

THE THREAT OF “CLAIR MOTIONS”: *MARTEL V. CLAIR* AND THE STANDARD FOR SUBSTITUTION OF COUNSEL IN FEDERAL HABEAS PETITIONS

LEE CZOCHER*

I. INTRODUCTION

In *Martel v. Clair*,¹ the Supreme Court will once again confront the conflict between promoting the fair imposition of the death penalty and ensuring the finality of criminal sentences. On one hand, the State of California has pursued the execution of its judgment against Kenneth Clair for nineteen years.² On the other hand, Clair has spent those years repeatedly contesting the State’s lack of evidence.³ When Clair requested to substitute his legal counsel during federal habeas corpus proceedings, questions about the appropriate standard for substitution of counsel in federal capital habeas cases exacerbated the conflict. The resolution of *Martel*, therefore, likely will feature that tension and depend on which the Court finds more compelling: the recent trend in habeas litigation of limiting opportunities for relief or the availability of substitution of counsel for non-capital petitioners.

II. FACTS

In 1994, the Respondent, Kenneth Clair, filed a federal habeas corpus petition contesting his 1987 state conviction of murder with the special circumstance of burglary, for which he received the death penalty.⁴ After exhausting state remedies, Clair returned to federal

* 2013 J.D. Candidate, Duke University School of Law.

1. *Clair v. Ayres*, 403 Fed. App’x 276, 279 (9th Cir. 2010), *cert granted sub nom.* *Martel v. Clair*, 131 S. Ct. 3064 (2011) (No. 10-1265).

2. *See* Petitioner’s Brief on the Merits at 4, *Martel v. Clair*, No. 10-1265 (U.S. Sept. 9, 2011) (stating that the California Supreme Court affirmed Clair’s death sentence in 1992).

3. *Id.* at 4–12.

4. Petition for Writ of Certiorari at 5, *Martel*, 131 S. Ct. 3064 (No. 10-1265).

court to litigate his case with a court-appointed federal public defender (FPD).⁵ The habeas petition included claims of juror misconduct and procedural and strategic errors made by trial counsel at both the guilt and sentencing phases of the trial.⁶

On March 16, 2005, Clair sent a letter to the district court expressing his dissatisfaction with the FPD's treatment of his case.⁷ The district court asked both parties to "state their positions concerning the letter."⁸ On April 26, the FPD informed the court of Clair's willingness for counsel to continue his representation, but that Clair reserved the right to "reexamine the issue of representation at the conclusion of the proceeding in [the District] Court."⁹ In light of this communication, the court took no further action on Clair's letter.¹⁰

Clair again requested the appointment of new counsel in a letter dated June 16, 2005.¹¹ Clair reasserted his prior grievances and added a new allegation: that his counsel had failed to pursue physical evidence once it was made available by the State.¹² Fourteen days later, the district court declined to substitute counsel, noting that "it appear[ed] that petitioner's counsel [was] doing a proper job" and "no conflict of interest or inadequacy of counsel [was] shown."¹³ On the same day, the court issued an order rejecting all of Clair's habeas claims.¹⁴

The FPD filed a notice of appeal from the denial of Clair's habeas petition and Clair filed a pro se notice of appeal from the denial of his motion to substitute counsel.¹⁵ Responding to an inquiry from the Ninth Circuit, the FPD expressed an inability to continue working with Clair.¹⁶ The court construed the communication as a motion to withdraw—which it granted—and appointed new counsel for Clair.¹⁷

5. *Id.*

6. Brief in Opposition to Petition for Writ of Certiorari at 2, *Martel*, 131 S. Ct. 3064 (No. 10-1265).

7. Petition for Writ of Certiorari, *supra* note 4, at 6.

8. Joint App'x at 18, *Martel*, No. 10-1265 (U.S. Sept. 9, 2011).

9. *Id.* at 26–27.

10. Petition for Writ of Certiorari, *supra* note 4, at 6.

11. Joint App'x, *supra* note 8, at 62–63.

12. *Id.* at 62–70.

13. *Id.* at 61.

14. Brief in Opposition to Petition for Writ of Certiorari, *supra* note 6, at 3.

15. Petitioner's Brief on the Merits, *supra* note 2, at 7–8.

16. *Id.*

17. *Id.*

While the appeal from the denial of the habeas petition was pending, Clair’s new counsel filed a Rule 60(b) motion for relief from judgment on the grounds of newly discovered, untested evidence and the district court’s improper denial of Clair’s request for new federal habeas counsel.¹⁸ The district court denied the motion on the merits,¹⁹ holding that Clair failed to explain how the desired testing would advance any of the claims in his habeas petition.²⁰ After the district court’s denial of the 60(b) motion, state post-conviction proceedings resulted in DNA testing of the physical evidence, which revealed fingerprints and male DNA that did not belong to Clair.²¹ Clair appealed the denial of his 60(b) motion.²²

III. LEGAL BACKGROUND

Although the Supreme Court has determined that the constitutional right to counsel enjoyed by criminal defendants at trial does not apply to habeas petitioners,²³ Congress has exercised its legislative discretion to provide capital petitioners with a statutory entitlement to counsel.²⁴ Congress did not articulate the appropriate standard for substitution of counsel, leading courts to question whether it should be based on the standard for inadequate performance at trial, the standard for discretionary appointments of counsel, or, perhaps, a different standard completely. Nevertheless, Congress has expressed its intent both to reduce delays in habeas proceedings and to improve fairness in implementing the death penalty.²⁵

18. *Id.*

19. *Id.*

20. *Id.* at 9.

