No. 24-5438

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

KEITH M. DONOGHUE
SHELLEY M. FITE
Co-Chairs,
Amicus Committee
JUDITH H. MIZNER
PARESH PATEL
CATHI ADINARO SHUSKY
Assistant Federal
Public Defenders
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS

JENNIFER NILES COFFIN *
Assistant Federal Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE
800 S. Gay St., Suite 2400
Knoxville, TN 37929
(865) 637-7979
jennifer_coffin@fd.org

** Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF THE *AMICUS CURIAE*[1]

This brief is submitted on behalf of the National Association of Federal Defenders ("NAFD") as amicus curiae in support of petitioner. NAFD, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, including petitioners seeking collateral review under 28 U.S.C. §§ 2254, 2255, and 2241. NAFD regularly files amicus briefs when we have special knowledge about a topic that would benefit the Court. And defenders have particular expertise and interest in the subject matter of this litigation. NAFD wrote as amicus in *Jones v. Hendrix*, 599 U.S. 465 (2023), about the scope of § 2255(e) and use of the habeas remedy at § 2241, while NAFD members represent individuals who seek to raise claims in a second or successive § 2255 motion when circumstances warrant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Individuals in federal custody who believe they are serving an illegal sentence will understandably try any means available to obtain post-conviction relief. But for every post-conviction claim raised after a first § 2255 proceeding—whether new or repeated, counseled or not—the federal prisoner inevitably hits the wall of 28 U.S.C. § 2255(h). And when that happens, the claim

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

rarely advances further. When it does, it is because he has raised the possibility of a patent injustice: either he has obtained newly discovered evidence establishing his innocence, or he can show the illegality of his conviction or sentence in light of a new, retroactive rule of constitutional law announced by this Court—itself an exceedingly rare event that has affected final sentences only a handful of times over the past three decades. As Mr. Bowe's case illustrates, the Eleventh Circuit's construction of 28 U.S.C. § 2244(b)(1) wrongly consigns to defeat even those claims satisfying § 2255(h)'s strict requirements.

NAFD submits this brief to offer empirical evidence that recognizing the same-claim bar in § 2244(b)(1) not to apply to federal prisoners will not impede the circuits' management of repetitious § 2255 claims. The filing statistics discussed below amply demonstrate that the circuits have another tool for disposing of these claims: the requirements of § 2255(h) itself. This tool provides circuits all they need to evaluate repeated § 2255 claims because in most cases, nothing has changed. Mr. Bowe's construction meanwhile preserves judicial power to afford relief in the unusual but important case where newly discovered evidence establishes that no reasonable jury would have found the prisoner guilty or when a new, retroactive Supreme Court rule of constitutional law reveals his conviction or sentence to be unlawful—despite an earlier denial of the same § 2255 claim.

This brief further shows that recognizing the same-claim bar in § 2244(b)(1) as applying only to state-prisoner habeas applications will not unleash a flood of additional requests for authorization under § 2255(h) or inundate district courts with § 2255 motions approved

for filing. While there will always be some few prisoners who seek relief repeatedly, federal prisoners in the three circuits that no longer apply § 2244(b)(1) in § 2255 cases have not sought authorization for repeated claims more often than before. Further, § 2255 filings and filings in similar cohorts of uncounseled cases suggest that recognizing the jurisdictional bar on petitions for certiorari in 28 U.S.C. § 2244(b)(3)(E) to apply only to state-prisoner habeas cases is not likely to lead to a rush of new petitions for certiorari. Most likely, things will stay about the same—except that review, and if need be relief, will be available when warranted.

ARGUMENT

Federal prisoners get one shot at postconviction relief by way of a motion under 28 U.S.C. § 2255. Once a federal prisoner's first § 2255 proceeding is over, obstacles to relief abound. With 28 U.S.C. § 2255(h), "Congress enumerated two—and only two—conditions in which a second or successive § 2255 motion may proceed." *Jones v. Hendrix*, 599 U.S. 465, 477 (2023). These conditions are hard to satisfy by design, but even the federal prisoner who manages to meet one of the two conditions in § 2255(h) may yet be thwarted, in six circuits, by § 2244(b)(1)'s same-claim bar. Some petitioners (like Mr. Bowe) are refused authorization to file a successive § 2255 motion not because their claim fails to meet the substantive requirements of § 2255(h), but because the claim was previously—and erroneously—rejected based on circuit precedent that has since been abrogated.

