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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL MARTEL, WARDEN, :

Petitioner :

v. : No. 10-1265

KENNETH CLAIR. :

- - - - - x

Washington, D.C.

Tuesday, December 6, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

WARD A. CAMPBELL, ESQ., Supervising Deputy Attorney General, Sacramento, California; for Petitioner.

SETH P. WAXMAN, ESQ., Washington, D.C.; for Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-1265, Martel v. Clair.

Mr. Campbell.

ORAL ARGUMENT OF WARD A. CAMPBELL

ON BEHALF OF THE PETITIONER

MR. CAMPBELL: Mr. Chief Justice, and may it please the Court:

For 12 years, Mr. Clair's Federal habeas corpus petition was litigated in the Federal district court in front of the same Federal district court judge. His petition raised 39 challenges to his guilt and penalty, and the judge oversaw years of discovery, presided over a 2-day evidentiary hearing, and received extensive briefing.

When the case was under submission, Mr. Clair sent a letter to the judge expressing dissatisfaction with his team of attorneys from the Federal Public Defender's office and requested that they be replaced. The judge asked both sides' counsel for their position on Clair's complaint. The Federal Public Defender responded that, after conferring with their client, Mr. Clair was willing to continue with them for that point.

1 The court then stated it would take no
2 further action. Three months later, just before the
3 court was to issue its decision in the case, Clair
4 complained again. The court issued a written order --

5 CHIEF JUSTICE ROBERTS: Was there some way
6 that Clair knew that the court was just about to issue
7 its decision?

8 MR. CAMPBELL: I think, Your Honor, the only
9 way you could be sure was the fact that at some point,
10 as I understand it, the district court judge had
11 announced the day he would be retiring, which would be
12 June 30th of 2005. So, there's probably an inference
13 there it could be expected that the decision was going
14 to be coming out by the end of the -- end of June 2005.

15 JUSTICE GINSBURG: There was a deadline set
16 for all submissions, wasn't there?

17 MR. CAMPBELL: There was an initial deadline
18 set for the filing of the briefing, post-evidentiary
19 hearing briefing, and there would be no extensions of
20 time.

21 Subsequently, there was, in fact, another
22 submission by Mr. Clair in May of 2005 with some
23 additional declarations. The court accepted those
24 declarations but made it clear it would accept no
25 additional submissions in the case unless it ordered

1 otherwise, that it would proceed with the decision.

2 Once upon -- anyway, in June, June 16th,
3 2005, Mr. Clair sent a second complaint about his
4 counsel again, and the district court issued a written
5 order denying that request, finding that Clair's counsel
6 was doing a proper job and did not appear to have a
7 conflict of interest.

8 The district court had an excellent factual
9 basis for that conclusion because it had just completed
10 work on its extensive order denying the petition in Mr.
11 Clair's case.

12 JUSTICE GINSBURG: But this petition had
13 something new, the report that his investigator had
14 turned up this evidence.

15 MR. CAMPBELL: That's correct, Your Honor.
16 The -- what Mr. Clair's complaint indicated, there was
17 some additional physical evidence that had not been
18 examined or investigated before. He indicated that the
19 Federal Public Defender actually had met with the Orange
20 County law enforcement about the evidence, and he was
21 upset that there was no further action being taken by
22 the Federal Public Defender regarding testing, seeking
23 DNA testing or testing of that evidence.

24 JUSTICE ALITO: There has been some
25 additional litigation regarding this physical evidence

1 since this -- the time of the -- the unsuccessful
2 substitution request; hasn't there been?

3 MR. CAMPBELL: That's correct. After --

4 JUSTICE ALITO: Could you tell us what has
5 happened with that?

6 MR. CAMPBELL: I'm sorry?

7 JUSTICE ALITO: I'm sorry. Could you tell
8 us what has happened with that litigation?

9 MR. CAMPBELL: The status of that
10 litigation: Once the petition was denied, Mr. Clair
11 filed a notice -- there was a notice of appeal filed by
12 the Federal Public Defender. Mr. Clair also filed a
13 notice of appeal because of the denial of his
14 substitution motion. Those are merged together.
15 Mr. Clair was appointed new counsel.

16 The new counsel then filed Rule -- a Rule --
17 a request to the district court to entertain a
18 Rule 60(b) motion, which the district court denied. The
19 Ninth Circuit ordered that the district court consider
20 the Rule 60(b) motion. The district court heard the
21 Rule 60(b) motion and then denied it.

22 Mr. Clair then filed a protective petition,
23 a petition for writ of habeas corpus for a successor
24 petition, with the Ninth Circuit and has also filed a
25 petition for writ of habeas corpus for the California

1 Supreme Court.

2 JUSTICE ALITO: That's what I was referring
3 to.

4 MR. CAMPBELL: Yes.

5 JUSTICE ALITO: And what -- what has
6 happened there? Was there -- was there testing of this
7 evidence in connection with that?

8 MR. CAMPBELL: There -- there had been --
9 there has been some testing of the evidence during --
10 during that time by the Orange County law enforcement in
11 regards to its relationship to the crime or its
12 relationship to another crime that occurred at that
13 time, which I think that information is set forth in the
14 -- the appendix to the opposition to the petition for
15 certiorari.

16 The --

17 JUSTICE SOTOMAYOR: I'm sorry. Can you
18 remind me of what the outcome of that testing was?

19 MR. CAMPBELL: The -- the outcome of the
20 testing is that, to the extent that the testing was done
21 to see if the -- there was any DNA matching between the
22 other murder that had occurred a couple days before and
23 the murder of Ms. Rodgers -- let's see if I can say this
24 succinctly. The -- there was -- there was no matching
25 of Mr. Clair's DNA with anything from the murder scene

1 of the Rodgers murder, and there was no matching of any
2 DNA that was found for the perpetrator of the other
3 murder at the site of Ms. Rodgers' murder.

4 JUSTICE SOTOMAYOR: Counsel, as I read your
5 briefs, I think you're making, perhaps, two different
6 arguments. And I want to focus you in on which one
7 you're really concentrating on.

8 MR. CAMPBELL: Okay.

9 JUSTICE SOTOMAYOR: Which is this
10 presentation seems to be that, regardless of what
11 standard we apply to the court of appeals' review of
12 what the district court did in denying the motion to
13 substitute counsel, that it was wrong. And I presume
14 that means it was wrong for the standard you're
15 proposing and it was wrong for the interests of justice
16 standard. Am I correct?

17 MR. CAMPBELL: I -- yes, Your Honor. I
18 think under any standard that would apply, we think that
19 the -- that the Ninth Circuit's disposition is
20 incorrect.

21 JUSTICE SOTOMAYOR: All right. As I read
22 the Ninth Circuit decision, assuming an interests of
23 justice standard because that's the one they invoked,
24 they said what happened here is that the district court
25 didn't hold a hearing to determine itself exactly what

1 the dispute was about. And so, it was a process
2 failure, basically is what they're saying.

3 Now, you make assumptions based on matters
4 that have come up since that hearing about what the
5 dispute was about, and -- but I still don't know what
6 the Federal defender's position was as to whether or not
7 communications had broken down with the client to a
8 point where they thought, as they did on appeal, that
9 they couldn't continue.

10 So, tell me why, assuming we accept that an
11 interests of justice standard applies, the circuit court
12 has no power or applied it improperly by saying --
13 forget about the remedy -- has no power to say, district
14 court judges, you have to at minimum inquire and set
15 forth your reasons based on the facts of that inquiry.