21. Brief in Opposition to Petition for Writ of Certiorari, *supra* note 6, at 12–13.

22. *Id.* at 4.

23. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

24. 18 U.S.C.A. §§ 3006A, 3599 (West 2011).

25. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (stating that the purpose of AEDPA was “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases” in view of principles of “comity, finality and federalism” (quoting *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.))); *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (noting that Congress intended petitioners to have access to “quality legal representation”).

A. *The Standard for Effective Assistance of Counsel at Trial*

Criminal defendants have a Sixth Amendment right²⁶ to “the effective assistance of competent counsel.”²⁷ To obtain relief from an adverse judgment based on counsel’s inadequate performance, a criminal appellant must show both a deficient performance and a resulting prejudice.²⁸ First, counsel’s performance is deficient if it falls below an objective standard of reasonableness.²⁹ For example, the guarantee of effective assistance of counsel mandates that counsel “make reasonable investigations” or “make a reasonable decision that makes particular investigations unnecessary.”³⁰ In assessing counsel’s performance, courts must strive to “eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel’s perspective at the time.”³¹ Courts are “highly deferential,” therefore, when scrutinizing counsels’ decisions and begin with a presumption that they were reasonable.³²

Second, even if the defendant’s representation was objectively unreasonable, in order to gain relief from judgment, the representation must have been so poor as to prejudice the outcome.³³ In certain contexts, such prejudice is so likely that a case-by-case inquiry is unnecessary and courts will assume prejudice.³⁴ For example, actual or constructive denial of counsel,³⁵ state interference with counsel’s assistance,³⁶ and an actual conflict of interest³⁷ all present circumstances under which prejudice is presumed.³⁸ Aside from these extraordinary contexts, however, the defendant normally must show more than a “conceivable effect on the outcome of the

26. U.S. CONST. amend. VI.

27. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

28. *Strickland*, 466 U.S. at 687.

29. *Id.* at 687–88.

30. *Id.* at 691.

31. *Id.* at 689.

32. *Id.*

33. *Id.* at 687.

34. *Id.* at 692.

35. For example, prejudice is presumed where counsel fails to file a notice of appeal without the respondent’s consent. *Roe v. Flores-Ortega*, 528 U.S. 470, 473, 484 (2000).

36. *See, e.g., Geders v. United States*, 425 U.S. 80, 96 (2011) (holding that an order preventing the defendant from consulting his counsel during an overnight recess was prejudicial).

37. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475, 488 (1978) (holding that “whenever a trial court improperly requires joint representation over timely objection, reversal is automatic”).

38. *Strickland*, 466 U.S. at 692.

proceeding.”³⁹ The benchmark for determining prejudice is whether counsel “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”⁴⁰

B. The Right to Counsel and the Standard for Substitution in Post-Conviction Proceedings

There is no constitutional right to counsel when petitioning for habeas corpus relief.⁴¹ A habeas petitioner’s due process rights are “not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in post-conviction relief.”⁴² In *Pennsylvania v. Finley*,⁴³ the Supreme Court held that providing prisoners assistance of counsel in post-conviction proceedings does not require “the full panoply of procedural protections that the Constitution requires” for criminal trials and appeals.⁴⁴ This leaves legislatures with substantial discretion in their choices regarding post-conviction assistance of counsel.⁴⁵

Congress set forth the basic scheme for federal habeas corpus writs contesting state custody in 28 U.S.C. § 2254.⁴⁶ Under that statute, subsection (i) provides that the ineffectiveness of counsel during post-conviction proceedings is not a ground for relief in § 2254 proceedings.⁴⁷ Separate provisions in 28 U.S.C. § 2261 govern certain expedited capital cases,⁴⁸ and although they mirror § 2254’s preclusion of relief for ineffectiveness of counsel, the provisions also stipulate that the limit on relief shall not prevent the replacement of ineffective counsel.⁴⁹

The rules governing assistance of counsel for indigent federal habeas petitioners are set forth in 18 U.S.C. §§ 3006A and 3599.⁵⁰ Section 3006A allows courts discretion to appoint counsel for indigent

39. *Id.* at 693.

40. *Id.* at 686.

41. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 7–15 (1989).

42. *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2320 (2009).

43. 481 U.S. 551 (1987).

44. *Id.* at 559.

45. *Id.*

46. 28 U.S.C.A. § 2254 (West 2011).

47. *Id.* § 2254(i).

48. *Id.* § 2261.

49. *Id.* § 2261(e).

