to a nonconstitutional statutory right to counsel. Accordingly, as with other motions in capital habeas proceedings, a petitioner’s delay in bringing concerns about counsel to the court’s attention should be a legitimate consideration of the court in granting or denying the request. This consideration is even more pronounced if a substitution motion appears calculated to avoid AEDPA’s restrictions on successive litigation.

5. The District Court is Not Obligated to Inquire About the Petitioner’s Request

As Clair’s case demonstrates, substitution motions also raise questions as to the duty of the court to inquire regarding a petitioner’s complaints or concerns about counsel. Except for particular conflicts of interest, there is no obligation for district court judges to conduct formal inquiries into the reasons for a defendant’s request for appointed counsel. *Mickens v. Taylor*, 535 U.S. at 168-176; *Wilson v. Parker*, 515 F.3d 682, 695 (6th Cir. 2008). In any event, the narrow permissible scope of substitution under §3599 should allow judges to act on any substitution requests by

referring to the record or after conducting a very limited inquiry.

C. Clair's Motion was Insufficient on its Face to Justify Substitution of Counsel

As explained above, Clair needed to show that counsel (1) did not meet the statutory qualifications or (2) was adversely affected by a conflict of interest or (3) had failed to review his record for arguable claims. In other words, Clair needed to prove he had been denied the counsel guaranteed by §3599.

Clair did not make any of these arguments or showings. In fact, as the district court knew, the situation was just the opposite. Clair's counsel had submitted a substantial habeas corpus petition; engaged in discovery; and conducted an evidentiary hearing. Clair's last-minute motion, instead, centered on Clair's ongoing dissatisfaction with his counsel's attitude and his disagreement with their investigative decisions. In essence, he was raising an irrelevant claim of ineffective assistance of habeas counsel. Since Clair was not entitled to effective assistance of habeas counsel, the Ninth Circuit could not vacate the adverse habeas judgment on that ground. Clair's arguments were insufficient to justify substitution of his counsel under §3599.

II. EVEN IF SUBSTITUTION WERE NOT LIMITED TO THE THREE CIRCUMSTANCES IDENTIFIED IN THE STATE'S ARGUMENT, THE NINTH CIRCUIT'S DISPOSITION OF CLAIR'S MOTION FOR NEW COUNSEL STILL VIOLATED GENERAL HABEAS CORPUS PRINCIPLES AND AEDPA

As already shown, Clair was not entitled to new counsel under §3599 and the Ninth Circuit was wrong to vacate the denial of his habeas corpus petition in order to give new counsel a chance to reopen Clair's case with new claims. But, even if, as the Ninth Circuit concluded, the "interests of justice" standard of §3006A applied to Clair's substitution motion, its decision was still erroneous. Clair's disapproval of his counsel and of his counsel's investigative choices still did not entitle him to new appointed counsel. The panel misapplied the "interests of justice" standard when it found that the district court had abused its discretion. Clair's motion did not establish that he needed new counsel in order to protect his due process rights. Moreover, the Ninth Circuit's application of the "interests of justice" standard disregarded habeas doctrine and AEDPA rules limiting the pretexts for repetitive, successive litigation. Nor would he have been entitled to new counsel even if the standards applicable to substitution motions in criminal trials were somehow extended to habeas corpus proceedings. In fact, the Ninth Circuit's disposition was more generous to the habeas corpus petitioner, Clair, than the prevailing

standards would tolerate for a defendant on trial. And, in any event, the Ninth Circuit utterly failed to conduct an appropriate prejudice analysis for nonconstitutional error.

A. The District Court Acted Consistently with the “Interests of Justice” Standard of §3006A

As the Ninth Circuit correctly pointed out, §3599 does not set out a standard for replacement of counsel. To fill that void, the panel appropriated the general “interests of justice” standard for replacement of counsel in §3006A.²⁰ But, the memorandum opinion misapplied that standard when it held the district court abused its discretion by denying Clair’s motion for new counsel.

