

No. 10-1265

In the Supreme Court of the United States

MICHAEL MARTEL,
Petitioner,

v.

KENNETH CLAIR,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF FLORIDA, ALABAMA, ARIZONA, COLORADO,
CONNECTICUT, DELAWARE, GEORGIA, GUAM, IDAHO,
KENTUCKY, LOUISIANA, MONTANA, NEBRASKA, NEW
MEXICO, NEVADA, NORTH CAROLINA, OHIO,
OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA,
SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH,
WASHINGTON AND WYOMING IN SUPPORT OF THE
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QUESTION PRESENTED

At the end of ten years of capital federal habeas corpus proceedings in the district court, respondent suddenly complained about and sought replacement of his court-appointed public defender with a new appointed lawyer. The district court refused, explaining “it appears Petitioner’s counsel is doing a proper job” and that “[n]o conflict of interest or inadequacy of counsel is shown.” Thereupon it 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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STATEMENT OF AMICI INTEREST

At issue are 18 U.S.C. § 3599 and 18 U.S.C. § 3006A, which provide funding to attorneys representing capital and noncapital defendants respectively. The plain language and legislative histories of both statutes demonstrate that neither was intended to regulate the substance or efficacy of a federally appointed habeas counsel's representation. The Amici States, which engage in substantial federal habeas litigation, would be adversely affected by an interpretation of these statutes that gives capital habeas petitioners an unfettered right to substitute federally appointed counsel at the eleventh hour—and thereby gain the ability to relitigate a previously denied habeas petition. The Ninth Circuit relied on these statutes to find that the district court abused its discretion when it denied a petitioner's motion to substitute his appointed habeas counsel because the petitioner was dissatisfied with his counsel's performance. The Ninth Circuit's interpretation of these statutes invites delay and encourages gamesmanship by petitioners facing capital sentences, who have every incentive to postpone the proceedings for as long as possible.

The Amici States are concerned because the Ninth Circuit's decision does not offer any constraining principles that reduce the potential for abusive tactics by habeas petitioners. The court comes very close to suggesting that federal habeas petitioners have a *per se* statutory right to change counsel, irrespective of the grounds or merit of the substitution motion. The Amici States urge this

Court to reject such an interpretation of what are, in essence, two funding statutes that do not establish a basis for relief the Ninth Circuit imposed.

SUMMARY OF ARGUMENT

Under 18 U.S.C. § 3599, a state capital defendant has a statutory right to appointed counsel to pursue federal habeas relief. Section 3599(e) further provides that “[u]nless replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant,” a federally appointed attorney “shall represent the defendant throughout every subsequent stage of available judicial proceedings” 18 U.S.C. § 3599(e).

In determining when a habeas petitioner’s motion to substitute appointed counsel should be granted, the Ninth Circuit looked to 18 U.S.C. § 3006A(c) for an answer. Section 3006A, however, only provides funding to attorneys representing indigent *non-capital* defendants under certain circumstances, including those seeking federal habeas relief, and provides that a court “may, in the interests of justice, substitute one appointed counsel for another at any stage of proceedings.” The Ninth Circuit erroneously concluded that section 3006A(c)’s “in the interests of justice” language governed habeas counsel substitutions under section 3599. The Ninth Circuit conceded that no express textual support exists for its holding, yet concluded that capital habeas petitioners always have the right to substitute counsel—“in the interests of justice”—whenever the petitioner expresses dissatisfaction with his appointed counsel’s performance. Thus, according to the Ninth Circuit, the interests of justice dictate not only a new attorney, but also multiple opportunities to revisit a previously denied federal habeas petition.

The legislative histories of sections 3599 and 3006A provide no basis for concluding that Congress intended them to be read in the manner employed by the Ninth Circuit. Congress could have easily stated that section 3006A(c)'s "interest of justice standard" applies when a habeas petitioner is represented by an attorney appointed under section 3599. But it did not. Moreover, the Ninth Circuit's standard for substitution of counsel is more permissive than would be available to even a criminal defendant. Simple dissatisfaction with trial counsel's performance is not sufficient grounds to entitle a defendant to a new attorney, and it should not be the standard governing a petitioner's request for new counsel in the federal habeas context.