50. 18 U.S.C.A. §§ 3006A, 3599 (West 2011).

non-capital defendants and provides for substitution of counsel in the interests of justice.⁵¹ That discretion does not extend to capital defendants, who have a mandatory right to assistance of counsel under § 3599.⁵² The statutory entitlement arose out of Congress's desire to "promot[e] fundamental fairness in the imposition of the death penalty" by providing capital habeas defendants with "quality legal representation."⁵³ Although both statutes provide for substitution of counsel, § 3599, unlike § 3006A, does not articulate a standard for when substitution is appropriate.⁵⁴

C. AEDPA's Effect on Habeas Petitions

Courts and legislatures alike have been concerned about the abuse of the writ of habeas corpus. Those concerns, apparent in judicial decisions,⁵⁵ spurred the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA).⁵⁶ The Act's purpose is "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"⁵⁷ in view of principles of "comity, finality and federalism."⁵⁸

AEDPA imposes significant restrictions on a prisoner's second or subsequent habeas petitions. First, courts must dismiss any claim already adjudicated in relation to a previous petition.⁵⁹ Second, any new claims must be dismissed unless they "rel[y] on either a new and retroactive rule of constitutional law or new facts showing a high

51. *Id.* § 3006A(a)(2)(B), (c).

52. *Id.* § 3599. Capital petitioner's right to counsel was previously located at § 848(q), but was recodified without other changes by the Terrorist Death Penalty Enhancement Act of 2005, PUB. L. NO. 109-177, § 222, 120 Stat. 230, 231.

53. *McFarland v. Scott*, 512 U.S. 849, 855, 859 (1994).

54. *See* § 3599(e) ("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 . . .").

55. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 470 (1991) ("The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus."); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (stating that federal habeas is not "a means by which a defendant is entitled to delay an execution indefinitely").

56. Antiterrorism and Effective Death Penalty Act, PUB. L. NO. 104-132, 110 Stat. 1214.

57. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.)); *see also* H.R. REP. NO. 104-23 at 10 (1995) ("[C]apital defendants and their counsel have a unique incentive to keep litigation going by any possible means.").

58. *Id.* (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

59. *Gonzalez v. Crosby*, 545 U.S. 524, 529-30 (2005) (citing 28 U.S.C.A. § 2244(b)(1) (West 2011)).

probability of actual innocence.”⁶⁰ These restrictions apply to Rule 60(b) motions, which present new claims for relief, present new evidence in support of a claim already litigated, or rely on a purported change in the substantive law.⁶¹ Furthermore, even in some circumstances where AEDPA does not govern, “a court of appeals must exercise its discretion in a manner consistent with the objects of the statute.”⁶²

The Supreme Court has yet to determine which standard is applicable to capital habeas petitioners, and Congress has not given direction more explicit than the observed dual purposes of ensuring fairness and reducing delays.

IV. HOLDING

The Ninth Circuit consolidated Clair’s appeals.⁶³ The court distinguished between a claim for ineffective assistance of counsel and a claim that the district court failed to exercise its discretion,⁶⁴ treating Clair’s appeal of the district court’s denial of his habeas petition as the latter.⁶⁵ Because it ruled favorably on this claim, the court did not reach Clair’s appeal of the denial of his Rule 60(b) motion or his request to file a successive petition.⁶⁶

Although § 3599 does not provide a standard for substitution of counsel, the court determined that Congress must have intended capital petitioners to have at least as much opportunity to substitute their counsel as non-capital petitioners.⁶⁷ This determination arose out of the importance Congress placed on providing capital petitioners with “quality legal representation” due to the “seriousness of the possible penalty.”⁶⁸ To effectuate Congress’s intent, the court applied the interests-of-justice standard—the same standard applied to

60. *Id.* (citing U.S.C.A. § 2244(b)(2) (West 2011)).

61. *Id.* at 531.

62. *See Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (exercising discretion consistent with the objectives of AEDPA by holding that a motion to recall mandate was a successive petition).

63. Brief for Respondent at 14, *Martel v. Clair*, No. 10-1265 (U.S. Nov. 8, 2011). Clair appealed the denials of his request for substitution of counsel and his rule 60(b) motion as well as requested leave to file a successive petition. *Id.* at 12–14.

64. *Clair v. Ayers*, 403 Fed. App’x 276, 279 (9th Cir. 2010).

65. *Id.* at 277, 279.

66. *See id.* at 279.

67. *Id.* at 277–78.

68. *Id.* (quoting *McFarland v. Scott*, 512 U.S. 849, 855 (1994)).

substitution of counsel requests for non-capital habeas defendants.⁶⁹

The Ninth Circuit held that the district court abused its discretion either by failing to apply the interests-of-justice standard or by applying it in “an implausible, illogical or unreasonable manner.”⁷⁰ According to the Ninth Circuit, the untested physical evidence allegedly located by Clair’s private investigator “was potentially of great importance to Clair’s habeas petition.”⁷¹ The court noted that Clair’s conviction “was based on circumstantial evidence” before DNA testing was prevalent.⁷² Because Clair’s allegations “implicated the fairness of the proceeding,” assessing whether substitution of counsel was in the interests of justice necessitated some inquiry into those allegations.⁷³ By not investigating, the district court abused its discretion in denying the motion “without explanation.”⁷⁴