By contrast, in three courts of appeals, circuit precedent establishing that § 2244(b)(1) does not apply in the § 2255 context has existed for at least two years. Their experience proves they are well-equipped under § 2255(h) itself to dispatch patently meritless

claims, including those previously raised. As in other contexts, these courts are sufficiently acquainted with repeat filers that they "can usually make quick work" of such motions. *Banister v. Davis*, 590 U.S. 504, 517 (2020). The lack of § 2244(b)(1) as a separate barrier to § 2255 review has not unleashed a surge of burdensome filings or measurably increased the courts' workload. Instead, the absence of § 2244(b)(1) from their toolbox has had the salutary effect of allowing further review for a small handful of repeated claims now revealed as having possible merit. And for some, like Kenneth Graham in the Fourth Circuit, it has resulted in relief from an unconstitutional conviction and a new sentence nearly ten years shorter.[2]

These courts' experience in this successive § 2255 context and in two analogous contexts—applications for certificates of appealability and petitions for mandamus—likewise does not portend floods of petitions for certiorari in this Court. Mr. Bowe's construction of § 2244(b) and § 2255(h) meanwhile preserves review in the rare case that raises a question of exceptional importance about the requirements for federal prisoners seeking to file a successive § 2255, which will lead to more uniform treatment of federal prisoners' claims.

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[2] Amended Judgment, *United States v. Graham*, No. 1:13-cr-00620 (D. Md. Mar. 26, 2024); *see In re Graham*, 61 F.4th 433, 438–41 (4th Cir. 2023) (granting authorization of claim based on new rule of constitutional law when authorization of same claim was previously denied due to circuit precedent).

I. Recognizing that § 2244(b)(1) applies only in state habeas cases will not result in a torrent of motions by federal prisoners to authorize repeated claims under § 2255(h).

The plain text of 28 U.S.C. § 2244(b)(1) applies only to habeas applications under § 2254, which governs only state prisoners. Three circuits—the Fourth, Sixth, and Ninth—rightly hold that § 2244(b)(1) does not apply to motions by federal prisoners for authorization to file a second or successive § 2255 motion. *In re Graham*, 61 F.4th 433, 438–41 (4th Cir. 2023); *Williams v. United States*, 927 F.3d 427, 434–36 (6th Cir. 2019); *Jones v. United States*, 36 F.4th 974, 981–84 (9th Cir. 2022). When these courts are presented with a motion for authorization to raise a claim that was presented in a prior § 2255 motion, they focus solely on the strict standard set forth in § 2255(h) to decide whether to allow the claim to proceed, just as they do with a proposed claim that was not previously raised. That standard allows successive filing only through two narrow gateways: (1) for claims of innocence based on "newly discovered evidence" and (2) for claims based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

As elsewhere, most motions for authorization under § 2255(h) in the Fourth, Sixth, and Ninth Circuits are filed by pro se litigants, a small number of whom present repeated but plainly meritless claims in their continuous quest for relief. In other cases, the filings are by counsel, such as when Federal Public and Community Defender offices are appointed to represent federal prisoners under 18 U.S.C. § 3006A(a)(2)(B). Across both groups, it sometimes happens that the federal prisoner raises a claim that has been raised

and denied in a previous § 2255 application, but due to a change in controlling law, the claim achieves new viability. These circuits are able to authorize such claims rather than deny them under concededly erroneous circuit law.