Finally, the Ninth Circuit's decision failed to accord deference to California's state court judgments. Federal courts have never been a forum to relitigate state criminal trials. Federalism requires that federal courts respect state convictions even when they do not agree with them. Federal courts may not grant multiple opportunities to seek habeas relief on statutory grounds never contemplated by Congress. Yet the standard articulated by the Ninth Circuit will render any statutory constraints on the writ ineffectual.

ARGUMENT**I. The Denial of a Motion to Substitute Capital Habeas Counsel is Not an Abuse of Discretion When the Petitioner Expresses Some Dissatisfaction with Counsel's Performance.****A. Sections 3599(e) and 3006A(c) do not give capital postconviction litigants in federal habeas proceedings the unfettered right to change counsel at the eleventh hour.**

1. The Ninth Circuit strayed from the intended meanings of sections 3599(e) and 3006A(c) in holding that the district court abused its discretion by failing to permit substitution of counsel below. Section 3599 simply regulates funding for appointed counsel to *capital* defendants in federal habeas proceedings. In contrast, section 3006A(c) provides appointed counsel to *noncapital* defendants in certain circumstances and states that a court may permit substitution of counsel "in the interests of justice." No basis exists for engrafting the latter onto the former. In doing so, the Ninth Circuit has created a permissive substitution of counsel standard in the habeas context without textual support. This new standard now provides petitioners, represented by attorneys appointed under section 3599, an opportunity to obtain new habeas proceedings by merely demonstrating that they are dissatisfied with their appointed habeas attorneys' performance. The Ninth Circuit's holding imposes a standard more

permissive than would be available to a defendant proceeding in a criminal trial.

Section 3599(e) provides that a capital defendant seeking federal habeas relief may request substitution of counsel, but it does not set forth a standard for granting a substitution motion. Instead, the statute simply provides: “Unless replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings” 18 U.S.C. § 3599(e) (originally codified at 21 U.S.C. § 848(q)(8)).

When Congress enacted section 3599(e) it could have easily adopted or referenced the “interests of justice” standard contained in section 3006A(c).¹ But it did not. Indeed, Congress used similar language regarding the availability of “investigative” services in both sections 3599 and 3006A. *Compare* 21 U.S.C. § 848(q)(9) (1995) (“Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant’s attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore”), *with* 18 U.S.C. § 3006A(e)(1) (“Upon

¹ Section 3006A(c) was enacted as part of the Criminal Justice Act of 1964. This Act principally ensures that indigent federal defendants have the effective assistance of counsel and other resources at trial and through appeal.

finding, after appropriate inquiry in an ex parte proceeding, that the [investigative, expert or other services] are necessary and that the person is financially unable to obtain them, the court ... shall authorize counsel to obtain the services.”). But Congress did not employ parallel language regarding the standard for replacement of counsel, and section 3006A(c)’s reference to the “interests of justice” has no bearing on motions for substitution of counsel under section 3599(e).

Where similar language is used in related statutes, a court legitimately can accord similar interpretations to the separate provisions. See *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) (“The similarity of language in [the two statutes] is, of course, a strong indication that the two statutes should be interpreted” similar to one another.); see also *McKinney v. Paskett*, 753 F. Supp. 861, 863 (D. Idaho 1990) (“Comparing this section of the Criminal Justice Act to the very similar language regarding ‘experts and investigators’ in subsection 848(q)(9), it is clear that subsection 848(q)(9) was drafted to provide the same protection to the defense of federal defendants accused of drug crimes.”).

Here, however, the plain language of section 3006A(c) does not parallel that of section 3599(e). It is thus doubtful that Congress intended for the provisions to have the same meaning. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“where Congress includes particular language in one section of a statute but omits it in another ... , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)

(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The Ninth Circuit’s interpretation of section 3599(e) transforms a statute responsible for “grant[ing] indigent capital defendants the right to qualified legal counsel,” *McFarland v. Scott*, 512 U.S. 849, 854 (1994), into a provision regulating the substance of attorney-client relations in federal habeas proceedings. Reviewing courts should not be permitted to fashion new legal standards by synthesizing isolated clauses from unrelated statutory provisions.

Not only did the Ninth Circuit engraft a new standard to apply to motions for substitution of counsel under section 3599(e), it did so by applying the “interests of justice” language without regard to any principled boundary. The unfortunate result is that whenever a dispute arises between a habeas petitioner and a section 3599 appointed attorney, the “interests of justice” compel substitution of counsel even if the State faces the prospect of relitigating the entirety of the petitioner’s federal habeas claims.