16 MR. CAMPBELL: Yes. And the reason is, is
17 that, looking at the record and what was presented to
18 the Federal district court at the time it received the
19 request by Mr. Clair in June of 2005, what Mr. Clair's
20 allegation was, was that he disagreed with the
21 investigative, tactical, strategic decisions that were
22 being made by the Federal Public Defender. That's --
23 that was the reason that was in Mr. Clair's -- Mr.
24 Clair's allegations. Those premises, even --

25 JUSTICE SOTOMAYOR: But what does that have

1 to do with "I think they're doing a good job"? I mean,
2 it could well be that the judge later decides, after he
3 hears from the Federal defender, I don't think that --
4 we don't think there's anything to be done; he
5 disagrees. But he really never got an explanation from
6 the Federal defenders.

7 MR. CAMPBELL: I'm sorry. I didn't --

8 JUSTICE SOTOMAYOR: He never got an
9 explanation from the Federal defenders.

10 MR. CAMPBELL: Your Honor, it in fact -- it
11 would be -- it's appropriate -- if the record -- if the
12 allegations of the -- of the Petitioner and the record
13 before the court is sufficient for the court to make the
14 finding that there is in fact no basis for substitution,
15 it is not necessary for the court to go ahead and
16 conduct an inquiry or a hearing or to initiate other
17 further process in the case. And the allegation here
18 which went to the physical evidence in the case from the
19 standpoint of the evidence in this case and the way this
20 case was prosecuted and the evidence of Mr. Clair's
21 guilt, the fact that there was additional physical
22 evidence that might be available simply wouldn't have
23 supported any cognizable claims in the Federal habeas
24 corpus action. There was no need for any further
25 investigation or inquiry on the part of the court based

1 on what was presented to it at the time.

2 JUSTICE ALITO: What about a -- a possible
3 Brady claim? Is there a disagreement about whether this
4 physical evidence could have been tested at the time and
5 revealed anything at the time of the trial?

6 MR. CAMPBELL: There I have to -- I think I
7 have to take what the Ninth Circuit says in its opinion
8 about this case, which is what we have here is physical
9 evidence that could be subject to forensic testing now
10 that was not available in 1987. So, the fact that there
11 might be later -- there might have been developments in
12 forensic techniques since 1987 when Mr. Clair's trial
13 occurred doesn't support any claim of trial error back
14 in 1987. You can't show any prejudice from any -- from
15 any failure back in 1987 because the testing wasn't
16 available to do that they now want to do.

17 JUSTICE ALITO: What about an actual
18 innocence claim?

19 MR. CAMPBELL: Well, an actual innocence
20 claim, I think to begin with, it wouldn't be clear,
21 based on this Court's jurisprudence at the time, that a
22 factual innocence claim would be cognizable in this
23 Federal habeas corpus proceeding. It would be a -- this
24 Court has indicated to the -- has never really actually
25 held that that is a cognizable claim. Even if it -- it

1 did, it wouldn't be an exhausted -- it would certainly
2 be an unexhausted claim. California, in fact, does
3 entertain that type of claim, does provide a State
4 avenue for that type of claim.

5 There's plenty of reasons why you would not
6 raise that claim at this point, especially at the end of
7 the process in the first Federal habeas corpus petition.

8 JUSTICE SOTOMAYOR: You are familiar with
9 3599(e), aren't you?

10 MR. CAMPBELL: Yes.

11 JUSTICE SOTOMAYOR: Which requires counsel
12 to participate in subsequent proceedings.

13 MR. CAMPBELL: Yes.

14 JUSTICE SOTOMAYOR: Of a certain type and
15 limited.

16 Is it your position that if there is a
17 complete breakdown of communications with an attorney,
18 post-habeas decision, that that is inadequate in the
19 interests of justice or otherwise for a court to say
20 that could implicate proceedings after 3599, so I should
21 substitute now?

22 MR. CAMPBELL: Actually, Your Honor, yes, it
23 is. At that point, the defendant has, of course,
24 already gone through the trial, the State appeal, and
25 the State habeas process, and it's particularly at the

1 State trial and the State appellate process, of course,
2 the standard for substitution of counsel is the
3 potential total breakdown of communications,
4 irreconcilable conflict, conflict of interest. By the
5 time you've gone through the entire process by which you
6 have gone through the State trial, you've exhausted your
7 claims in State court --

8 JUSTICE SOTOMAYOR: Oh, but you're presuming
9 you're going to win.

10 MR. CAMPBELL: Excuse me?

11 JUSTICE SOTOMAYOR: You're presuming you're
12 going to win. I think 3599 applies to situations in
13 which the habeas petitioner wins a remand or otherwise
14 has something that's going to follow the habeas
15 decision.

16 MR. CAMPBELL: Well, Your Honor, the -- the
17 point is, is that by the time you have reached that
18 juncture in which the claims have been raised and
19 litigated multiple times in multiple forums, that the
20 need for the type of communication and contact that
21 occurs at the trial and State appellate level is not as
22 essential or necessary at that juncture.

23 JUSTICE GINSBURG: Well, suppose -- suppose
24 the public defender had said to the district court what
25 it said to the Ninth Circuit, and that is that the

1 attorney-client relationship has broken down to such an
2 extent that substitution would be appropriate, what
3 wasn't asked, but suppose the public defender had given
4 that answer to the district judge. Would the district
5 judge still have rightly denied the motion for
6 substitution?

7 MR. CAMPBELL: Yes, he would have,
8 especially given that the case at that point was
9 completely under submission and simply awaiting for
10 decision. At that point, we're -- there is, in fact, no
11 more litigation to be occurring, the -- whatever the
12 problem with communication is at that point is not going
13 to in any way adversely affect the -- the
14 representation. The case is over.

15 JUSTICE KAGAN: If I understand your answers
16 to some of these questions, you are not at all relying
17 on the fact that the district court had made this
18 decision 2 months earlier. You think that the answer
19 would be the same had the district court not made an
20 inquiry 2 months earlier; is that correct?

21 MR. CAMPBELL: That -- that is correct. I
22 mean, if -- yes. That -- that is an extra fact in this
23 case, but I don't think that's the pivotal fact as far
24 as what the district court could have done as far as
25 exercising its direction -- its discretion in June when

1 it received the complaint from Mr. -- Mr. Clair.

2 JUSTICE KAGAN: So, when is a district court
3 required to engage in some kind of inquiry?

4 MR. CAMPBELL: Well, when the -- when the
5 allegation is made that -- by the petitioner that he
6 has, in fact, been denied what he is entitled to under
7 3599, which is the appointment and representation by
8 counsel qualified under that statute.

9 JUSTICE KAGAN: Well, I -- I was again
10 assuming, as Justice Sotomayor was, that if we're in an
11 interest of justice world, if that's the appropriate
12 standard, when is the district -- when does the district
13 court have to make an inquiry, and what kind of inquiry
14 does he have to make?

15 MR. CAMPBELL: The inquiry -- the inquiry
16 would occur when an allegation was made that, for
17 whatever reason, the counsel does not meet the
18 qualifications that are expected to be met, the counsel
19 has an adverse conflict of interest, or counsel has
20 basically reached a point where he is no longer
21 representing or acting as an advocate for --

22 JUSTICE KAGAN: Well, you're -- I thought
23 that that test was an alternative to the interest of
24 justice standard. I'm positing that the interest of
25 justice standard applies, and you're giving me back

1 those same three factors. Do you think that that's all
2 the interest of justice standard is about?

3 MR. CAMPBELL: I think in the context of the
4 Federal habeas corpus action, that is in fact -- in
5 which there's a statutory right to counsel -- that is in
6 fact the interest -- where the interests of justice
7 standard would be. The interests of --

8 JUSTICE SOTOMAYOR: So, this is sort of a
9 made-up standard.

10 MR. CAMPBELL: No --

11 JUSTICE SOTOMAYOR: Can you point to one
12 case in which this standard has been used by any
13 district court or court of appeals?