This Court has never defined or applied the “interests of justice” standard of §3006A for purposes of appointment or replacement of habeas counsel. But

²⁰ Under §2254(h), of course, §3006A does not apply to appointment of counsel in capital cases under §3599. Furthermore, by enacting what is now §3599 even before the passage of §2254(h), Congress had provided that appointment of counsel in capital cases should be treated differently from appointment in run-of-the-mine cases. That said, under a proper analysis, the district court’s denial of Clair’s substitution motion should still have also been upheld under §3006A. In any event, to the extent that the “interests of justice” standard of §3006A also applies to substitution motions under §3599, that standard should reflect the limits discussed in Argument I of this brief.

the Ninth Circuit has. Prior to the enactment of what is now §3599, and also prior to the passage of AEDPA, the Ninth Circuit dealt with the issue of the discretionary appointment of counsel in a capital case under §3006A. In *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), a panel held that counsel should be appointed when “the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations.” *Id.* at 1196.

Subsequently, the Ninth Circuit also held that the “interests of justice” standard applied to a motion to relieve counsel in a capital case. But, in light of this Court’s opinion in *Pennsylvania v. Finley*, the Ninth Circuit also held that the alleged ineffectiveness of federal habeas corpus counsel could not form the basis for a motion to relieve counsel. *Bonin v. Vasquez*, 999 F.2d 425, 429-431 (9th Cir. 1993) (rejecting argument “to include Sixth Amendment rights within the Due Process Clause in complex habeas cases.”); see also *Bonin v. Calderon*, 77 F.3d at 1160 (“To recognize such a claim would . . . ‘swallow the rule’ that there is no constitutional right to effective assistance of counsel in habeas corpus proceedings.”). In particular, the Ninth Circuit pointed out that the impact of a right to effective assistance of counsel on habeas “would be the likelihood of an infinite continuum of litigation in many criminal cases” in which courts would never be able to avoid the merits of ineffective assistance of counsel claims despite the limitations of the “abuse of

the writ” doctrine. *Bonin v. Vasquez*, 999 F.2d at 429-430 citing *McCleskey v. Zant*, 499 U.S. at 494.

Despite this authority and despite the disclaimer in its memorandum opinion, the Ninth Circuit’s disposition of Clair’s case depended on Clair’s complaints about the way counsel had litigated his case.²¹ The panel’s analysis went way beyond any “due process” concerns underlying its “interests of justice” standard. As the panel offered by way of explanation, “the district court’s failure to exercise its discretion foreclosed the possibility that different counsel, upon proper consultation with Clair, would have taken additional necessary action with respect to prosecuting Clair’s habeas petition. . . .” Petn. App. 5. For all intents and purposes, then, the Ninth Circuit’s disposition was a rush to judgment on the effectiveness of Clair’s prior counsel—precisely the analysis previously forbidden by Ninth Circuit authority and this Court’s own jurisprudence.

Moreover, the panel’s application of the “interests of justice” standard totally ignored the habeas principles discussed in the preceding argument and

²¹ The Ninth Circuit opinion tried to shield itself on this point by stating that “Clair’s contention, however, was not that his habeas counsel was constitutionally ineffective, but rather that the district court failed properly to exercise its discretion with respect to his request for his statutory right with regard to a change of counsel.” Petn. App. 5. No matter how it is couched, however, the panel’s reasoning was based on concerns about the effectiveness of Clair’s counsel.

followed by the Ninth Circuit in the *Bonin* litigation. To the extent that Clair sought new counsel to pursue new investigations, to potentially amend his first petition with new claims, and to seek an additional evidentiary hearing, the “interests of justice” standard should have also required the panel to consider the countervailing values of finality, comity, and federalism that animate habeas jurisprudence. In particular, the panel did not take into account that its disposition was opening the door in Clair’s capital case to additional delay and to raising claims that would ordinarily be limited by AEDPA’s successive petition rule.²² See *United States v. Deplet*, 432 F.Supp. 622, 623 (D.C.N.Y. 1977) (“interests of justice” under §3006A include right of society to “demand speedy justice.”).