Even when Sixth Amendment considerations are implicated, courts require that a defendant show more than mere disagreement or dissatisfaction with counsel’s decisions. See *United States v. Corona-Garcia*, 210 F.3d 973, 977 n.2 (9th Cir. 2000) (“Even if we were to conclude that the conflict with respect to trial tactics was severe, however, we would still be disinclined to reverse on that ground because trial tactics are clearly within the realm of powers committed to the discretion of defense counsel in any event.”) (citation omitted); *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) (“A defendant is not

entitled to an attorney who agrees with the defendant's personal view of the prevailing law or the equities of the prosecutor's case. A defendant is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to trial preparation and trial tactics.”); *see also Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995) (“the standards for granting substitute counsel are strict”).

Courts considering substitution of counsel requests under section 3006A, for example, have considered a host of factors, such as the timing of the motion, *United States v. White*, 451 F.2d 1225, 1226 (6th Cir. 1971), the costs or suitability of a particular attorney, *United States v. Herrera*, No. CR 08-0739 WHA, 2010 WL 5060608, at *3 (N.D. Cal. 2010), and the nature and stage of the current proceedings, *United States v. Nelson*, No. CR 09-105S, 2010 WL 2574029, at *2 (D.R.I. June 22, 2010). Mere differences with counsel regarding the claims raised do not suffice. *United States v. Davis*, 354 Fed. Appx. 897, 899 (5th Cir. 2009); *see also United States v. Ghailani*, 686 F. Supp. 2d 279, 299 (S.D.N.Y. 2009) (noting that this Court has interpreted “the Sixth Amendment as fundamentally more concerned with fostering an effective adversarial system than with ensuring satisfying attorney-client relationships”).

It is well understood that there is no constitutional right to postconviction counsel. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 7-15 (1989). As noted, section 3599 is simply a statute that provides federal habeas counsel to capital defendants. It does not provide habeas petitioners a

legal basis to challenge the quality or efficacy of post-conviction counsel's performance. Section 3599(e) does not dictate that a petitioner must be provided with new habeas counsel whenever the petitioner expresses some modicum of dissatisfaction with his federally-appointed habeas counsel. Yet the Ninth Circuit's non-textual reading of section 3599 ignores the express language of the statute, erroneously concluding that it regulates matters beyond simply providing an attorney, for circumscribed and limited purposes, to an indigent capital defendant.

2. Even considering legislative history, which this Court avoids when language is as plain as that in section 3599, *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"), the Ninth Circuit was without a basis to conclude that "Congress must have intended to provide [capital habeas] petitioners with at least as much opportunity to replace counsel with whom they are dissatisfied as it provides noncapital habeas petitioners" *Clair v. Ayers*, 403 Fed. Appx. 276, 278 (9th Cir. 2010). The court cited no support for this statement and, indeed, nothing in the background or context of any of the statutes at issue supports the Ninth Circuit's statement. *See Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

Enacted as part of the Anti-Drug Abuse Act of 1988, and originally codified at 21 U.S.C. § 848(q),

section 3599 was part of the first federal death penalty provision enacted since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). The Act made drug-related homicide a federal capital offense. *Harbison v. Bell*, 129 S. Ct. 1481, 1489 (2009). But the legislative history as to the counsel provisions is "regrettably thin." *Id.* No Senate or House reports explain the meaning behind these provisions. *Sterling v. Scott*, 57 F.3d 451,456 (5th Cir. 1995) ("No House or Senate reports or other expression of legislative intent in drafting this provision [§ 848(q)] were submitted with this legislation.").