14 MR. CAMPBELL: No, I cannot, but --

15 JUSTICE SOTOMAYOR: Can you point to any
16 inquiry by Congress in which such a test was discussed,
17 considered in any way?

18 MR. CAMPBELL: No, I cannot. But --

19 JUSTICE GINSBURG: Where did you get it
20 from?

21 MR. CAMPBELL: It's actually analogous to
22 the way this Court over the years has divided up the
23 jurisprudence regarding the Sixth Amendment right to
24 counsel and the dividing line between claims of
25 ineffective assistance of counsel and claims of denial

1 of counsel.

2 JUSTICE SOTOMAYOR: Well, so, what you're
3 suggesting is in noncapital cases, which are less
4 serious, you're going to have a higher bar for a right
5 that the statute gives a judge without any limitation.
6 The capital limitation is that the judge on its own
7 motion or a motion by defendant can substitute.

8 MR. CAMPBELL: No, we're not in the context
9 of a noncapital habeas. There's never -- there has
10 never been any construction, certainly by this Court, of
11 what "interests of justice" means in the context of
12 substitution of counsel, of a statutory counsel, in the
13 context of either capital or noncapital habeas. And
14 whether it's --

15 JUSTICE SOTOMAYOR: So, how about a standard
16 that the courts are used to and one that has a basis in
17 Congress's choice, like interests of justice?

18 MR. CAMPBELL: Well, actually, Your Honor, I
19 think -- I think that we have in fact, to the extent we
20 are analogizing to what this Court has long done as far
21 as dividing questions of Sixth Amendment claims between
22 ineffective assistance of counsel and denial of
23 counsel -- we're in fact submitting a concept that is
24 actually very familiar to this Court and very similar to
25 what this Court deals with in many Sixth Amendment

1 claims.

2 We're simply looking at it in the context
3 now of the fact that you've been given, or entitled, a
4 statutory entitlement to be represented by counsel. You
5 are entitled to protect that right to the extent to
6 vindicate that particular right, which is to be
7 appointed that counsel. If you're denied that right,
8 then you, in fact, have a legitimate reason to ask for
9 new counsel, for new counsel to be appointed. The
10 interests of justice standard doesn't have a fixed
11 meaning, really, in any context.

12 JUSTICE BREYER: If it doesn't have a fixed
13 meaning. I mean, wouldn't you think -- I suspect the
14 answer is you do think that -- a district judge has a
15 lot of power in many, many areas, and in one of those
16 areas, some district judge sometime could make a
17 horrendous mistake that really wrecks a case, and in
18 such a matter, the court of appeals, if it sees a really
19 horrendous error, will probably have the authority to
20 say you went beyond whatever standard applies, at least
21 here, at least -- okay, we agree on that one.

22 So, they use some words, "effectiveness,"
23 whatever the words are, "interest of justice," just to
24 reflect that fact. I mean, that's what I think what
25 happened. Then your complaint is he didn't abuse his --

1 he didn't really abuse anything; he made a good
2 decision, the district judge. Isn't that what that
3 comes down to?

4 MR. CAMPBELL: That is certainly an aspect
5 of the complaint, But the -- to us what's very
6 important --

7 JUSTICE BREYER: What's important?

8 MR. CAMPBELL: What is important here is
9 that the premise of the Ninth Circuit's opinion is that
10 it would be an acceptable motion for substitution for
11 the -- for Mr. Clair to complain or allege disagreements
12 with his counsel about --

13 JUSTICE BREYER: All right. So, what's
14 bothering you is the way they applied it.

15 MR. CAMPBELL: Well --

16 JUSTICE BREYER: And they applied it in
17 circumstances that you think -- the district judge was
18 actually -- his decision was fine. You don't have the
19 power to set that aside because it was within -- it's
20 within the scope of any kind of standard you want to
21 call it, including calling it "interests of justice."
22 Am I right in thinking that, that that's really your
23 concern?

24 MR. CAMPBELL: Yes, our concern, Your Honor,
25 is that the premise of the Ninth Circuit's opinion is --

1 goes to what the appropriate standard, what the
2 appropriate level of complaint, whatever you want to
3 call it --

4 JUSTICE BREYER: All right. So, what you
5 really want us to do is to look at the record of the
6 case, go through it, and say, here, whatever words
7 you're going to use, the district court acted within his
8 discretion in saying don't change the counsel. Is that
9 what you -- is that what I'm supposed to do? I'm trying
10 to get at what you want me to do.

11 MR. CAMPBELL: That -- yes, that is -- yes.

12 JUSTICE SCALIA: No, you don't want that.
13 You don't want to stay whatever words you use.

14 JUSTICE BREYER: No, I'm not --

15 JUSTICE SCALIA: You want us to say the
16 words to be used are the words that we use in deciding
17 whether you have been accorded your constitutional right
18 to counsel, right?

19 MR. CAMPBELL: That's -- that's correct,
20 Your Honor. I think the confusion here --

21 JUSTICE BREYER: I didn't mean literally
22 "whatever words you use."

23 MR. CAMPBELL: Well --

24 JUSTICE BREYER: I'm trying to figure out
25 what you want me to do. One is to go back and search

1 all the cases that use some words for a standard, which,
2 as you can tell, I'm reluctant to think that that's
3 meaningful in this case.

4 The other is to look at the record to see if
5 he acted within what you would normally think of as the
6 district court's discretionary authority.

7 MR. CAMPBELL: I think the confusion here is
8 caused by the fact that the Ninth Circuit opinion
9 started out by borrowing the phrase "interests of
10 justice" and inserting it into a section where it is --
11 where it was not inserted, and it would appear to be a
12 deliberate act of Congress to do that, and then it gave
13 it a meaning which we think under any circumstances
14 would be inappropriate in this context.

15 CHIEF JUSTICE ROBERTS: I suppose you don't
16 think that the standard of review is abuse of
17 discretion, because if you do, then I suppose you're
18 assuming that the district court has discretion whether
19 to grant the motion or not instead of being confined by
20 a particular standard.

21 MR. CAMPBELL: Well, abuse of discretion --
22 if the Court is wrong as a matter of law, of course, it
23 automatically -- I mean, that is an abuse of discretion.

24 And our -- our feeling here about the Ninth
25 Circuit's opinion is that the way it has defined what

1 would be appropriate in terms of a motion for a
2 substitution and what would trigger an inquiry by the
3 judge -- you know, as a matter of law the Ninth Circuit
4 was wrong in this case.

5 JUSTICE KENNEDY: Well, but abuse of
6 discretion doesn't mean that the judge operates in a
7 vacuum. If we make -- issue an opinion and say, oh,
8 well, that the standard is an abuse of discretion, that
9 doesn't tell people too much. Abuse of discretion based
10 on what standards, what inquiries? And that's -- and
11 I'd like to know what your position is on that, because
12 it seems to me that, at the end of the day, it's going
13 to be something very close to interests of justice.

14 MR. CAMPBELL: Well, Your Honor, that's --
15 and I suppose the substance -- if we want to call it an
16 interests of justice standard, the substance of it would
17 be that it would not be -- substitution would not be --
18 it would not be appropriate to move for substitution on
19 the basis of disagreements with counsel about tactical
20 or investigative decisions, such as what Mr. Clair did
21 here. The appropriate standard is whether or not there
22 has been an actual denial of counsel as provided under
23 section 3599.