According to the court, the district court’s abuse of discretion “foreclosed the possibility that different counsel” might have taken steps that would lead to incorporating the new evidence into Clair’s original habeas petition.⁷⁵ The court therefore vacated the denial of Clair’s request for new counsel and the subsequent denial of his habeas petition.⁷⁶ The court then determined “the most reasonable solution” was to treat Clair’s current counsel as if he were the counsel who might have been appointed had the district court properly exercised its discretion.⁷⁷ The appellate court also directed the district court to consider any submissions, “including any requests from counsel to amend the petition to add claims based on or related to the new evidence,” as if made prior to the vacated ruling.⁷⁸

V. ARGUMENTS

The dispute in *Martel v. Clair* has two dimensions. First, the State and Clair disagree about which standard should govern substitution

69. *Id.* (quoting 18 U.S.C.A. § 3006A (West 2011)).

70. *Id.* at 278.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* The court noted that Clair’s 60(b) motion raised similar issues, but that such motions are adjudicated under a standard less favorable to Clair. *Id.* at 279 n.1.

76. *Id.* at 279.

77. *Id.* (citing *Fetterly v. Paskett*, 997 F.2d 1295, 1301–02 (9th Cir. 1993) (allowing a new attorney to advance claims the previous attorney overlooked to avoid the unfair result of having to raise them in a subsequent petition)).

78. *Id.*

of counsel for capital habeas petitioners. The State argues that substitution is only appropriate in three specific circumstances. Clair counters that the more generous interests-of-justice standard should apply. Second, assuming the interests-of-justice standard did apply, the parties disagree over whether the district court abused its discretion and whether the Ninth Circuit should have remanded for a more limited inquiry.

A. Determining the Standard for Substitution of Counsel

The State argues that substitution of counsel in capital habeas cases is available only when a petitioner promptly complains that his counsel (1) is unqualified under the statute; (2) has a disabling conflict of interest; or (3) has completely abandoned the case.⁷⁹ To advance this restrictive standard, the State claims that concerns about the abuse of habeas corpus apply with particular force to petitioners’ motions to substitute counsel.⁸⁰ The State argues that these concerns, in conjunction with Congress’s approach of creating separate statutory schemes for appointment of counsel in capital and non-capital cases, mandate an exacting standard for substitution of counsel in cases like Clair’s.⁸¹

According to the State, because traditional concerns of abuse cast suspicion on delay, limits on the ability to substitute counsel are embedded in the statutory scheme governing appointment of counsel.⁸² First, the State argues that by removing the appointment of counsel in capital habeas petitions from the discretionary purview of the district courts, Congress “singled out” such cases for “unique treatment” and intended “to create a separate system of specialized rules.”⁸³ The State substantiates its theory of separate systems by pointing to statutory differences between capital and non-capital appointment of counsel.⁸⁴ For example, only non-capital appointment of counsel statutes stipulate an interests-of-justice standard for

79. Petitioner’s Brief on the Merits, *supra* note 2, at 17. The State also asserts that “habeas counsel does not abandon a client as long as counsel independently reviews the record of the case.” *Id.* at 38 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 558 (1987)).

80. *Id.* at 20–22.

81. *Id.* at 31–32.

82. *Id.* at 22.

83. *Id.* at 24.

84. *See id.* at 25 (emphasizing differences in required qualifications, the timing of appointment and expense authorization, counsel compensation, and representation in state proceedings).

substituting counsel.⁸⁵

Second, despite the lack of “explicit guidance” from the statute, the State characterizes § 3599(e) as implying a higher standard than that in non-capital collateral attacks.⁸⁶ The State rationalizes Congress’s neglect to articulate the higher standard as a result of its presumed awareness that there is no constitutional right to effective assistance of counsel in habeas petitions.⁸⁷ Congress therefore could have assumed that appointed counsel’s performance would not be open to attacks for ineffective assistance.⁸⁸ Additionally, the statute contemplates, according to the State, “long-term appointments of indefinite duration,” thus evincing an intention to “minimize the necessity and the occasion for substitution of counsel.”⁸⁹ Finally, the State argues that although both §§ 2254 and 2261 specify that ineffectiveness of counsel during post-conviction proceedings is not a ground for relief, only the latter stipulates that this limit will not preclude the appointment of different counsel on such grounds.⁹⁰ This difference suggests that Congress did not intend for ineffectiveness of counsel to be a ground for substitution.⁹¹

The State also makes numerous policy overtures, emphasizing that substitution of counsel, unless limited in scope, would have a “deleterious effect” on the timeliness of litigation.⁹² Both the Supreme Court and members of Congress have noted that an impending execution incentivizes delay.⁹³ Given the frequency with which disagreements arise between defendants and their counsel, petitioners would have no difficulty formulating a pretext for such motions.⁹⁴ The State warns that if substitution of counsel then becomes widely available, capital habeas petitioners would readily exploit this new avenue for delay with “Clair motions.”⁹⁵

85. *Id.*

86. *Id.*

87. *Id.* at 26 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) (finding that habeas petitioners do not have a constitutional right to effective assistance of appointed counsel); *Holland v. Florida*, 130 S. Ct. 2549, 2561 (2010) (stating that Congress is presumed to be aware of prevailing law)).