Most of the debate in Congress surrounded the propriety of federal imposition of the death penalty, with little attention given to the statutory counsel right that was created. *See, e.g.*, 134 Cong. Rec. 22,975-22,995 (1988). The provisions relating to the qualifications and substitution of counsel, originally proposed by Representative John Conyers, were added without significant debate in the legislative record. Representative Conyers's comments emphasized the importance of experienced counsel in capital punishment cases. 134 Cong. Rec. 22,996 ("What we propose is a requirement that the lawyers in these cases have sufficient experience that will enable them to handle these very difficult cases."). Notably, Representative George Gekas, who proposed provisions similar to those enacted in section 3599(a)(2), *see Harbison*, 129 S. Ct. at 1489, stated that he did not wish the Conyers amendment "to be viewed by ... anybody ... or utilized as a dilatory tactic or in any way to thwart the final will of the jury which has imposed the death penalty, but rather to accord the defendant all the rights to which

I feel are already his and to expand them to the extent that the qualifications of the counsel shall be without question.” 134 Cong. Rec. 22,997. The Senate’s consideration of similar provisions also lacked significant discussion of the issues here. *Id.* at 30,745-46. The legislative history of section 3599 therefore does not support the holding below, given that Congress never expressed that motions for substitution of counsel should be governed by the lax standard espoused by the Ninth Circuit.

In adopting section 3006A, Congress focused nearly exclusively on federal criminal defendants at trial. The statute’s purpose was “to diminish the role poverty plays in securing to a criminal defendant a fair trial, an experienced lawyer, a trained investigator or a technical expert.” John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574, 600 (1982). The legislative history available shows that much of the concern leading to the enactment of section 3006A(c) focused on when counsel was initially appointed, not the substitution provision. The documents associated with the legislation reveal that lawmakers wanted to ensure representation began pre-trial. H.R. Rep. No. 864, *reprinted in* 1964 U.S. Code Cong. & Adm. News 2990, 2995 (letter from Attorney General) (the statute “insures that the advice of counsel will be available at the critical early stages when recollections are fresh and the opportunity to uncover evidence is greatest.”). Much of the debate over the provisions of section 3006A concerned how counsel should be provided, *id.* Conf. Rep. No. 1709, at 3001, and whether investigative services should

be provided to the accused, *id.* at 3002. Little can be gleaned from the legislative history as to what the counsel substitution provisions meant. Therefore, to the extent the legislative histories of sections 3599(e) and 3006A(c) are relevant, they do not support the extraordinary relief Clair obtained here. None of the history addresses the issue presented and thereby provides no support for the Ninth Circuit's interpretation.

3. The Ninth Circuit creates a right to substitute counsel that exceeds even that which is given to criminal defendants at trial, who are constitutionally entitled to counsel. Section 3599 should not be applied in ways neither expressed by the plain language nor intended by the drafters. Such holdings, if left unchecked, will only further delay the federal review of state capital sentences. *See generally Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (Manion, J., concurring) ("Delay is the name of the game in death penalty cases.").

The Ninth Circuit's decision works mischief in other ways. For example, the Ninth Circuit has asserted that the statutory right to counsel in section 3599 implies a right to competence in federal postconviction proceedings. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003) ("And if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent."). The ruling has resulted in tangential

litigation regarding competence and has resulted in protracted stays. *See, e.g., Blair v. Cullen*, No. CV 99-6859-VAP, 2010 WL 5563896 (C.D. Cal. Mar. 31, 2010); *Van Adams v. Schriro*, No. CV-04-1359-PHX-MHM, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

The Ninth Circuit's holding imposes a standard more permissive than would normally be available to a defendant proceeding in a criminal trial. The court's non-textual reading of section 3599 undermines the statute's plain meaning—reading rights into it that do not exist. And the court does not give any countervailing weight to the interests that States have in the administration of justice. Section 3599 should not be used to further hamper the States' interest in the finality of their judgments and Congress's intent to eliminate unnecessary delay in capital matters.

B. The Ninth Circuit's analysis is contrary to the basic norms of federalism, will render AEDPA's established statutory guidelines and legislative intent a nullity, and is administratively unworkable.

1. The principles of federalism, particularly the concepts of finality and comity, are implicated when federal courts review state criminal convictions. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (citations omitted) ("Finality serves as well to preserve the federal balance. Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional

rights.”) (citation and quotation marks omitted). Fundamentally, States must be afforded the opportunity to effectuate criminal sentences without undue involvement from federal courts. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.”); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”).

A state criminal conviction that did not violate the defendant’s federal constitutional rights binds a federal court’s review of that judgment. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 416 (1993). A core precept of federalism is that federal courts must accord due respect to the States’ criminal justice systems. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000) (“[W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States’ interest in the integrity of their criminal and collateral proceedings.”). At a minimum, federal courts must resist the temptation to relitigate state criminal convictions—even when the result under challenge does not accord with a federal court’s view of the appropriate outcome. *See, e.g., Harrington v. Richter*, 131 S. Ct. 770, 780 (2011) (reversing a Ninth Circuit issuance of a writ, noting that “[judicial] resources are diminished and misspent ... and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance”).