An example of the panel’s disregard for applicable habeas principles was its peremptory decision to grant Clair new counsel in district court and to potentially undo over a decade of district court proceedings by vacating the earlier denial of his habeas corpus petition. The court rejected the option of remanding Clair’s case for a limited inquiry into his complaints to determine if there were even

²² As it was, his new counsel on appeal had already litigated a Rule 60(b) motion. As the district court pointed out, if the motion had not been denied, he would have had to confront whether the motion raised new claims in violation of AEDPA. Petn. App. 15. The Ninth Circuit’s decision now allows Clair to avoid AEDPA completely.

grounds for a substitution. *Schell v. Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000) (en banc) (evidentiary hearing ordered on substitution claim); *Hendricks v. Zenon*, 993 F.2d 664, 671 fn. 2 (9th Cir. 1993) (“limited remand” appropriate regarding substitution of counsel allegations). The panel’s rationalization for its choice was the “conundrum” caused by the retirement of the district court judge and the appointment of new counsel for Clair on appeal. But this was a “conundrum” of the court’s own creation. There was no reason Clair’s case could not have been remanded for a limited inquiry before a different judge, including the new judge already assigned to Clair’s case. Fed. Rule Civ. Proc. 63 (judge’s inability to proceed). A remand, ordered in the “interests of justice,” could have obviated the possibility of unnecessary protracted litigation.

However, a remand was not even necessary. Based on the Ninth Circuit’s own narrative of events, it can hardly be said that the district court’s decision was somehow implausible, illogical, or unreasonable.²³ Petn. App. 3. The record shows that

²³ The Ninth Circuit incorrectly stated that the district court had not explained its decision denying Clair’s June 16 request for new counsel. In fact, the record shows that the district court indeed articulated reasons for denying the request. Dist. Doc. 407, J.A. 61, Petn. App. 18. The district court was not necessarily obligated to conduct further inquiry into Clair’s allegations or even to state any findings for the record. See, e.g., *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002) (failure to conduct inquiry is not always abuse of discretion); *Schell v. Witek*, 218 F.3d at 1026 (failure to conduct inquiry is

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the conduct of Clair’s counsel—filing a petition, doing discovery, and conducting an evidentiary hearing—fully comported with due process. Petn. App. 22-23. *Pennsylvania v. Finley*, 481 U.S. at 558-559 (sufficient that statutorily appointed competent habeas counsel conducted independent review of the record and reported no arguable issues).

The district court had earlier inquired into Clair’s March 16 letter and had been assured that Clair was willing to let his current counsel continue representing him for the time being. Dist. Doc. 399-400; J.A. 18, 26-27, 33. Just as the district court was about to issue its denial of Clair’s petition, it received Clair’s June 16 letter renewing his earlier complaints and adding a new one about previously undiscovered physical evidence. The district court denied the request as inappropriate because Clair’s counsel appeared to be acting properly and because Clair had not demonstrated that his counsel had a conflict of interest or was inadequate. Dist. Doc. 407, J.A. 61-72.

not prejudicial per se). Nor does the Ninth Circuit’s opinion convincingly explain why the record of the district court’s decision was inadequate. See, e.g., *Wainwright v. Witt*, 469 U.S. 412, 430 (1985) (findings not required for denial of challenge for cause); *Coleman v. Thompson*, 501 U.S. at 739 (state courts not required to make particular findings); *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 784 (2011) (unexplained state court denials of habeas corpus petitions). For that matter, nothing prevented the Ninth Circuit from affirming the district court’s denial of Clair’s motion on any ground supported by the record. *Wainwright v. Witt*, at 430-431; *Bonin v. Calderon*, 59 F.3d 815, 824 (9th Cir. 1995).

Contrary to the Ninth Circuit's opinion, the district court reasonably could have concluded that there was no need to delay the proceedings in Clair's case for further inquiry as Clair's complaints did not indicate that substitution was necessary to protect his due process rights. The district court was justifiably skeptical of Clair's expressed concerns. For example, Clair complained that his counsel resisted publicizing his case, J.A. 63; but at the same time he admitted that counsel legitimately feared that publicity would antagonize the district court. *People v. Marshall*, 13 Cal.4th 799, 863 fn. 15, 919 P.2d 1280, 1317 fn. 15 (1996) (ethical restrictions on publicity regarding adjudicative proceedings). And, of course, generating extraneous publicity was also irrelevant to the merits of Clair's case.