88. *Id.*

89. *Id.* at 25–26.

90. *Id.* at 27.

91. *Id.*

92. *Id.* at 21.

93. *Id.* at 20–21.

94. *Id.* at 21–22.

95. *Id.* at 17.

In response, Clair advances three primary arguments. First, Clair rejects the State’s proposed standard and argues that § 3599’s “roots in Section 3006A support the continued use” of the interests-of-justice standard for both capital and non-capital habeas cases.⁹⁶ Second, Clair asserts that there is no basis in either the text or the legislative history to believe that Congress wished to depart from this familiar and workable standard.⁹⁷ Third, the interests-of-justice standard, properly administered, takes into account all of the State’s asserted interests and the capital prisoner’s incentive to delay.⁹⁸

Although Clair agrees that special rules govern capital cases, Clair frames the alternate structure as Congress’s attempt “to be *more solicitous* of capital defendants’ greater need for the assistance of well-qualified counsel.”⁹⁹ Clair construes the heightened qualifications and economic support for counsel in capital cases as evidence that Congress “expanded the scope of the right [to post-conviction representation] beyond what the Sixth Amendment requires in criminal trials.”¹⁰⁰ Congress’s intent to “promot[e] fundamental fairness in the imposition of the death penalty” by providing capital habeas defendants with “quality legal representation,” Clair argues, suggests that the Court of Appeals correctly borrowed the interests-of-justice standard from 18 U.S.C. § 3006A.¹⁰¹

Clair points out that borrowing the standard from § 3006A follows the Supreme Court’s approach in *McFarland v. Scott*,¹⁰² in which the Court looked to § 3599’s predecessor in construing the statute.¹⁰³ Clair emphasizes that “[n]othing in the new provision” suggests a departure from the interests-of-justice standard that applied to discretionary appointment.¹⁰⁴ The State’s argument, Clair asserts, requires an untenable assumption that “Congress silently made it more difficult for a capital defendant to seek substitution of counsel.”¹⁰⁵

96. Brief for Respondent, *supra* note 63, at 25.

97. *Id.* at 21–22.

98. *Id.* at 31–32.

99. *Id.* at 21.

100. *Id.* at 30.

101. *Id.* at 18, 22 (quoting *McFarland v. Scott*, 512 U.S. 849, 855, 859 (1994)).

102. 512 U.S. 849 (1994).

103. Brief for Respondent, *supra* note 63, at 20.

104. *Id.* at 21.

105. *Id.*

To underscore the appropriateness of the standard, Clair points to its “added advantages of familiarity and administrability.”¹⁰⁶ The standard appears in multiple contexts in criminal adjudication and courts of appeals are familiar with reviewing its application for abuses of discretion.¹⁰⁷ According to Clair, because the interests-of-justice standard is so common and workable in the criminal context, “there is no basis for concluding that Congress silently prescribed some new and different standard for Section 3599.”¹⁰⁸

Clair concedes that the three factors in the State’s test “may well be relevant,” but argues that restricting a court’s consideration to these factors “has no basis in the statute and makes no practical sense.”¹⁰⁹ Clair notes that no court has ever adopted a test similar to the State’s “novel” three-part test.¹¹⁰ Furthermore, the State “cites no language in Section 3599 or Section 3006A to support its exclusive three-factor test.”¹¹¹ According to Clair, the State’s construction would render the “express provision” for substitution of counsel “virtually meaningless.”¹¹² Because the capital habeas petitioner is statutorily entitled to assistance of counsel, a provision that provides for new counsel when he has been completely denied his statutory right to counsel is superfluous.¹¹³

Clair also argues that the State misinterprets § 2254(i) to bar more relief than Congress intended.¹¹⁴ Although the State is correct that barring relief on these grounds was unnecessary, Clair argues that Congress was simply codifying the Supreme Court’s decision in *Pennsylvania v. Finley*.¹¹⁵ The State’s contrary reading that something more was intended is therefore unsupported.¹¹⁶ If § 2254(i) restricts substitution of counsel to the three scenarios the State proposes, non-capital habeas cases, presumably, would also be subject to this standard.¹¹⁷ This result, however, is inconsistent with § 3006A’s

106. *Id.* at 22.

107. *Id.* at 22–23.

108. *Id.* at 23.

109. *Id.* at 24.

110. *Id.* at 24–25.

111. *Id.* at 25.

112. *Id.* at 26.

113. *Id.*

114. *Id.* at 28–29.