24 JUSTICE SOTOMAYOR: Counsel, can I give you
25 an example? Beginning of the litigation, all right?

1 Capital counsel is appointed. Capital counsel wants to
2 raise challenges to the conviction and sentence, and
3 defendant says: I don't -- I want to die. Is a
4 district court entitled to substitute that counsel under
5 your theory? Because you said to me it has to be
6 counsel that's -- that counsel that has abandoned the
7 client. Counsel doesn't want to abandon the client;
8 counsel wants to prosecute the case. There's no
9 conflict of interest. Counsel's not representing
10 anybody else. And what was your third criteria?

11 MR. CAMPBELL: Qualifications, just the
12 basic standard of qualification.

13 JUSTICE SOTOMAYOR: Well, this is -- you
14 know, this is Seth Waxman sitting right next to you.

15 (Laughter.)

16 MR. CAMPBELL: He's undoubtedly qualified,
17 Your Honor.

18 JUSTICE SOTOMAYOR: I -- I suspect that's
19 the case.

20 MR. CAMPBELL: Otherwise he wouldn't have
21 the appointment.

22 JUSTICE SOTOMAYOR: So, beginning of the
23 case, first decision, and defendant comes in and says
24 substitute my attorney. What would be your argument
25 under your test?

1 MR. CAMPBELL: There are several responses
2 to that. At one level, the client would -- always has a
3 -- and I think always has basic -- basic decisionmaking
4 authority over basic decisions, whether or not a
5 petition should be filed or not filed, this type of
6 thing. So, a failure of an attorney to abide by that
7 particular instruction would in fact be a failure to --

8 JUSTICE SOTOMAYOR: So, there are some
9 decisions that -- that the client controls?

10 MR. CAMPBELL: There have always been some
11 basic decisions a client makes in any -- in any case.
12 But it's not --

13 JUSTICE SOTOMAYOR: That's not abandonment.
14 That's an error. That's a problem. But it's not
15 abandonment under your definition.

16 MR. CAMPBELL: It is in fact the failure of
17 the lawyer to truly act as an agent for the client at
18 that point.

19 JUSTICE SOTOMAYOR: Well, if I tell my
20 attorney follow these leads, that's a failure of an
21 agent as well.

22 MR. CAMPBELL: It's -- it's -- actually,
23 though, that is in fact normally always considered to be
24 an area that's within the domain of the attorney. Those
25 types of investigative tactical decisions have always

1 been the decisions that attorneys have normally made for
2 their clients and not necessarily under the control of
3 their clients.

4 But let me tell you about the volunteer
5 situation, as a practical matter. The volunteer
6 situation is a whole -- almost a whole separate category
7 of litigation from the kind of litigation we're talking
8 about. And what normally happens in those cases is
9 counsel is not substituted; usually, frequently, a
10 second counsel is brought in to deal with representing
11 the client on those particular issues, and the first
12 counsel remains. So, that's become --

13 JUSTICE SCALIA: A volunteer issue? What
14 are you talking about? I'm --

15 MR. CAMPBELL: A volunteer issue is when
16 someone says: I do not want to pursue my remedies; I
17 want to simply be executed. In the practice, we call
18 that a volunteer.

19 JUSTICE SCALIA: You call that a
20 volunteer --

21 MR. CAMPBELL: We call that a volunteer.

22 JUSTICE SCALIA: Volunteer. Volunteering to
23 be executed?

24 MR. CAMPBELL: That's -- that's the normal
25 term of art.

1 JUSTICE SOTOMAYOR: Given my example, isn't
2 it the case that, under the interests of justice
3 standard, there will be situations in which a
4 substitution like the one I just posited would be right
5 that wouldn't be right under your standard?

6 MR. CAMPBELL: Your Honor, I think that
7 actually our standard would cover what is appropriate
8 for protecting the defendant's statutory right to
9 counsel and that --

10 JUSTICE SOTOMAYOR: Are you suggesting that,
11 for noncapital defendants, Congress chose to give them
12 more rather than less?

13 MR. CAMPBELL: No, not -- not at all. I
14 don't think -- I don't think noncapital or capital
15 habeas petitioners have any greater -- have any greater
16 right to the assistance of counsel.

17 JUSTICE SOTOMAYOR: But you're saying
18 capital have lesser rights.

19 MR. CAMPBELL: I think -- my guess -- I
20 don't think -- I don't think this Court has ever drawn a
21 categorical difference between them in terms of what
22 rights are available to them for purposes of
23 representation by counsel.

24 JUSTICE SOTOMAYOR: Isn't delay one of the
25 factors that courts routinely look at under the

1 interests of justice standard?

2 MR. CAMPBELL: Yes. And I -- you know, once
3 -- any motion for substitution, no matter what standard
4 you use, should be -- should be made promptly. So
5 should --

6 JUSTICE SOTOMAYOR: So, we go back to
7 Justice Breyer's point that, even under the interests of
8 justice standard, you're claiming there was an error?

9 MR. CAMPBELL: Absolutely. Oh, yes. Yes.
10 We would submit even under that standard it would be an
11 error.

12 Your Honor, unless there's any more
13 questions --

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Waxman.

16 ORAL ARGUMENT OF SETH P. WAXMAN

17 ON BEHALF OF THE RESPONDENT

18 MR. WAXMAN: Mr. Chief Justice, and may it
19 please the Court:

20 The court of appeals held that it was an
21 abuse of discretion to deny substitution without making
22 any inquiry, even of counsel, into the specific
23 situation alleged by Mr. Clair. The court did not hold
24 that Mr. Clair was entitled to substitute counsel. It
25 did not hold that he was entitled to amend his petition.

1 It did not hold that substitute counsel was even
2 required or advised to seek --

3 CHIEF JUSTICE ROBERTS: So --

4 JUSTICE KAGAN: Is inquiry always --

5 CHIEF JUSTICE ROBERTS: So, what if last
6 week we get notice from Mr. Clair that he is
7 dissatisfied with his Supreme Court counsel, that
8 communication has broken down, that you plan to argue
9 particular -- present particular arguments, and he
10 doesn't want you to do that. Do we have an obligation
11 to conduct an inquiry into his complaint?

12 MR. WAXMAN: I think if you have any
13 obligation whatsoever -- and I want to make clear that
14 there -- these kinds of letters and requests for
15 last-minute substitutions happen all the time, and in
16 the mine run, there may not be any duty of independent
17 inquiry. If you had one, it would simply be to do what
18 the court did in March, which is to inquire of the two
19 counsel in the case, is there anything to this, and then
20 rule.

21 CHIEF JUSTICE ROBERTS: No. He says -- he
22 says: I've turned up new evidence, or I think this is a
23 great argument, and my counsel has told me he is not
24 going to raise it, and I want new counsel who will raise
25 this argument.

1 Will we have to say -- look at it and say,
2 well, we have to figure out is that a good argument; is
3 it better than the ones counsel are going to raise?

4 MR. WAXMAN: No --

5 CHIEF JUSTICE ROBERTS: Has communication
6 broken down.

7 MR. WAXMAN: No, of course not. In this
8 situation, the Court had pending before it a first
9 petition for habeas corpus that alleged both ineffective
10 assistance of counsel at trial and specific Brady
11 violations. And, by the way, in answer to your first
12 question, the district judge announced that he was
13 retiring on June 27th, effective the 30th.

14 CHIEF JUSTICE ROBERTS: I want to --

15 MR. WAXMAN: So, this was beforehand.

16 CHIEF JUSTICE ROBERTS: I want to ask you
17 about that. You mention that no fewer than six times in
18 your brief. What is your point, that the judge altered
19 his disposition of a legal matter before him for his
20 personal convenience?