At the same time, § 2255(h) provides the tools they need to efficiently and expeditiously screen out futile repetitious claims. These circuits have not experienced a deluge of motions presenting repeated claims, nor have they authorized large numbers of claims for review by district courts. So while the Ninth Circuit, for one, was unnecessarily apprehensive that its interpretation "may result in more applications for leave to file such motions before courts of appeals," it was right to "doubt[] that this would produce a wave of new district-court postconviction proceedings." *Jones*, 36 F.4th at 984. As it correctly recognized, "even previously presented claims must satisfy the gatekeeping test in § 2255(h), and . . . motions that failed before very likely will fail if presented again." *Id.*

1. Start with the Sixth Circuit, the circuit with the longest experience relying on § 2255(h) without § 2244(b)(1)—since 2019. That circuit also happens to be an excellent case study of the effect of removing the bar of § 2244(b)(1) because in every case, the court issues an order of at least two to four pages in which the court summarizes the procedural history of the case, identifies the claims raised, and gives reasons for its disposition.[3] It will explain, for example, that a proposed § 2255 based on *Borden v. United States*, 593

[3] These unpublished orders are available on the court's PACER system as well as the electronic case database on Lexis. (They are not available on Westlaw.)

U.S. 420 (2021), does not meet § 2255(h)(2) because *Borden* was a statutory interpretation case, and therefore did not announce a new rule of constitutional law. Or it will explain that even though the motion purports to rely on a new, retroactive rule of constitutional law, the record on its face shows that the movant would still be subject to the same sentence enhancement regardless. These orders allow ready identification of the number and nature of claims that would be barred by § 2244(b)(1) under a rule like that of the Eleventh Circuit.

To measure the effect of removing the barrier of § 2244(b)(1) in the Sixth Circuit, we examined the court's written orders disposing of motions for successive authorization in § 2255 cases both before and after that court issued its opinion in *Williams*. These orders indicate that removing § 2244(b)(1) as a separate basis for denying a repeated claim has had no impact on the rate at which federal prisoners present repeated claims or their efficient disposition. At the same time, the circuit's correct interpretation of § 2255(h) has allowed a small number of repeated claims with possible merit to move toward relief, as happened in *Williams* itself.

In 2018, the year before it decided *Williams*, the Sixth Circuit cited § 2244(b)(1) as a reason to deny authorization of a repeated claim by a federal prisoner in 27 cases, reflecting about 14.9 percent of 181 motions for authorization decided that year under § 2255(h) in an original proceeding.[4] Notably, in many

[4] To identify all the motions for § 2255(h) authorization decided in 2018 in the Sixth Circuit, we searched the Lexis electronic case database for decisions issued by that court in 2018 using the search term "2255(h)." Upon review of the results, we narrowed the cases to those actually addressing a motion for authorization.

of these cases, the court's description of the procedural history and the proposed claim made plain that the claim failed to satisfy § 2255(h) in any event. In others, the court explicitly recognized that it did not need to rely on § 2244(b)(1) to dispose of the motion because the claim failed to satisfy § 2255(h).

In 2022, after *Williams* was decided, and when federal prisoners were especially likely to present a repeated request for authorization based on *Davis* in light of *Taylor* (as Mr. Bowe did), federal prisoners filed in the Sixth Circuit 93 motions for authorization ultimately considered under § 2255(h).[5] Just sixteen (17.2 percent) presented a repeated claim—fewer than the court considered in 2018 and nearly the same low rate. In all but one, the court denied authorization, apparently expending no more time and effort than it would have done previously. For example, in denying authorization for a repeated *Davis* claim previously denied as having no plausible merit under binding

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We then cross-checked that list by searching for and reviewing the cases docketed in 2017 and 2018 as "original proceedings" on the court's PACER system (the "case type" category in that court for motions for authorization to file second or successive § 2255 motions) and identifying those decided in 2018. Note that the 181 such motions identified do not include motions dismissed for want of prosecution or denied as unnecessary, such as when the prisoner had never before filed a § 2255 motion so needed no authorization. There was also a small handful of cases in which the Sixth Circuit construed some other type of filing as a motion for authorization under § 2255(h). None of those included a repeated claim.

[5] These cases were identified by searching for and reviewing the filings in the cases docketed in 2022 in the Sixth Circuit under the case type "original proceeding" on the court's PACER system. Again, the motions identified do not include motions dismissed for want of prosecution or denied as unnecessary.

precedent, the court simply noted that the movant offered "no new argument" and dispatched the claim in a few lines. *In re Waller*, No. 22-3441, 2022 U.S. App. LEXIS 30602, *6 (6th Cir. Nov. 3, 2022).