Although Clair also denigrated his counsel's search for alleged alibi witness Curtis L. Lee, J.A. 63-64; the district court's own order denying Clair's petition recounted that Lee "fails as an alibi witness" because "his testimony was not sufficiently definite to provide a solid alibi." Petn. App. 61. Nothing in Clair's letter could have changed the district court's estimate of Lee's worth as a defense witness or of the performance of Clair's lawyers regarding their investigation of Lee as a witness.

Clair inaccurately asserted that counsel's sole strategy in his habeas corpus case was just to save him from the death penalty without also vacating his

conviction.²⁴ His criticism, however, hinged on a report from his counsel's own investigator about her efforts to locate Jarrod Hessling and her interview with Kimberly Hessling—both guilt-trial-related witnesses. Petn. App. 41, 60. To cajole a reluctant Kimberly to talk, the investigator tried to assure her that “we were only fighting for [Clair] to have the chance to die a natural death in prison. . . .” J.A. 71-72. The district court reasonably could have concluded that Clair either misunderstood the report or was taking the investigator's statement out of context, especially since the investigator was actually reporting about a guilt-trial investigation. On its face, this report contradicted Clair's assertion that his counsel was not trying to also overturn his murder conviction. Plus, petitioner's counsel had raised approximately twenty-three claims challenging Clair's conviction. And the district court's evidentiary hearing, of course, was directed to guilt and penalty phase claims. Petn. App. 31, 59, 74. Clair's critique of his counsel's strategy was, quite apparently, without substance.²⁵

²⁴ Of course, if true, counsel's focus on Clair's penalty was not necessarily a poor strategic choice. See *Florida v. Nixon*, 543 U.S. 175, 191-192 (2004).

²⁵ The earlier March 16 letter also indicated that Clair's concerns about his counsel involved a lack, from Clair's standpoint, of a “meaningful” relationship with his lawyer. Thus, his letter referred to an uneasy, but ongoing “working relationship.” J.A. 20. But Clair was not entitled to new counsel for such reasons. *Slappy v. Morris*, 461 U.S. 1, 13-14 (1983).

Finally, the Ninth Circuit focused on what it deemed a “serious additional allegation” in Clair’s June 16 letter that his counsel had failed to examine important untested physical evidence from the scene of Linda Rodgers’s murder. In particular, Clair announced in the letter that there were “unknown” fingerprints that did not match his prints or anyone else’s in the Hessling house. He also alluded to other unspecified evidence that allegedly had never been tested for DNA. J.A. 67. The Ninth Circuit characterized this “physical evidence” as of potential great importance to Clair’s habeas petition because Clair’s “conviction was based upon circumstantial evidence, and occurred *before* the advent of DNA testing and other modern forensic techniques.” Petn. App. 4 [emphasis added].

The Ninth Circuit, however, misunderstood or greatly exaggerated the significance of Clair’s last-minute allegation about new untested physical evidence. To begin with, Clair’s conviction was not just a circumstantial evidence case. Rather, the “key” evidence of Clair’s guilt was his own tape-recorded statement to Flores in which he incriminated himself and corroborated Flores’s testimony against him. Petn. App. 52-54.²⁶ However, there had never been any

²⁶ Clair probably did not help his case in the district court by submitting belated and incredible declarations from Flores and her friends. The declarations asserted that Flores’s medical condition at the time prevented her from being out with Clair on the night of Linda Rodgers’s murder. As the district court pointed out, the declarations “prove too much” since they are

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physical evidence connecting Clair to the crime scene. The discovery of additional physical evidence that still did not connect him to the crime scene did nothing to undercut the evidence of his own guilt based on his taped conversation with Flores.

Even more importantly, as the Ninth Circuit's own opinion demonstrates, this allegedly new "important physical evidence" was not pertinent to any claim cognizable in Clair's habeas corpus proceeding. As the opinion explains, the discovery of the evidence was important because Clair's trial "occurred *before* the advent of DNA testing and other forensic techniques." Petn. App. 4. That is, the evidence was not relevant to any claims of error occurring at Clair's trial. From the viewpoint of the district court when Clair requested new counsel, this new evidence could be viewed only as relevant to a "freestanding claim" of "actual innocence." But, in light of the record evidence of Clair's guilt, this new evidence could hardly support a valid exoneration claim. See *House v. Bell*, 547 U.S. 518, 554-555 (2006). Moreover, Clair could not raise such a claim in federal court, for California provides "available state avenues" to entertain "actual innocence" claims. *Walker v. Martin*, ___ U.S. ___, 131 S.Ct. 1120, 1128 fn. 5 (2011) (state habeas corpus); *Herrera v. Collins*,

inconsistent with Clair's and Flores's taped conversation about what happened that night. Petn. App. 49-50, 63-64.