21 MR. WAXMAN: No.

22 CHIEF JUSTICE ROBERTS: Then what's the
23 significance of the fact that he was going to retire?

24 MR. WAXMAN: The -- the significance of the
25 fact that he -- he hadn't announced that he was going to

1 retire. The significance of the fact that he did retire
2 is only to my mind an explanation for why he failed to
3 conduct the minimal inquiry --

4 CHIEF JUSTICE ROBERTS: So, you are
5 saying --

6 MR. WAXMAN: -- that he had previously --

7 CHIEF JUSTICE ROBERTS: So, you are saying
8 he violated his judicial oath for his own personal
9 convenience, that he failed to do something that you say
10 he should have done, because he was retiring?

11 MR. WAXMAN: I'm not -- he -- the error
12 would have been the same if he had stayed on the bench
13 for another 10 years.

14 CHIEF JUSTICE ROBERTS: So, why do you say
15 six times in your brief that the judge was retiring the
16 next day or retired the next day?

17 MR. WAXMAN: Because -- it goes to their
18 complaints with the remedy in the case. That is,
19 they're faulting that the remedy is not go back and ask
20 this judge to decide whether substitution was
21 appropriate.

22 CHIEF JUSTICE ROBERTS: There was another
23 judge.

24 MR. WAXMAN: Yes.

25 CHIEF JUSTICE ROBERTS: There is another

1 judge. She's available. I have to say it strikes me,
2 frankly, as argument by innuendo that I think is very
3 unjustified.

4 MR. WAXMAN: Well, I -- I apologize if it
5 gave that impression. I don't mean any innuendo in the
6 case. Our proposition is simply this: Prior to
7 adjudicating the claims of ineffective assistance of
8 counsel and Brady, when the court receives a letter that
9 says, Your Honor, I'm sorry for writing a second time.
10 As you know, I have always maintained that I'm innocent.
11 My investigator has just discovered physical evidence in
12 the State's files that he believes may clear me. My
13 counsel --

14 JUSTICE KAGAN: Mr. Waxman, what --

15 CHIEF JUSTICE ROBERTS: I'm still trying to
16 get to the point -- I'm sorry. I'm still trying to get
17 to the point of the relevance of the fact that he was
18 retiring.

19 MR. WAXMAN: It goes to the remedy, and it
20 goes to the fact he --

21 CHIEF JUSTICE ROBERTS: How does it go --
22 how does it go to the remedy?

23 MR. WAXMAN: It -- they are alleging that
24 there was an abuse of discretion not to send it back to
25 the judge to do what he had declined to do. And our

1 proposition is, because substitute counsel had been in
2 place for 5 years and because the judge who had
3 superintended the case for 12 years was no longer there,
4 it was appropriate and within the court of appeals'
5 discretion under 28 U.S.C. 2106 to remand it to the new
6 judge, with new counsel, for -- to allow new counsel
7 simply to ask the new judge, who had not heard all of
8 the witnesses or the evidence, to demonstrate why, if
9 counsel thought it was appropriate, to allow him to
10 amend the petition under Rule 15(a)(2).

11 JUSTICE KAGAN: Mr. Waxman --

12 JUSTICE ALITO: Well, that would be pretty
13 incredible. Maybe that's what's required. Why isn't
14 this is a fair reading of what Judge Taylor did? As of
15 April 29th, as I recall, there was not a problem with
16 the representation. And the decision was made on
17 June the 30th. Now, on June the 16th, that's the time
18 when Clair sent his letter.

19 By this point, the petition had been pending
20 for a long time before the judge. The judge presumably
21 was approaching the point where he was going to issue
22 his decision. He saw the letter. He could not see any
23 way in which the matters that were discussed in the
24 letters could lead to a claim that would go anywhere.
25 As to the physical evidence, if it couldn't have been

1 tested at the time of trial, there would not have been a
2 Brady obligation, and an actual innocence claim here
3 would be quite far-fetched in light of the very
4 incriminating statements that -- that Mr. Clair made in
5 the tape-recorded conversation.

6 Had he substituted counsel, he would not
7 have been under an obligation, I think, to allow
8 substituted counsel to amend the petition, which had
9 been pending for a long period of time. So, he said:
10 Counsel is doing a proper job; there doesn't appear to
11 be a conflict of interest; and I'm going to deny this.

12 Now, counsel could have been appointed and,
13 in fact, was appointed to represent Mr. Clair going
14 forward. Why isn't that a fair reading of what he did?
15 And if so, what need was there for further inquiry?

16 MR. WAXMAN: Well, this -- it may very well
17 be what was in his thought processes, but we don't know
18 that. And, in any event --

19 JUSTICE KENNEDY: But we know what was in
20 his thought processes, Mr. Waxman, because 14 days later
21 he issued a 60- or 61-page opinion with -- dealing with
22 47 different claims, many of which, many of which,
23 related to actual innocence, which was the -- the
24 gravamen of the letter of the complaint on the 16th.
25 So, you -- you can't consider the letter just in

1 isolation from the 61-page opinion that's issued 16 days
2 later.

3 MR. WAXMAN: Oh, I -- I think that the --
4 that a district judge faced with a request to substitute
5 counsel at this very late stage is appropriately --
6 appropriately takes into account everything that has
7 happened, everything that he has allowed to happen,
8 everything that defense counsel has -- has done. And he
9 is obviously permitted to approach this request with a
10 high degree of skepticism and a strong --

11 JUSTICE KAGAN: And you suggest, Mr. Waxman,
12 that he did not have to make an inquiry in every case;
13 is that right? You're not saying that.

14 MR. WAXMAN: That's right. I mean --

15 JUSTICE KAGAN: So, what -- when does a
16 person have to make an inquiry?

17 MR. WAXMAN: Well, of course --

18 JUSTICE KAGAN: What in this case required
19 an inquiry on the judge's part?

20 MR. WAXMAN: I think, you know, if the
21 district judge is presented with factually supported
22 allegations that appointed counsel has failed to pursue
23 newly discovered evidence that may be germane to an
24 issue to be decided, especially where the potential
25 import of that evidence is specifically explicated and

1 corroborated by a willing percipient witness, in this
2 case the investigator who viewed it, the district judge
3 has an obligation simply to ask counsel for the State
4 and counsel for the defense, please respond, as the
5 judge did in June -- in March.

6 Now, in March, the judge -- the judge asked
7 for a response --

8 JUSTICE KAGAN: Well, I guess this goes back
9 to Justice Alito's question, but suppose the judge says
10 to himself, even if the response comes in, yes,
11 relations are terrible because the client wants the
12 lawyers to -- to investigate a particular thing and the
13 lawyers don't want to investigate that thing. The judge
14 knows it doesn't make a difference either way, because
15 he is ready to issue his opinion, and further
16 investigation of this evidence is not going to change
17 his mind as to any material issue. Why should the judge
18 not reject the motion?

19 MR. WAXMAN: Well, because the judge could
20 not know that based on the allegations in the Ford
21 letter and the Clair letter.

22 It is not the case, going to Justice Alito's
23 point from my question to my friend, that what was
24 represented in that letter, the new physical evidence
25 related only to DNA testing. There was a specific

1 allegation that there were fingerprints located at the
2 scene of the crime that previously had been represented
3 to the trial court and to defense counsel either to be
4 unusable or on materials that had gone through the U.S.
5 mail so that the probative value would be limited. And
6 both of those things were untrue.