115. *Id.* Congress codified Supreme Court holdings throughout AEDPA. *Id.*

116. *Id.*

117. *Id.* at 29 (noting that § 2254(i) applies to any proceeding under § 2254, including non-capital habeas cases).

provision for substitution of counsel in the interests of justice.¹¹⁸

Nor does § 2261(e)’s express reservation of the ability to substitute counsel on grounds of ineffective assistance suggest that such substitution would not be available under § 3599.¹¹⁹ Because § 2261 also governs certain state post-conviction proceedings, Clair construes the reservation as “merely negat[ing] any possible implication that Congress intended to preclude trial courts from removing and replacing incompetent counsel.”¹²⁰ Clair argues that this stipulation “reinforces that a petitioner in a case ‘arising under section 2254,’ but subject to the . . . special rules [for expedited capital cases], retains the protections that otherwise apply outside” the context of expedited cases.¹²¹ Such protection includes the ability to substitute counsel where consistent with the interests of justice.¹²²

Finally, Clair contests the State’s prediction that habeas petitioners will abuse the lower standard to delay proceedings.¹²³ Because the interests-of-justice standard does not automatically entitle a defendant to appointment of new counsel—the district court can exercise its discretion only after due inquiry—Clair claims the standard will not result in unwarranted delay.¹²⁴ Clair argues that courts regularly deny substitution of counsel on grounds such as “the prospect of unreasonable delay, lack of evidence of a serious breakdown of the attorney-client relationship, and any likelihood that substitution would be pointless in light of the status of proceedings or the weakness of the defendant’s claims.”¹²⁵ Therefore, exercising discretion would include consideration of all of the interests the State advances in its challenge to the interests-of-justice standard.¹²⁶

B. The Ninth Circuit’s Review of the District Court for Abuse of Discretion

According to the State, even if the interests-of-justice standard does apply, the district court’s denial of Clair’s motion should stand.¹²⁷

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 30.

123. *Id.* at 31.

124. *Id.*

125. *Id.* at 31–32.

126. *Id.* at 31.

127. Petitioner’s Brief on the Merits, *supra* note 2, at 42.

The Ninth Circuit's holding rested on the district court's lack of investigation into Clair's second request, but the State argues that there is no duty to conduct an inquiry unless a conflict of interest is alleged.¹²⁸ Furthermore, the State argues that the Ninth Circuit's formulation of the interests of justice was biased in favor of the petitioner because it did not require consideration of the countervailing values of finality, comity, and federalism.¹²⁹ Because the Ninth Circuit unnecessarily vacated the district court's judgment, it is apparent that they did not afford proper weight to these competing values. Instead, the court should have remanded for a limited inquiry under the new district court judge as to whether substitution is required in the interests of justice.¹³⁰

The State's proposed application of the interests-of-justice standard would require only that counsel comport with due process. The State argues that the actions of Clair's counsel—"filing a petition, doing discovery, and conducting an evidentiary hearing"—fully comply with the demands of due process.¹³¹ Furthermore, the State asserts that Clair's claims regarding untested physical evidence would not be relevant to an error at trial, nor would the evidence undermine what the State regards as the key piece of evidence—a recorded, incriminating conversation between Clair and a witness.¹³² Even if Clair's counsel's performance fell below an objective standard of reasonableness, Clair could not show the deficiency prejudiced his petition.¹³³

Conversely, Clair argues the Court of Appeals correctly applied the abuse-of-discretion standard.¹³⁴ Clair notes that exercise of discretion requires an accurate knowledge of the relevant facts.¹³⁵ Furthermore, articulating the effect of those facts is especially necessary for appellate review, where discretion involves weighing

128. *Id.* at 40 (citing *Mickens v. Taylor*, 535 U.S. 162, 168–76 (2002)).

129. *Id.* at 45–46.

130. *Id.*

131. *Id.* at 47–48. The State cites *Pennsylvania v. Finley*, 481 U.S. 551, 558–59 (1987), to support its claim that it is sufficient “if statutorily appointed competent habeas counsel conduct[s] independent review of the record and report[s] no arguable issues.” Petitioner's Brief on the Merits, *supra* note 2, at 48.

132. Petitioner's Brief on the Merits, *supra* note 2, at 51–52.

133. *See id.* at 58–59 (“[T]he record makes it clear that the refusal to replace counsel did not prejudice Clair.”).

134. Brief for Respondent, *supra* note 63, at 33.

135. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972)).

multiple competing considerations.¹³⁶ According to Clair, the district court did not fulfill either of these obligations, and therefore abused its discretion.¹³⁷

According to Clair, the district court’s ignorance of all relevant facts was apparent in the court’s disparate responses on the two occasions Clair complained about his counsel.¹³⁸ In response to Clair’s first letter, the court directed counsel and the State to respond, acting only after receiving communication from counsel that the matter had been resolved to Clair’s satisfaction.¹³⁹ In contrast, after receiving Clair’s second letter with additional detail and new allegations, “the court did not solicit any response from counsel or otherwise undertake to inform itself of the surrounding facts.”¹⁴⁰ Clair asserts that the district court was “obliged to make at least some minimal inquiry by asking counsel to respond” in order to make an informed decision.¹⁴¹ By failing to do so the court essentially failed to exercise its discretion at all.¹⁴²

Clair also defends vacating the rejection of his habeas claims and rejects the State’s assertion that the remedy entitles him to reopen his case.¹⁴³ Clair argues that the remedy was warranted by “an unusual problem posed by the idiosyncratic facts of this case” and would not permit an end-run around AEDPA.¹⁴⁴ Although remanding solely on the question of substitution of counsel ordinarily would be appropriate, it would have been inappropriate in Clair’s case because his counsel had already withdrawn and his new lawyer had spent five years on the case.¹⁴⁵ Clair notes that the decision to treat Clair’s current counsel as the one that might have been appointed at the time does not entitle him to amend his petition or add claims.¹⁴⁶ Instead, Clair’s requests to amend will be governed by the ordinary standard for amending petitions.¹⁴⁷ Therefore, the State’s arguments that Clair’s possible claims lack substantive merit should be determined by the

136. *Id.* at 33–34 (internal citations omitted).