In the single case in which the court granted authorization for a successive claim previously presented and denied, the pro se prisoner was in a position similar to Mr. Bowe. The court had previously denied him authorization to raise a *Davis* claim that his § 924(c) conviction based on attempted armed pharmacy robbery was invalid, due to binding circuit precedent. *In re Patterson*, No. 22-5672, 2022 U.S. App. LEXIS 34759, at *3 (6th Cir. Dec. 15, 2022). But after *Taylor*, the court changed course because he had now "made a prima facie showing that his § 924(c) conviction based on attempted armed robbery might no longer qualify as a crime of violence under either the now-invalid residual clause or the use-of-force clause of § 924(c)(3)(A)." *Id.*

This low rate of repeated claims even *decreased* in 2023. Out of the 102 motions for authorization filed that year and considered under § 2255(h), only eight presented repeated claims—just 7.8 percent. Of those eight, the court authorized just one, again for a prisoner who returned with counsel to seek authorization of a previously denied *Davis* claim after *Taylor* revealed it to have possible merit. *In re Kinnear*, No. 23-5573, 2024 U.S. App. LEXIS 4247, *6 (6th Cir. Feb. 23, 2024).

2. The same trend appears to hold in the Ninth Circuit, as that court predicted when it held in *Jones* that § 2244(b)(1) does not apply in § 2255 cases. Unlike the Sixth Circuit, the Ninth Circuit does not routinely set out in its orders the procedural history of the given case, nor does it always give reasons for its disposition.

And the government oftentimes does not respond to the motion. As a result, it was less feasible to compare the rate of same-claim requests for authorization. But we *could* compare the overall number of requests for authorization docketed on its PACER system as "original proceedings" both before and after *Jones*, as well as their outcomes. This more generalized comparison similarly shows that relying solely on § 2255(h) added no discernable burden in the Ninth Circuit either.

In 2021, the year before it decided *Jones*, the Ninth Circuit docketed for consideration 38 motions for authorization to file a second or successive § 2255 motion as original proceedings.[6] Of those, 36 were summarily denied, almost all without government response. One *Davis* claim was granted in a counseled case. As in the Sixth Circuit, the court denied authorization for *Davis* claims in a number of cases because they were obviously without merit under binding precedent. *E.g.*, *McDaniel v. United States*, No. 21-70879 (9th Cir. Apr. 12, 2021) (citing *Henry v. Spearman*, 899 F.3d 703, 708 (9th Cir. 2018)).

[6] Differences in charging practices with respect to § 924(c) and stays granted in anticipation of *Davis* in the Ninth Circuit likely explain the considerably fewer motions in that circuit than in the Sixth Circuit, where courts frequently denied pending § 2255 motions raising challenges to the residual clause in § 924(c) in the weeks before *Davis* was decided. As with the Sixth Circuit, this number refers only to those motions ultimately considered under the standard in § 2255(h). It does not include a small number of motions denied as unnecessary or otherwise not considered under § 2255(h).

In 2023, the year after the Ninth Circuit interpreted § 2244(b)(1) as not erecting an additional barrier to successive § 2255 filings for the same claim, the court docketed for consideration 33 motions for authorization under § 2255(h), fewer than before *Jones*. The number of these motions that included repeated claims was likely far lower, assuming the trends were the same as in the Sixth Circuit (and we have no reason to think otherwise). As there, the removal of § 2244(b)(1) does not appear to have incentivized federal prisoners to re-file claims that had previously been rejected.

The Ninth Circuit summarily denied all but two of the motions, both supplemented by court-appointed counsel and held in abeyance pending decision in a related en banc case. In the few cases in which it was clear from the order that the proposed claim was a repeated *Davis* claim, the court had no trouble relying on the § 2255(h)(2) standard alone to deny authorization. *E.g.*, *Huff v. United States*, No. 23-1222 (9th Cir. Sept. 15, 2023) (denying motion when proposed repeated claim was based on *Davis* but the challenged § 924(c) conviction was based on completed Hobbs Act robbery, still a crime of violence after *Taylor*).