506 U.S. 390, 414 fn. 14 (executive clemency) (Rehnquist, C.J., opn.), 427 (1993) (O'Connor, J., concurring). Under any standard, Clair's counsel could reasonably choose not to pursue this claim. *Smith v. Robbins*, 528 U.S. at 288.

When the "interests of justice" standard is properly viewed in terms of whether substitution was necessary to protect Clair's due process rights, and in light of the habeas jurisprudence and statutory law that should inform the standard, it is easy to see why the district court denied Clair's June 16 request for new counsel. Clair's complaints about counsel were either inaccurate or misplaced. And, as a matter of due process, Clair's counsel had provided him adequate representation. His counsel had filed a substantial petition for writ of habeas corpus, performed investigation and discovery, and then conducted an evidentiary hearing. Petn. App. 22-23. See *Pennsylvania v. Finley*, 481 U.S. at 558-559. Clair's counsel had acted appropriately. J.A. 61. Furthermore, the societal interest of justice in finality, including limiting delay and minimizing repetitive litigation, counseled in favor of denying Clair's motion. It follows, therefore, that the district court did not abuse its discretion in deciding that substitution of Clair's counsel was not necessary and the Ninth Circuit should have upheld that decision.

B. The Ninth Circuit’s Disposition of Clair’s Motion was Also Inconsistent with Standards for Substitution of Counsel Applied by this Court and the Lower Courts in the Context of Trial and Direct Review

If the Ninth Circuit’s disposition was truly not based on the ineffectiveness of Clair’s appointed counsel—as it claimed—then its decision was inconsistent with the prevailing rules and standards of this Court and the lower courts relating to substitution of counsel at the level of trial and direct review. The Ninth Circuit found that the district court had abused its discretion, even though Clair was not asserting that his counsel was constitutionally ineffective, but only that he was merely disagreeing with counsel about the litigation and investigation of his case. Viewed in this light, the Ninth Circuit’s ruling reflected the application of a substitution-of-counsel standard on habeas corpus that, anomalously, is more generous than the standard ordinarily applied at trial and direct review. This difference, of course, is totally unsupportable.

The general rule for motions for substitution of counsel at trial applied by the lower courts is that “[t]he defendant has a right to substitution only upon establishing ‘good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead . . . to an apparently unjust verdict.’” *United States v. Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010) (Fisher,

J., concurring). Substitution motions are considered in light of a threat to the defendant's Sixth Amendment right to effective assistance of counsel. *Schell v. Witek*, 218 F.3d at 1026-1027; *United States v. Moore*, 159 F.3d 1154, 1158-1159 (9th Cir. 1998). But lower courts also agree that trial defendants are not entitled to substitution of trial counsel merely because they disagree with their counsel's strategic and tactical decisions. *Schell v. Witek*, at 1026, citing *Brookhart v. Janis*, 384 U.S. 1, 8 (1966); *Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990); *McKee v. Harris*, 649 F.2d 927, 932 (2nd Cir. 1981) ("lack of trust" insufficient); *United States v. Christian*, 861 F.2d 195, 197 fn. 2 (8th Cir. 1988); *United States v. Padilla*, 819 F.2d 952, 956 (10th Cir. 1987).

This Court has never ruled, however, that trial defendants are otherwise entitled to substitution of counsel except when their attorneys have an actual conflict of interest or fail to serve as active loyal advocates. *Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc). Nor has this Court held that "irreconcilable differences" between a defendant and counsel justify substitution. *Footte v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007). Rather, this Court has held that defendants are *not* entitled to a "meaningful relationship" with their appointed counsel. *Slappy v. Morris*, 461 U.S. at 13-14; *Plumlee v. Masto*, at 1210-1211.