137. *Id.* at 34.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 35–36.

142. *Id.* at 36.

143. *Id.* at 39, 41.

144. *Id.* at 39–40.

145. *Id.*

146. *Id.* at 40.

147. *Id.*

district court, which will retain the power to deny any motion to amend.¹⁴⁸

VI. ANALYSIS AND LIKELY DISPOSITION

The Supreme Court is unlikely to limit substitution of counsel in habeas proceedings to the three circumstances proposed by the State. In addition to Clair’s argument that the test lacks a textual basis,¹⁴⁹ the standard’s source clearly contemplates “actual or constructive denial of counsel” in situations besides those listed by the State.¹⁵⁰ The State’s standard ignores situations where prejudice is present, but not presumed.¹⁵¹ Furthermore, requiring complete abandonment of a case¹⁵² involves an inferential leap that the State has not justified. To say that Congress does not have to provide habeas petitioners with “the full panoply”¹⁵³ of Sixth Amendment rights does not necessitate reducing the provision of “quality legal representation”¹⁵⁴ to a mere independent review of the record.¹⁵⁵ Although the State correctly notes concerns about abuse and delay,¹⁵⁶ it has not shown that its proposed standard is necessary to protect those interests.¹⁵⁷

Instead, the Supreme Court likely will adopt the interests-of-justice standard because it sufficiently accounts for finality, comity, and federalism concerns and has support in the legislative history of § 3599. Given that the entitlement to counsel in § 3599 evolved out of the discretionary appointment of counsel in § 3006A,¹⁵⁸ it makes sense

148. *Id.* at 41.

149. Brief for Respondent, *supra* note 63, at 21–22.

150. *See Strickland v. Washington*, 446 U.S. 668, 692 (1984) (referring to situations besides the presumptively prejudicial that may present an actual ineffectiveness claim).

151. *See id.* at 693 (noting that except in those scenarios where prejudice is presumed, “actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice”).

152. The State maintains that substitution of counsel is inappropriate in all but three circumstances, one of which is complete abandonment of a client. *See* Petitioner’s Brief on the Merits, *supra* note 2, at 38 (“[C]ounsel does not completely abandon a client as long as counsel independently reviews the record of the case.” (citing *Pennsylvania v. Finley*, 481 U.S. 551, 558 (1987))).

153. *Finley*, 481 U.S. at 559.

154. *McFarland v. Scott*, 512 U.S. 849, 855 (1994).

155. *See* Petitioner’s Brief on the Merits, *supra* note 2, at 37 (suggesting that an independent review of the record suffices).

156. *Id.* at 21.

157. *See, e.g.*, Transcript of Oral Argument at 18–19, *Martel v. Clair*, No. 10-1265 (U.S. Dec. 11, 2011) (Sotomayor, J.) (asking the State’s counsel to name one district or circuit court case in which its restrictive standard was adopted).

158. Brief for Respondent, *supra* note 63, at 25.

to retain the provision’s standard until Congress indicates otherwise. It is conceivable that Congress would want to limit incentives for delay.¹⁵⁹ But Congress recodified § 3599’s predecessor to its present location without specifying a new standard for substitution of counsel,¹⁶⁰ and the interests-of-justice standard is already common in the criminal context.¹⁶¹ Therefore, retaining this standard may be the most reasonable course.¹⁶² Furthermore, as Clair argues, the interests-of-justice standard is perfectly capable of accommodating concerns about delay and abuse.¹⁶³

In reviewing the district court’s application of the interests-of-justice standard, the Ninth Circuit walked a fine line between requiring inquiry and requiring second-guessing of litigation strategy. Counsel must be entitled to “make a reasonable decision that makes particular investigations unnecessary,”¹⁶⁴ but the panel’s emphasis on the potential importance of the evidence¹⁶⁵ suggests a determination about the FPD’s investigative decisions only possible with hindsight.¹⁶⁶ Even though conversing with Clair may have led the FPD to conclude that “pursuing certain investigations would be fruitless,”¹⁶⁷ the district court did not inquire into whether this was indeed the case.¹⁶⁸

159. Although Clair argues that there is no basis for believing Congress wished to depart from that standard, *id.* at 22–23, that assertion is at odds with Congress’s observation that “capital defendants . . . have a unique incentive to keep litigation going by any possible means.” H.R. REP. NO. 104-23 at 10 (1995).

160. *See supra* note 52.

161. Brief for Respondent, *supra* note 63, at 23.

162. *See* Transcript of Oral Argument, *supra* note 157, at 18–19 (Kennedy, J.) (predicting that the standard the Court ultimately formulates will closely resemble the interests-of-justice standard).