3. In the Fourth Circuit, too, available data indicates that the authorization process without the added barrier of § 2244(b)(1) has not grown less workable or invited a flood of burdensome same-claim filings. While that court also does not routinely set out the history of these cases or explain its reasoning, the court does categorize its motions for authorization to file a second or successive § 2255 as "successive 2255s," making it even easier to identify cases on its PACER

system and review them to compare the overall rate of filings with and without § 2244(b)(1) in the picture.

In 2022, before the Fourth Circuit held in *Graham* that § 2244(b)(1) does not apply in § 2255 cases, federal prisoners filed 98 motions for authorization ultimately considered under § 2255(h). All but one was denied, mostly without government response, and nearly all in a one-page summary order. In a few, as in the other circuits, the court made clear its denial was because the movant had not made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *E.g.*, *In re Bostic*, No. 22-124 (4th Cir. Mar. 17, 2022) (conveying that movant had "no plausible claim for *Davis* relief" because his § 924(c) conviction was based on "substantive Hobbs Act robbery") (citing *In re Thomas*, 988 F.3d 783, 788 (4th Cir. 2021)). The single motion granted from the 2022 docket raised a claim of innocence based on newly discovered evidence under § 2255(h)(1) that had not been presented before.

In 2024, the year after it decided *Graham*, the Fourth Circuit considered 73 motions for authorization under § 2255(h), fewer than before *Graham*. Assuming all trends were the same (again, we have no reason to think otherwise), the number of repeated claims was far fewer. The court summarily denied all but three of the motions, each of which raised a claim based on *Counterman v. Colorado*, 600 U.S. 66 (2023), and was held in abeyance pending disposition of another Fourth Circuit case that would decide whether *Counterman*'s constitutional rule is retroactive. The court has since answered the retroactivity question in the affirmative, so far allowing two of the three proposed § 2255 motions to proceed, including one for a pro se prisoner who presented a handwritten

repeated claim of actual innocence of his threat conviction that had previously been denied in a first § 2255. *In re Chesser*, No. 24-196 (4th Cir. Feb. 28, 2025).

In sum, the rate of repeated claims considered in these three circuits under the standard in § 2255(h) alone, without resort to § 2244(b)(1), has not discernably changed. Courts efficiently dispatch repeated claims under § 2255(h), just as they do claims not previously raised. Most important, they have allowed a small number of federal prisoners to file a second or successive § 2255 raising a repeated claim once it became evident that their claim had potential merit. As Mr. Bowe explains, this is as it should be.

II. Allowing federal prisoners to file petitions for certiorari will not flood the Court with burdensome filings, but will allow needed review in cases of exceptional importance.

A ruling that § 2244(b)(3)(E) does not apply in § 2255 cases is also unlikely to lead to a new or burdensome deluge of petitions for certiorari in this Court. We make this prediction based on reasonable inferences, as direct evidence is not available. Unlike with the removal of the same-claim bar in § 2244(b)(1), we do not have an identifiable cohort of 'before' and 'after' cases. Courts have long thought petitions for rehearing and for certiorari are barred by § 2244(b)(3)(E), so have not entertained them. But in the course of our study of the three circuits that have removed § 2244(b)(1) from the § 2255 process, we found helpful clues in existing § 2255 cases and in analogous contexts from which it can be fairly inferred that removing the jurisdictional bar will not unduly burden this Court.

First, existing § 2255 cases already provide some insight about how federal prisoners will proceed on Mr. Bowe's construction of § 2244(b)(3)(E). As shown by the hundreds of PACER filings we reviewed in the Fourth, Sixth, and Ninth Circuits, only a small number of pro se prisoners denied authorization under § 2255(h) file (or try to file) petitions for rehearing or for certiorari.