7 And Mr. Ford said to the judge: I'm
8 prepared to explain to you exactly what those prints
9 are, and they have not been tested against anyone,
10 including the other people who were suspected of the
11 identical type murder the night before in the same area
12 or other potential suspects in this case like Mr.
13 Henriksen.

14 JUSTICE BREYER: The Ninth Circuit -- I
15 see -- I think I see what they were trying to get at.
16 They want -- they don't see anything practical here to
17 do except to try to get the judge, the district judge,
18 to focus on the question of whether the petition should
19 be amended to assert this kind of claim about the new
20 physical evidence; is that right?

21 MR. WAXMAN: Yes. They were --

22 JUSTICE BREYER: That's where they're trying
23 to go. Okay. Now, suppose you lose this case. Suppose
24 you -- they were to say -- suppose this Court said,
25 well, to tell you the truth, that district judge was

1 operating within his authority in saying that this
2 counsel can continue to represent him. But we know
3 subsequently relations broke down, and now there is a
4 new counsel. All right?

5 Can't the new counsel go back to the
6 district court and say, Judge, we'd like to amend the
7 petition so that you will consider, you know, whether it
8 should be amended to include this physical evidence
9 claim? Couldn't he do that?

10 MR. WAXMAN: He can't ask to -- to amend a
11 petition in a case in which there's a final judgment.
12 He could file a -- he could file a Rule 60(b) motion,
13 which he did in this case --

14 JUSTICE BREYER: And what did --

15 MR. WAXMAN: -- and face the very --

16 JUSTICE BREYER: And the judge -- I think
17 you answered this, but I can't remember the answer.
18 What happened when he filed the 60(b)? Did they amend
19 the petition or did they consider the thing or not?

20 MR. WAXMAN: No. While the appeal was
21 pending, so that he wouldn't be accused of having simply
22 sat on his rights while the Ninth Circuit was deciding,
23 he filed a Rule 60 -- he filed for leave to file a Rule
24 60(b) motion and said in essence: Look, the
25 investigator has discovered this new evidence. I

1 haven't been able to test it or examine it. Please give
2 me leave to do that, because I believe it may support
3 reopening the judgment.

4 The district judge said: I'm not going to
5 allow you to make that motion.

6 The Ninth Circuit issued a mandamus
7 directing the district judge to rule on the motion. She
8 then denied it, essentially finding that the motion
9 should be denied because Mr. Grele, substitute counsel,
10 hadn't already proven to her what it is that he was
11 seeking to find out; that is, what does this evidence
12 show. And --

13 JUSTICE BREYER: So, there's no -- in other
14 words, what the Ninth Circuit in my view is trying to do
15 is they've worked out some complicated way of trying to
16 get the district court to consider the motion about the
17 new physical evidence.

18 MR. WAXMAN: Yes, I --

19 JUSTICE BREYER: And if that -- if that's
20 right, then unless you -- there's no way to get there.
21 I don't see how you get there under the law. And so,
22 that's my --

23 JUSTICE SOTOMAYOR: Mr. --

24 JUSTICE BREYER: But what do you think? I'd
25 just like to know what he's --

1 MR. WAXMAN: I have an answer to your
2 question, but, of course, I'll defer to any superseding
3 questions from --

4 JUSTICE SOTOMAYOR: It has to go with the
5 scope of the remedy that they did.

6 MR. WAXMAN: Uh-huh.

7 JUSTICE SOTOMAYOR: Assuming, as I do and
8 you just said, that what the Ninth Circuit said is
9 there's -- he should have gotten a reason, an
10 explanation, but now there's a new attorney anyway, so,
11 what do we do, isn't the normal thing to do just to
12 remand it, to let the district court decide what steps
13 it wants to take, including to decide whether or not it
14 would have granted the motion for substitution if it had
15 heard the explanation?

16 MR. WAXMAN: Yes.

17 JUSTICE SOTOMAYOR: Meaning, there was a new
18 judge, but that doesn't -- a new judge is never stopped
19 from considering --

20 MR. WAXMAN: No, of course --

21 JUSTICE SOTOMAYOR: -- what has happened in
22 a case and to decide whether under the facts as they
23 existed at the time --

24 MR. WAXMAN: Of course not. I mean, even
25 the State acknowledges that asking the judge whether or

1 not there should be substitution when there has been
2 substituted counsel since the appeal was taken is, as
3 they call it, an academic exercise. But, technically,
4 the judge --

5 JUSTICE SOTOMAYOR: But it's not academic.
6 It wasn't academic for the judge below, the new judge --

7 MR. WAXMAN: Well --

8 JUSTICE SOTOMAYOR: -- to say what happened
9 back then; I don't believe the motion was timely; I
10 don't believe that you were foreclosed from doing other
11 things; motion to substitute would have been denied --

12 MR. WAXMAN: Right. I guess --

13 JUSTICE SOTOMAYOR: -- end of case.

14 MR. WAXMAN: I guess -- I'm not sure there's
15 a huge difference between that and what the Ninth
16 Circuit did or what I understand the Ninth Circuit to be
17 doing, which was to issue an order -- basically say the
18 substitution motion had to be decided within the broad
19 discretion that the law allows before entry of judgment.
20 I'm going -- we're going to do as best we can to put Mr.
21 Clair back in that position. It seems to us that since
22 he -- since counsel said, represented, as soon as it was
23 asked after his letter, there's an irreconcilable
24 breakdown and substitution is advised --

25 CHIEF JUSTICE ROBERTS: Counsel, I --

1 MR. WAXMAN: -- he has counsel and -- I'm
2 sorry.

3 CHIEF JUSTICE ROBERTS: No. I'm trying to
4 help you. I understood you to say you had an answer to
5 Justice Breyer's question.

6 MR. WAXMAN: Yes, I do have an answer to
7 Justice Breyer's question, if I can just -- thank you.
8 If I can just finish answering -- I apologize for my
9 lengthy answers.

10 CHIEF JUSTICE ROBERTS: Why don't you finish
11 your answer to Justice Sotomayor and then go back to
12 Justice Breyer?

13 MR. WAXMAN: Thank you.

14 In essence what has happened -- what I
15 understand the court of appeals to have decided is to
16 say, look, because we have had substitute counsel for 5
17 years and the FPD has said it couldn't continue, we're
18 allowing this to go back and let substitute counsel
19 convince the judge, if it can, if it chooses to, whether
20 or not to exercise its considerable discretion in
21 allowing leave to amend the petition before judgment.
22 The judge may very well say no, and the case is then
23 back before us. But it might say yes. In other words,
24 to do what in essence is the prejudice or materiality
25 inquiry that Judge Taylor would have engaged in if he

1 found that there was a breakdown.

2 I mean, if there's a breakdown and the judge
3 says the only new evidence is that the moon was in the
4 fifth house and that doesn't depend on anything, I'm
5 denying -- or it was a new moon, I'm denying this.

6 Justice Breyer, I -- I agree with you that
7 the Ninth Circuit was struggling to figure out a way to
8 most efficiently resolve the multiple appeals that were
9 pending in front of them. And they understood from the
10 Rule 60(b) appeal that was also pending and from the
11 appeal on the denial of substitution that there was this
12 newly discovered evidence in the State's files, that the
13 investigator who looked at it thought that it was really
14 important; and they had no record about what it was or
15 whether it should have been considered.

16 Now, they could have said, well, we're going
17 to direct the Rule 60(b) judge to grant leave to examine
18 the physical evidence and analyze it. And it was an
19 abuse of discretion of the Rule 60(b) judge not to allow
20 Mr. Clair at least to make some showing.