163. Brief for Respondent, *supra* note 63, at 42; *see* Lindsay R. Goldstein, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform*, 73 *FORDHAM L. REV.* 2665, 2678–79 (2005) (suggesting that available cases reveal four factors common to analysis of motions to substitute counsel: “(1) the timeliness of the motion, (2) the adequacy of the court’s inquiry into the matter, (3) the extent of the conflict between the attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense, and (4) the balancing of these factors with the public’s interest in the prompt and efficient administration of justice” (quoting *United States v. Mack*, 258 F.3d 548, 556 (6th Cir. 2001))). *But see* Transcript of Oral Argument, *supra* note 157, at 49 (Alito, J.) (noting that because the interests-of-justice standard is so open ended, denying substitution of counsel would seldom constitute an abuse of discretion).

164. *Strickland v. Washington*, 446 U.S. 668, 691 (1984).

165. *Clair v. Ayers*, 403 F. App’x 276, 278 (9th Cir. 2010).

166. *See Strickland*, 446 U.S. at 689 (holding that in assessing counsel’s performance, courts must strive to “eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel’s perspective at the time”).

167. *Id.* at 691.

168. *Id.*

Furthermore, the FPD's response to the district court's first inquiry about Clair's dissatisfaction with his counsel did not evince such a conclusion.¹⁶⁹

The inquiry into the application of the standard, therefore, likely will turn on whether the Supreme Court considers mandatory inquiry too onerous a burden. Clair is likely to prevail on this question. The State lists cases to support its proposition that there is no obligation to conduct formal inquiries after a defendant's request for new counsel,¹⁷⁰ but the selected cases discuss only the duty to investigate alleged conflicts of interest.¹⁷¹ Clair argues that the exercise of discretion requires an accurate knowledge of the relevant facts, which logically suggests that a court should be certain it has those facts before exercising discretion.¹⁷² This certainty is only possible after at least some inquiry.

The State's argument with the most traction is that the Ninth Circuit should have remanded for a limited inquiry as to whether substitution was required in the interests of justice.¹⁷³ Although Clair's desire for different counsel had become moot, the question whether he was entitled to new counsel had not. Presumably, if Clair was not entitled to new counsel, then there was no error in denying his habeas petition. Regardless of the time that his new counsel spent on the case,¹⁷⁴ if Clair was not entitled to substitution of counsel at all, his claims would still be subject to the more exacting standard of successive petitions. This is especially relevant in light of the State's argument that the Ninth Circuit did not consider the countervailing values of finality, comity, and federalism.¹⁷⁵ Particularly worrisome is Clair's admission, after his first complaint about the FPD, that he "may reexamine the issue of representation at the conclusion of the proceeding in [the District] Court."¹⁷⁶ Postponing a final decision about his counsel until the conclusion of proceedings suggests exactly

169. See Joint App'x, *supra* note 8, at 26–27 (including no mention of a determination that investigation was unnecessary).

170. Petitioner's Brief on the Merits, *supra* note 2, at 40 (citing *Mickens v. Taylor*, 535 U.S. 162, 168–76 (2002); *Wilson v. Parker*, 515 F.3d 682, 695 (6th Cir. 2008)).

171. *E.g.*, *Mickens*, 535 U.S. at 175.

172. Brief for Respondent, *supra* note 63, at 34.

173. Petitioner's Brief on the Merits, *supra* note 2, at 46–47.

174. Clair's new counsel had spent five years on the case when the Supreme Court granted certiorari. *Id.*

175. *Id.* at 45–46.

176. Joint App'x, *supra* note 8, at 26–27.

the gamesmanship the State predicts “Clair motions” will facilitate.¹⁷⁷

There is probably little practical difference, however, between the proposed remedies in Clair’s case. The relevance of the unpursued physical evidence is the basis for both Clair’s request for new counsel and his desire to amend his petition. If the evidence is significant enough to allow amending his petition, it is likely that it is significant enough that his counsel reasonably should have pursued it, producing the same result either way.

VII. CONCLUSION

Although it was the possibility of a flood of “Clair motions” that urged settling the question of the standard in the first place, the consequences of the Ninth Circuit’s holding are unlikely to be so dire. If the remedy the Ninth Circuit fashioned was not limited to the unique circumstances of Clair’s case, more concern might be warranted. Properly applied, however, the interests-of-justice standard should prevent end-runs around AEDPA and adequately protect the interest in finality.

177. Petitioner’s Brief on the Merits, *supra* note 2, at 17. The State’s concerns about gamesmanship were a centerpiece of oral arguments, at which some of the Justices appeared dissatisfied with the notion that Clair could invoke a duty to inquire into the attorney-client relationship at such a late stage; or concerned that the Ninth Circuit’s remand placed Clair in a better position than he would have been had counsel been substituted in the original proceedings. *See* Transcript of Oral Argument, *supra* note 157, at 45–47 (Roberts, J.) (questioning whether the motion would allow petitioners to “circumvent various restrictions”); *id.* at 50–53 (Kagan, J., and Alito, J.) questioning the practical difference new counsel would have made).