For example, pro se federal prisoners in the Sixth Circuit tried to file petitions for rehearing in just eight out of the 93 cases docketed in 2022 and considered under § 2255(h), and just one filed a petition for certiorari. In the Ninth Circuit, one person out of the 33 cases docketed in 2023 and considered under § 2255(h) tried to file a petition for rehearing, and none a petition for certiorari. In the Fourth Circuit, prisoners in just six out of 73 such cases docketed in 2024 tried to file a petition for rehearing and none a petition for certiorari. If their efforts are any guide, it seems unlikely that more than a small proportion of movants will seek certiorari should the Court rule in favor of Mr. Bowe on the jurisdictional question.

We recognize that the efforts of these pro se § 2255 litigants are not a perfect guide. The bar in § 2244(b)(3)(E) might have dissuaded some pro se movants from petitioning for discretionary review. To test that theory, we looked at cases in two other contexts where similar cohorts of mostly uncounseled filers are inarguably free to petition for further appellate review if denied relief.

The first and most obvious analogous cohort is comprised of those individuals who seek a certificate of appealability in the court of appeals from the denial of their § 2255 motion in the district court. These

individuals are most like those seeking authorization under § 2255(h): All are federal prisoners, and all seek § 2255 relief. Most also proceed without counsel in their effort to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2).

Based on our review of cases on Lexis and Westlaw, the Sixth Circuit disposed of around 125 applications for a certificate of appealability in 2022.[7] All but two were denied, and rehearing was sought in 33 cases and granted in one. Certiorari was sought in just 14 cases, denied in all. That same year, the Ninth Circuit ruled on about 150 applications, with certiorari sought and denied in 20 cases. The Fourth Circuit also considered about 150 applications, with certiorari sought and denied in 12 cases. These individuals' limited use of petitions for rehearing and certiorari—even while the range of potential issues is far greater in this broader § 2255 context—offers strong support for the conclusion that certiorari jurisdiction at the authorization stage of second-or-successive § 2255 motions will not lead to a flood of petitions for certiorari.

A second cohort of individuals in analogous circumstances are those seeking an order of mandamus in the court of appeals. We encountered these filers during our deeper dive into the original proceedings docketed in 2022 in the Sixth Circuit, the subject of our closest review given its utility as a case study. We identified 102 petitions for mandamus filed as original proceedings that year, nearly all by pro se petitioners and more than two-thirds by state or federal prisoners or

[7] For this search, we used the search term "certificate of appealability" narrowed further by "2253(c)" and party name "United States."

federal defendants in an ongoing prosecution. Reflecting the strict mandamus standard, the court denied every one of the petitions not otherwise denied as moot in light of district court action. In just seven cases, a pro se prisoner filed a petition for rehearing, one who also filed a petition for certiorari. While we could not review all of the several hundreds of mandamus filings in the Ninth and Fourth Circuits for a given year, we have no reason to believe that these circuits would not show the same trends, as they have throughout.

No one would argue that by allowing petitions for certiorari for these analogous cohorts of mostly unsuccessful filings, Congress has unduly burdened the courts—especially not when allowing review means relief can be granted when warranted. *E.g.*, *Welch v. United States*, 578 U.S. 120 (2016) (Eleventh Circuit erroneously denied certificate of appealability). Jurisdiction in these contexts instead proves that courts are equipped and able to dispose of these requests with little difficulty. There is no reason to think things would be different in the context of motions for authorization under § 2255(h).

At the same time, as Mr. Bowe's case shows, jurisdiction is vitally important to ensure the proper and uniform application of § 2255(h) itself. And in counseled cases, it is our hope the Court's experience bears out federal defenders' commitment to seeking discretionary review only for questions of exceptional importance and in accordance with the rules of this Court and rules of appellate procedure. When such questions do emerge, this Court retains jurisdiction to settle them on a correct interpretation of § 2244(b) and § 2255(h).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

KEITH M. DONOGHUE
SHELLEY M. FITE
Co-Chairs,
Amicus Committee
JUDITH H. MIZNER
PARESH PATEL
CATHI ADINARO SHUSKY
Assistant Federal
Public Defenders
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS

JENNIFER NILES COFFIN *
Assistant Federal Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE
800 S. Gay St., Suite 2400
Knoxville, TN 37929
(865) 637-7979
jennifer_coffin@fd.org

** Counsel of Record*

April 14, 2025