Nor has this Court ever held that a judge has a duty to inquire into the reasons for an indigent

defendant's dissatisfaction with appointed counsel. *Wilson v. Parker*, 515 F.3d at 695. Indeed, lower courts do not consider a formal inquiry to always be necessary depending on the nature of the defendant's complaints and the record before the trial judge. See, e.g., *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002) (failure to conduct inquiry is not always abuse of discretion); *Schell v. Witek*, 218 F.3d at 1026 (failure to conduct inquiry is not prejudicial per se). Ordinarily, the appropriate remedy when a court fails to inquire about a defendant's concerns is a remand for the trial court to make inquiry about a substitution motion. See, e.g., *Schell v. Witek*, at 1027; *State v. Torres*, 93 P.3d 340, 344 (Ariz. 2004) (and cases cited); *People v. Olivencia*, 204 Cal.App.3d 1391, 1400-1401, 251 Cal.Rptr. 880 (Cal.App. 1988) (and cases cited); *People v. Kelling*, 151 P.3d 650, 655 (Colo. 2006) (and cases cited).²⁷

Measured against these standards applicable to defendants on trial, Clair's request for new counsel failed to justify substitution of counsel. According to the Ninth Circuit, Clair was not challenging the constitutional effectiveness of his counsel. Petn. App.

²⁷ By recounting this case law, the State is not arguing that the Sixth Amendment requires any particular standards or showings for substitution motions at trial or direct review. Rather, for purposes of this alternative argument, the State is simply noting that the Ninth Circuit's decision regarding replacement of counsel on habeas is even more generous than the standards being applied at trial by this Court and the lower courts.

5. Nor did Clair allege a conflict of interest. Yet, even at trial, it would have been a prerequisite to base a substitution motion on the threat that a defendant would otherwise be denied his Sixth Amendment right to effective assistance of counsel. Clair's request thus did not even meet the threshold for a substitution motion at trial. He was not alleging the necessary predicate for substitution, even at the trial level.

The panel opinion also faulted the district court for not inquiring into Clair's allegations that he was discontented by his counsel's alleged inattention to his case and that his counsel had failed to test recently discovered new evidence. But, even in the context of a criminal trial, this Court has never imposed a duty to make an inquiry in these circumstances. No inquiry is necessary when the record before the court demonstrates that substitution was unwarranted. As already explained in the preceding argument, the record was adequate. Clair's claims of "inattention" (not a breakdown in communications or irreconcilable conflict) and his criticism of counsel for not testing the new physical evidence amounted to mere tactical disagreements that would not have justified substitution even in a criminal trial.

Finally, the Ninth Circuit erred in replacing counsel, without even remanding the case for an inquiry in Clair's allegations. This peremptory disposition itself also varied from the generally recognized appropriate remedy of remanding the case

to conduct such an inquiry rather than simply reversing the judgment.

The basic premise of our habeas corpus jurisprudence is that the trial is the “main event” and that habeas review is “secondary and limited.” *McFarland v. Scott*, 512 U.S. at 859. Totally contrary to this Court’s precedents and guidance, the Ninth Circuit set a “lower hurdle” for Clair on habeas than would have existed for him at trial or on direct appeal. See *United States v. Frady*, 456 U.S. 152, 166 (1982). The Ninth Circuit elevated Clair’s motion for substitution of habeas counsel to a level above a motion for substitution at trial. Thus, the Ninth Circuit’s decision accomplished the feat of being inconsistent with both habeas corpus jurisprudence and substitution-of-appointed-counsel case law. Since Clair’s request could not have succeeded at the “main event,” it could hardly justify new counsel at his post-conviction sequel.

C. Any Error by the District Court did Not Deny Clair His Substantial Rights

Even if the district court committed error when it denied Clair’s statutory request for new counsel, the error was non-constitutional in nature. Therefore, the panel was obligated to determine whether it affected Clair’s substantial rights. 28 U.S.C. §2111; *Brecht v. Abrahamson*, 507 U.S. at 631 (citing *United States v. Lane*, 474 U.S. 438 (1986)). But the record makes it

clear that the refusal to replace counsel did not prejudice Clair.