21 JUSTICE ALITO: But suppose the --

22 MR. WAXMAN: But the more straightforward
23 way would have been to say you didn't inquire of
24 counsel; counsel may have had a very good reason for not
25 pursuing this; but in the face of a specific allegation

1 by a willing, percipient witness that there is highly
2 material evidence in the State's files and the public
3 defender is refusing to do anything about it, all we
4 think the Ninth Circuit was holding is --

5 JUSTICE GINSBURG: I thought -- Mr.
6 Waxman --

7 MR. WAXMAN: -- it was an abuse of
8 discretion not to ask.

9 I'm sorry, Justice Ginsburg.

10 JUSTICE GINSBURG: I thought -- I mean, this
11 is a case that has been going on for, what, 12 years in
12 the district court?

13 MR. WAXMAN: Yes.

14 JUSTICE GINSBURG: And I thought that the
15 basic disagreement between the client and counsel was
16 counsel said our best shot is going to be to keep you
17 alive; so, we want to do everything we can to change the
18 death sentence, and then -- and we don't want to detract
19 from that by making a claim of actual innocence when
20 there's -- there'd be a very slim basis for that. So,
21 that's the judgment, and it's a strategic judgment that
22 counsel made: Our best shot to keep this man alive is
23 to concentrate on the penalty phase.

24 MR. WAXMAN: Justice Ginsburg, if that
25 had -- if the judge had inquired of counsel and counsel

1 had given that reason, that would be something that the
2 court could evaluate in deciding whether the balancing
3 test that is required by the interests of justice
4 standard satisfied his inquiry. But we don't have
5 any -- I doubt very much that that is what counsel would
6 have said.

7 CHIEF JUSTICE ROBERTS: Counsel, if -- the
8 interests of justice, does that include the available
9 resources of the Federal Public Defender? I mean, those
10 offices are notoriously understaffed. And here you have
11 a situation where one lawyer has been representing an
12 individual for an awful long time, and the defendant
13 says, I want a new lawyer. It's obviously going to take
14 that -- a new lawyer away from their work and put them
15 in a position of having to get up to speed in a new
16 case.

17 And I just wonder if that's part of this --
18 I won't call "interests of justice" a standard -- it's
19 an aspiration. But does that go into the calculus?

20 MR. WAXMAN: I would think that that -- not
21 only that goes into the calculus, but all of the, I
22 would say, well-articulated doctrines that Congress and
23 this Court have applied essentially establishing
24 presumptions against reopening long-litigated matters,
25 whether --

1 CHIEF JUSTICE ROBERTS: Well, that gets to
2 my --

3 MR. WAXMAN: All of those things go into the
4 interests of justice balancing. There's no doubt about
5 it.

6 CHIEF JUSTICE ROBERTS: Is the -- is the
7 person in a different position with the new counsel than
8 he would have been with the old concerning the standards
9 about reopening things? In other words, do we say,
10 well, what would the old counsel have been able to do
11 with respect to reopening, and say, well, that's all the
12 new counsel can do? In other words, new counsel doesn't
13 allow you to circumvent the various --

14 MR. WAXMAN: Of course.

15 CHIEF JUSTICE ROBERTS: -- restrictions you
16 just talked about.

17 MR. WAXMAN: Of course not. The only point
18 is what -- what Clair was basically saying is: My
19 investigator has just found evidence that he believes is
20 highly exculpatory, physical evidence in the State's
21 files that was previously represented not to exist. My
22 counsel is refusing to do anything about it. Please
23 give me somebody, whether it's -- have my counsel do it
24 or some new counsel, to present this to the judge, just
25 so the judge can decide --

1 CHIEF JUSTICE ROBERTS: And one of the
2 things --

3 MR. WAXMAN: -- in evaluating these -- the
4 Brady and the ineffective assistance claim, and if this
5 is as represented, it could be highly material to those
6 claims.

7 CHIEF JUSTICE ROBERTS: And one of the
8 things I think the district court would do in that
9 situation with the same counsel is say, look, this was a
10 tactical strategic decision of the lawyer; you don't get
11 to reopen something because of that. Now, does that
12 same consideration apply with respect to the substituted
13 counsel, or does the substituted counsel allow the
14 defendant to get a leg up on the process and make new
15 arguments that the old counsel couldn't make?

16 MR. WAXMAN: Well, I think that in a -- if
17 substitute counsel -- if there is a remand in this case
18 and substitute counsel makes a Rule 15 motion, the court
19 will evaluate that under the broad interests of justice
20 standard. I mean, whoever the counsel is has to acquit
21 his or her professional obligations.

22 It may very well have been,
23 Mr. Chief Justice, that if Judge Taylor had said, look,
24 I -- please, you know, write to me in 3 days or let's
25 have a status conference and explain to me what's going

1 on; I understand you went to see this evidence; why
2 aren't you -- is it true that you're not pursuing it;
3 and if so, why not -- that would have completely
4 acquitted the judge's responsibility.

5 JUSTICE SCALIA: Mr. Waxman, the State
6 contends that the interest of justice standard is not
7 the right one. Why do you contend that it is? It
8 doesn't appear in -- in 3599, even though it did appear
9 in -- in the previous provision that used to cover these
10 cases, which is 3006A(c). You want to carry it over
11 from 3006A(c) to 3599. That seems to me a little
12 strange when they seemingly intentionally omitted it.

13 MR. WAXMAN: Well, I don't think it's
14 strange, Justice Scalia, and let me explain at least my
15 own reaction to this. 3599, the mandatory appointment
16 requirement, was cleaved from what is now 3006, the
17 discretionary appointment, where Congress said in the
18 Controlled Substances Act, look, in death cases, at
19 trial and in habeas, we're not -- we don't want to leave
20 it to the court's or the magistrate's discretion whether
21 or not to appoint. We are appointing.

22 And when it did so -- I mean, it is in
23 essence a -- a progeny -- I mean, it is -- it is a
24 cleaving of what was a discretionary obligation.
25 Congress -- Congress had no need in 3599 to reiterate

1 the language in 3006A(c), which itself is not limited to
2 appointments under 3006A(c).

3 I'm reading from page 95 of the petition
4 appendix. The statute says -- I'm sorry. It's page 93.
5 That the interests of justice standard says this -- and
6 I'm -- it's the last sentence on page 93a. "The United
7 States magistrate judge or the court may, in the
8 interests of justice, substitute one appointed counsel
9 for another at any stage of the proceedings." It
10 doesn't say "counsel appointed under the discretionary
11 authority of 3006."

12 It, like the rest of subsection (c) of which
13 it is a part, is a general rule for duration and
14 substitution of appointments. So, even if it were not
15 true that the sentence itself applied a force, it's, I
16 think, only consistent with what Congress's manifest
17 intention in enacting -- what became 3599(e) to permit
18 that when substitution is requested, that motion be
19 adjudicated in light of the interests of justice.

20 And, indeed, that's what the State told
21 Judge Taylor the standard was in this very case. I
22 mean, look at it this way, Justice Scalia: Imagine that
23 a district court -- I realize that the cases will be few
24 and far between, very few and very far between, where at
25 a late stage of the proceedings, the court will

1 interject substitution of counsel over the State's
2 opposition and over the court's understandable desire to
3 serve the public interest in efficiently and fairly
4 adjudicating motions.

5 But in the rare case where the district
6 judge says, gee, I think the public interest -- I think
7 that the interests of justice really would support
8 putting somebody else in here, but I can't because it
9 doesn't fit within one of the three boxes of the tests
10 that the State ex nihilo has announced in its merits
11 brief in this Court -- it's just impossible to imagine
12 that Congress would have wanted a judge to say, gee,
13 this is one of these one in a million cases where the
14 interests of justice really requires it, but I can't do
15 it.