The underlying matter is neither abstract nor academic for the States. A “State retains a significant interest in meting out a sentence of death in a timely fashion.” *Nelson v. Campbell*, 541 U.S. 637, 644 (2004). The State of Florida presently has approximately 400 individuals on death row.² There are more than 3,000 capital defendants nationwide.³ The majority of these defendants lack the monetary resources to retain private counsel to assist with postconviction legal processes. As such, section 3599(e) provides valuable financial support to federally appointed attorneys representing individuals in postconviction matters.

Section 3599(e), however, was not intended to be a vehicle to impede the functioning of state criminal justice systems. California’s experience is instructive. In 2005, Clair’s federal habeas claims were denied following a decade of ancillary federal court litigation. The substitution motion was filed two weeks before the district court denied his federal habeas claims. The Ninth Circuit nevertheless found, some twenty-five years after the murder of Linda

² According to the Florida Department of Corrections, 397 individuals are on death row. See Fla. Dep’t of Corrs., Corrections Offender Network, Death Row Roster, *available at* <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited August 31, 2011).

³ According to the Bureau of Justice, as of 2009, 3,173 individuals were serving capital sentences nationwide. See Bureau of Justice Statistics, Key Facts at a Glance, Prisoners on Death Row by Race, Number of Prisoners Under Sentence of Death, 1968-2009, *available at* <http://bjs.ojp.usdoj.gov/content/glance/tables/drracetab.cfm> (last visited August 31, 2011).

Rodgers, that the district court abused its discretion when it denied Clair's motion to substitute counsel.

The Ninth Circuit's remedy was to grant Clair new habeas counsel, and to grant new counsel the right to bring whatever new claims counsel saw fit to bring, or to revisit any existing claims in light of whatever new evidence counsel might produce. The result is that California must again litigate Clair's federal constitutional claims. And even if California once again proved its case, nothing would prevent Clair from complaining about his new counsel, and nothing would prevent the Ninth Circuit from replacing Clair's new counsel with still newer counsel, who would necessarily have the right to bring additional claims and evidence as he or she saw fit.

The specter of an endless cycle of repetitive litigation is not fanciful, but real and likely, and it is highly prejudicial to the States. *Cf. Morris v. Slappy*, 463 U.S. 1, 14 (1983) ("The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources."). Not only must California prepare for the prospect of yet another round of habeas proceedings, it must potentially ready itself for newly developed claims that were never presented or considered in the first instance by California's state courts. *See McCleskey*, 499 U.S. at 491-92 (observing that "if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or

subsequent habeas proceeding on grounds not even raised in the first petition.”).

The prospect of the Ninth Circuit’s commingling of sections 3006A(c) and 3599(e) becoming controlling legal authority deeply concerns the States, especially those with indigent capital defendants. Its decision portends troubling consequences for the effective functioning of state criminal justice systems. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J. concurring) (“To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems.”). Simply put, under the Ninth Circuit’s analysis, States will never be assured that federal habeas claims have been completely resolved. *See United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979) (observing that the “increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice”).

Federalism becomes empty formalism, in the federal habeas context, if States cannot be assured that their criminal convictions will be respected and subject only to limited federal habeas review. Federal habeas proceedings are not criminal trials and the constitutional protections that might be warranted in the context of a criminal trial should not be similarly available in the post-conviction context. The Ninth Circuit takes the opposite view, and its interpretation of sections 3006A and 3599(e)

is inconsistent with the most basic principles of federalism and comity.

2. If affirmed, the Ninth Circuit's decision will have a concrete impact on all habeas petitioners subject to AEDPA's strictures. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citation omitted). AEDPA implicates matters of comity, finality, and federalism, *see Williams*, 529 U.S. at 436, and provides a state defendant with a one-year statutory time limit to file a petition for writ of habeas corpus, 28 U.S.C. § 2244.