The Ninth Circuit faulted the district court for not inquiring into Clair's complaint that his counsel failed to investigate and test newly discovered evidence. The panel stated that the new evidence was potentially important because Clair's trial had occurred before DNA testing and other forensic techniques were available to test the evidence. The Ninth Circuit then basically presumed that counsel had failed to meaningfully investigate this new evidence and held that Clair's request for new counsel should be granted without further inquiry.

The only indication that the panel even considered prejudice is the cryptic footnote 1 in its memorandum opinion. There the panel noted that Clair's new counsel on appeal had raised, in an unsuccessful Rule 60(b) motion, issues related to the discovery of the new evidence. The panel disregarded the Rule 60(b) proceedings because, it said, they offered only a "limited opportunity" to repair defective decisions compared with pre-decision motions to amend or modify petitions. Petn. App. 5-6 fn. 1. Yet the panel did not explain why the district court potentially might rule differently if confronted, in a motion to amend the petition, with the same evidence and claims it had found insufficient to justify relief under Rule 60(b). The district court's two Rule 60(b) decisions scathingly dismissed Clair's "new evidence" claims. Petn. App. 8-10, 14-18. Furthermore, since Clair's showing was directed at a "freestanding claim

of actual innocence,” and since he had not demonstrated that such a claim would be cognizable in his case, he was not entitled to reopen his case under Rule 60(b). *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997). The district court that denied Clair’s Rule 60(b) motion was not obligated to vacate the judgment denying his petition if doing so would be an empty exercise. *Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline*, 953 F.2d 17, 20 (1st Cir. 1992) (and cases cited). The district court’s denial of Clair’s Rule 60(b) motion based on that same newly discovered evidence demonstrated that the district court’s earlier denial of Clair’s motion for new counsel did not deprive him of a “substantial right.” Nothing in the district court’s analysis of the Rule 60(b) analysis indicated that an attempt by Clair to amend his petition would be anything but futile—no matter who was representing him.

In addition, the Ninth Circuit opinion omitted the fact that the district court also had reexamined the earlier denial of Clair’s substitution motion. The district court explained that the only reason for granting Clair’s request for new counsel, after his case was under submission, would have been “new evidence” justifying a reopening of the proceedings. Since no “new evidence” existed, there was no justification for substitution of Clair’s counsel. Petn. App. 19. The Ninth Circuit opinion does not explain

why this finding by the district court should not have disposed of any question that Clair was not prejudiced by the earlier decision not to replace his counsel in 2005.²⁸ The record demonstrates that the district court's denial of his motion for new counsel under §3599 did not deny Clair's substantial rights.



²⁸ The State was hampered in arguing the relevance of the district court's denial of Clair's Rule 60(b) motion due to a lack of access to sealed documents that were submitted to both the district court and the Ninth Circuit. J.A. 74-76. Although the district court essentially found Clair's showing regarding his allegedly new evidence to be unclear, unspecific, and unpersuasive, the State was not able to fully utilize the information that supported the district court's determination and also, inferentially, that demonstrated that Clair was not prejudiced by the earlier denial of his motion for new counsel. This secrecy denied the State its appropriate role in the adversarial process. *United States v. Nixon*, 418 U.S. 683, 708-709 (1974); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). It denied the People, in general, access to knowledge and information about federal court review of state court judgments. See, e.g., *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983); *Ashworth v. Bagley*, 351 F.Supp.2d 786, 790 (S.D. Ohio 2005). There was no reason for this material to remain concealed since California courts could deploy "an array of ad hoc measures from their equitable arsenal" to protect any disclosures by Clair in the event of a retrial. *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 1164, 1191, 876 P.2d 487 (Cal. 1994).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Appendix To Petitioner’s Brief On The Merits

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28 U.S.C. § 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2261

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel. – This chapter is applicable if –

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record –

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

Federal Rule of Civil Procedure 60

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

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

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

(6) any other reason that justifies relief.

(c) **Timing and Effect of the Motion.**

(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) **Effect on Finality.** The motion does not affect the judgment’s finality or suspend its operation.

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

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

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

Federal Rule of Civil Procedure 63.

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.