16 JUSTICE ALITO: But the interests of justice
17 is such an open-ended test. If that is the test,
18 doesn't it follow that it will only be in the rarest of
19 cases that a district judge will have been found -- will
20 be found to have abused his or her discretion in denying
21 a substitution request?

22 Why does that very broad standard help you
23 here?

24 MR. WAXMAN: I mean, we don't -- we're not
25 really arguing about the standard one way or the other.

1 The point -- the only real question in this case is
2 whether whatever the standard is -- and we think it has
3 to be something like interests of justice -- a judge in
4 this particular situation with respect to this
5 particular set of circumstances, there is -- and my
6 investigator, a willing percipient witness, has gone to
7 the police station and found evidence that he believes
8 may well clear me --

9 JUSTICE ALITO: Well, how does the
10 fingerprint --

11 MR. WAXMAN: -- it requires at a minimum
12 that the judge say --

13 JUSTICE ALITO: I know you think there
14 should be inquiry.

15 MR. WAXMAN: I'm sorry.

16 JUSTICE ALITO: But before your time runs
17 out, how would the -- how would the fact that there were
18 fingerprints at the scene that do not match anybody who
19 was known to be in that house have provided evidence
20 for -- provided the basis for any claim that could have
21 established Mr. Clair's innocence at this late -- at
22 this late date, in the face of the other evidence that
23 was present in this case, the recorded statements?

24 MR. WAXMAN: Well, first of all, the other
25 evidence in this -- the case against Mr. Clair in

1 essence was the wired statement that he made. And even
2 the trial judge in this case said only of that equivocal
3 statement that it was, quote, "capable of being regarded
4 as an admission." Now, we don't disagree with that.
5 We're not --

6 JUSTICE KAGAN: Does your argument depend on
7 a notion that the evidence against the defendant was
8 weak? In other words, if there were a great deal of
9 evidence against the defendant, would you be making the
10 same argument, that the judge still had a duty to
11 inquire? Or are you asking us essentially to make a
12 determination that this was an iffy case to begin with?

13 MR. WAXMAN: Well, I think the answer -- I
14 know how frustrating this is, but I think the answer is
15 to both -- is yes to both scenarios, particularly
16 because there was no physical evidence linking him, and
17 really the State's case boiled down to this pretty
18 confusing statement. It was particularly salient to say
19 wait a minute. I mean, the -- the district judge had no
20 idea that there was any dispute about physical evidence,
21 or any physical evidence was in the State's files that
22 hadn't been disclosed and hadn't been tested.

23 JUSTICE ALITO: Well, suppose defense
24 counsel had introduced at trial fingerprint evidence
25 showing that 10 people were present at some point in

1 that house and they weren't people who lived there.
2 That's -- it's weak exculpatory evidence for the
3 defendant at best that there were -- there were unknown
4 people in the house. It might have been the cable guy.
5 Who knows who they were? So, it doesn't help very much.

6 MR. WAXMAN: Justice Alito, I mean, we're,
7 of course, all arguing in a vacuum here because we don't
8 know what the fingerprint evidence, if it were tested
9 and run against databases, would show.

10 But let me give you one not at all
11 far-fetched example: The State had -- the county
12 coroner had determined that because of the extraordinary
13 similarity between the murder of a woman in the
14 neighborhood -- very close by the night before and this
15 one, including the very peculiar puncture injuries, the
16 coroner's report in the State's file said this is very
17 likely the same perpetrator.

18 The State has identified the perpetrator of
19 that other crime. And we don't know whether even at
20 this day the State has matched that perpetrator's
21 fingerprints with the fingerprints that were discovered
22 next to the victim in this case. And it wouldn't be
23 far-fetched to say that in a case involving either
24 Brady -- may I finish? It will just be this sentence.
25 Brady or ineffective assistance of counsel, if the

1 fingerprint evidence did link up in that way, it
2 certainly would go into the habeas judge's evaluation of
3 the merits of those claims.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Campbell, you have 3 minutes remaining.

6 REBUTTAL ARGUMENT OF WARD A. CAMPBELL

7 ON BEHALF OF THE PETITIONER

8 JUSTICE SOTOMAYOR: Can you tell us whether
9 that testing has been done or not?

10 MR. CAMPBELL: No, I don't believe that
11 testing has been done.

12 JUSTICE SOTOMAYOR: I'm sorry. No, you
13 don't think it has been?

14 MR. CAMPBELL: No, I don't. I don't. The
15 testing has not been done. The only testing I'm aware
16 of is the testing that's discussed in the appendix.

17 JUSTICE SOTOMAYOR: In the appendix.

18 MR. CAMPBELL: Yes. Which excluded Mr. Goh,
19 who apparently was the perpetrator of the -- of the
20 other murder, from having any DNA at the scene of the
21 Rodgers murder. And Mr. Goh is dead now. So --

22 JUSTICE SOTOMAYOR: I'm sorry. Then your
23 answer is yes, Mr. Goh's prints don't match the prints
24 found in the file.

25 MR. CAMPBELL: Let me -- I am not aware --

1 the answer is I am not -- there has been no test
2 comparison of the fingerprints of Mr. Goh, to my -- to
3 my knowledge, in with the -- what was found at the
4 Rodgers murder. The only testing that we have is the
5 testing that is in the appendix to the opposition to
6 cert regarding the DNA comparisons that were done.

7 JUSTICE SOTOMAYOR: That doesn't worry your
8 prosecutor's office?

9 MR. CAMPBELL: I think that the problem that
10 the -- from the standpoint of the prosecutor's office,
11 the -- nothing that could be found about this case would
12 undercut the fact that Mr. Clair --

13 JUSTICE SOTOMAYOR: If -- if the
14 fingerprints that were found at the scene of this crime
15 matched Goh, that wouldn't give you pause?

16 MR. CAMPBELL: It would -- it would
17 certainly be a -- it would certainly -- I think it would
18 give them pause.

19 JUSTICE SOTOMAYOR: I'm sorry. What?

20 MR. CAMPBELL: I think -- I think it would
21 give them pause, but the fact is the --

22 JUSTICE SOTOMAYOR: So, why hasn't the test
23 been done?

24 MR. CAMPBELL: I don't know why the testing
25 has not been done. But whatever the testing would be,

1 the fact is Mr. Clair made numerous admissions and
2 numerous statements implicating himself in the murder of
3 Linda -- of Ms. Rodgers during the taped conversation he
4 had with Ms. Flores, which also corroborated
5 Ms. Flores's testimony about his involvement in that
6 murder. And that is the critical -- the critical
7 evidence in this case. Now, the California Supreme
8 Court, which has had this information in front of it,
9 has also, in fact, denied already a petition based on
10 the available evidence about the murders.

11 I think also if you look --

12 JUSTICE SCALIA: You -- you don't think it's
13 an iffy case?

14 MR. CAMPBELL: No, not based on that taped
15 statement. The taped statements are filled with implied
16 -- implied admissions about what he did with the
17 jewelry, about trying to evade her questions about the
18 case, to do anything to try to avoid having to really
19 confront himself directly with involvement in the case.
20 It's a -- it really is a very damning -- damning tape,
21 but it --

22 JUSTICE GINSBURG: But it's all -- it's all
23 that, what -- what he told his girlfriend, right?
24 There's nothing else. It's only that?

25 MR. CAMPBELL: Well, I think the point of it

1 is that the tape -- she testified, and the tape
2 corroborates her testimony. So, in fact, what you have
3 is you -- you have mutual reinforcement.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

6 (Whereupon, at 11:03 a.m., the case in the
7 above-entitled matter was submitted.)

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