AEDPA's legislative history reveals that Congress sought to put an end to piecemeal and repetitive litigation in capital cases. The Conference Report bears this out, stating: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." 142 Cong. Rec. H3305 (daily ed. April 15, 1996) (Conference Report on S. 735). Similarly, one of AEDPA's principal architects, Senator Orrin Hatch, indicated that the statute was intended to hasten federal habeas proceedings. Senator Hatch observed that AEDPA "simply ends the improper review of State court decisions. After all, State courts are required to uphold the Constitution and to faithfully apply Federal laws. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts." 142 Cong. Rec. S3446-02, 3447 (1996).

The Ninth Circuit's ruling provides habeas petitioners with a mechanism to circumvent AEDPA's strict statutory time limits. In Clair's case, his disagreement with his federally appointed attorney entitled him not only to a new attorney, but also to an entirely new federal habeas proceeding. The Ninth Circuit's rule invites successive and repetitive litigation on ancillary matters, and encourages *de novo* review of state criminal proceedings, which, of course, is impermissible under AEDPA. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

AEDPA accords strong deference to state court rulings and decisions. *See Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010). And though not an AEDPA case, the Ninth Circuit's determination in the underlying matter demonstrates that it did not accord any respect or deference to Clair's state proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States ... when reviewing the claims of state prisoners in federal habeas corpus."); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) ("deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations ... it must conclude that the state court's findings lacked even 'fair[] support' in the record").

More troubling is the absence of identifiable constraining principles that would prevent reviewing courts from undermining state court judgments in circumstances similar to those presented here. The

Ninth Circuit does not suggest a limiting principle. It implies a petitioner's discontentment with his appointed habeas counsel is sufficient to overturn a federal court's denial of a writ for habeas corpus. Federal courts should not have the unfettered capacity to determine that whenever a federal habeas petitioner moves to substitute habeas counsel, the petitioner not only must be granted the right to file a new habeas petition, but also the right to develop additional federal claims that were never considered by state courts in the first instance. Given the foregoing principles, it is doubtful Congress intended to provide habeas petitioners with a variety of non-textual legal mechanisms to lengthen delays in federal habeas proceedings.

3. Finally, the Ninth Circuit's holding, if accepted, raises serious concerns regarding its administrative workability. The Ninth Circuit observed "Section 3599 provides that counsel may be changed upon a defendant's motion, but does not provide a standard under which such a motion should be adjudicated." *Clair*, 403 Fed. Appx. at 277. But the absence of express textual direction from Congress does not confer upon federal courts the right to disregard the entirety of the statutory text at issue.⁴ Federal courts should not interpret statutory clauses in isolation, and the words contained within a statute should not be extended to their greatest

⁴ See *Stafford v. Briggs*, 444 U.S. 527, 535 (1984) ("And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law" (quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857))).

“definitional possibilities.” *Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009).

This Court’s recent holding in *Harbison v. Bell*, 129 S. Ct. 1481 (2009), sheds light on the administrative unworkability of the Ninth Circuit’s decision here. In *Harbison*, this Court held that the plain language of section 3599(e) permitted a federally-appointed attorney to represent an indigent capital defendant in state clemency proceedings. Consistent with *Harbison*, Clair is entitled to federally-appointed counsel, not only for his federal habeas proceeding (and appeal), but also for any: (1) stays of execution, (2) competency proceedings, and (3) motions for executive clemency.

But consider that under the Ninth Circuit’s interpretation of section 3599(e), a reviewing court would be required, “in the interests of justice,” to grant a motion to substitute counsel if Clair (or a similarly situated capital defendant) expressed dissatisfaction with his appointed counsel’s work-product regarding the substance of a federal habeas petition, a certificate of appealability, a federal appellate brief, a motion for stay of execution, or an appeal for executive clemency. The permutations of this interpretation are alarming for those States that have section 3599 appointed attorneys litigating matters in their state and federal courts. *Cf.* 28 U.S.C. § 2254(i) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”). Courts could become inundated with “Clair” motions, piecemeal litigation would increase

exponentially, and States would find it more difficult to achieve finality. This result is not what Congress intended when it provided funding for federal habeas counsel representing capital defendants. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”).

Accordingly, the Ninth Circuit’s analysis of section 3599(e) is not only contrary to the statute’s plain meaning, but also is administratively unworkable. The Amici States urge that the Ninth Circuit’s reading of section 3599(e) be rejected.

CONCLUSION

For all of the above reasons, this Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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