No. 23-1345

IN THE

Supreme Court of the United States

DANNY RICHARD RIVERS,
Petitioner,
v.
BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary

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[1] All parties received timely notice of this brief prior to its filing. No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, or its counsel made such a contribution.

professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL is keenly interested in protecting the constitutionally guaranteed writ of habeas corpus, and it has filed amicus briefs in a number of cases relating to the scope of that writ, including *Banister v. Davis*, 140 S.Ct. 1698 (2020), *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Jones v. Hendrix*, 599 U.S. 465 (2023).

The Montana Innocence Project is a member of the Innocence Network, an association of 69 independent organizations that provide *pro bono* representation to people with claims of innocence. Founded in 2008, the Montana Innocence Project's self-proclaimed mission is to "free the innocent and unjustly incarcerated, and advocate for systems of justice that are accurate, accountable and fair for all." Drawing on lessons from cases in which the system convicted innocent persons, the Montana Innocence Project seeks to achieve this mission through a combination of advocacy, *pro bono* legal representation, and education. As such, it has a strong interest in insuring the correct development of state post-conviction and federal habeas law.

Amici curiae, the Federal Public Defenders of the District of Neveda and the District of Montana run Federal Public Defender Organizations established under 18 U.S.C. § 3006A(g)(2)(A). Their primary role is to provide the highest quality legal representation to indigent federal defendants and federal habeas petitioners in their districts.

Amici have a significant interest in this case. The Ninth Circuit periodically appoints their offices to represent non-capital habeas petitioners on appeal in cases where the petitioners were *pro se* in the district court below. In the instant case, the Fifth Circuit agreed with the Ninth Circuit and other sister circuits that an attempt to amend a federal habeas petition, made after the district court enters a judgment on the merits but before the court of appeals resolves an appeal, is necessarily a disguised second or successive petition under 28 U.S.C. § 2242(b). These rulings restrict their ability to zealously advocate for their appellate court-appointed clients, by precluding them from pursuing necessary remands to the district court even where the client lacked counsel in the district court. They respectfully suggest review is necessary to correct the erroneous ruling from the Fifth Circuit below, the Ninth Circuit and other sister circuits.

SUMMARY OF ARGUMENT

In 1996, following the Oklahoma City bombing, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) which, among other things, includes a number of substantive and procedural hurdles that petitioners must surmount before they can obtain habeas relief in federal court.

Among these hurdles are a set of strict conditions that must be met before a prisoner can file a "second or successive" petition.

Under the AEDPA, a federal court must dismiss claims already brought in a prior habeas petition if they are raised in a "second or successive" petition. *See* 28 U.S.C. § 2244(b)(1). With respect to a claim that was not raised in a previous petition, a prisoner must show either that: (1) the claim relies on a new rule of constitutional law that was previously unavailable and has been made retroactive by the Supreme Court or (2) the factual predicate for the claim could not have been discovered earlier through due diligence and the facts underlying the claim establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the prisoner guilty. *See* 28 U.S.C. § 2244(b)(2); *see also,* 28 U.S.C. § 2255(h).[2]

Despite these strict conditions, the term "second or successive" is left undefined by the AEDPA. *Panetti v. Quarterman,* 551 U.S. 930 (2007). It is nevertheless clear that "a petition will not be deemed 'second or successive' unless, at a minimum, an earlier filed petition has been finally adjudicated." *Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016). This lack

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[2] 28 U.S.C. § 2255(h) sets forth the second or successive bar for federal, as opposed to state, habeas petitions. It uses materially identical language and is analogous to § 2244(b)(2)(B), the statute that governs successive habeas petitions challenging state convictions, like that at issue here. Therefore, this brief will at times refer to cases involving § 2255(h).

of definition has played an important role in subsequent court decisions and has led to a circuit split over when collateral review ends for purposes of subsequent motions and other filings.

The circuits are in general agreement that a motion to amend a habeas petition that is still pending in the district court is not itself a second or successive petition. *See, e.g., Johnson v. United States*, 196 F.3d 802, 804 (7th Cir. 1999); *Vitrano v. United States*, 643 F.3d 229, 233-34 (7th Cir. 2011); *Woods v. Carey*, 525 F.3d 886, 890 n.3 (9th Cir. 2008). There is, however, sharp disagreement as to whether a petitioner can amend his petition after it has been denied and is on appeal. Several circuits, including the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh – have determined that a habeas petition that has been denied on the merits in district court has been finally adjudicated and, therefore, any attempt to amend – even during the appellate process – will be deemed a second or successive petition that must overcome the hurdles set forth in § 2244(b)(2) or § 2255(h). *See Rivers v. Lumpkin*, 99 F.4th 216 (5th Cir. 2024); *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006); *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020); *United States v. Terrell*, 141 F. App'x 849 (11th Cir. 2005). Two circuits, the Second and the Third, allow petitioners to amend their petitions during the appellate process. *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002); *United States v. Santerelli*, 929 F.3d 95 (3rd Cir. 2019).[3] And one circuit, the Tenth,

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[3] As stated in the petitioner's petition for writ of certiorari, the rule in the Third Circuit is somewhat

appears to follow its own rule. *United States v. Espinoza-Sanchez*, 235 F.3d 501 (10th Cir. 2000).

In this case, *amici* agree with the Petitioner, Danny Rivers, and submit that this Court should grant certiorari to resolve this circuit split. In doing so, it should issue a decision adopting the rationale of the Second Circuit in *Ching*. In adopting the rationale of *Ching*, the Court will save the time and resources of the government and the courts. Such a rule will also ensure that petitioners will have one full opportunity to challenge their convictions and sentences during federal post-conviction.

ARGUMENT

I. Given the costs incurred by both the government and petitioners, this Court should define the term second or successive to exclude habeas applications that are filed while a petitioner's initial petition is pending in either the district court or on appeal.

Congress passed the AEDPA with the purpose of "further[ing] the principles of comity, finality, and federalism." *Williams v.* Taylor, 529 U.S. 420, 436 (2000). With these goals in mind, it included a number of restrictions in the act that are designed, in large

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different than that adopted in *Ching*. A petitioner's right to amend his petition in the Third Circuit depends upon the outcome of his appeal. *Santerelli*, 929 F.3d at 104.

part, to limit the number of habeas filings by state and federal prisoners. In an effort to achieve this goal, Congress enacted, among other provisions, strict requirements that must be satisfied before a second or successive application for federal post-conviction relief can be granted. *See* 28 U.S.C. §§ 2244(b) and 2255(h).

Through passage of 28 U.S.C. §§ 2244(b) and 2255(h) Congress sought to limit prisoners' ability to "abuse the writ" by filing multiple or, as they are referred to in habeas parlance, "second or successive" habeas petitions. Despite this concern, neither Congress nor the courts have fully defined the phrase "second or successive." Without a clear cut definition, the phrase has been referred to as a "term of art," that is not self-defining. *Banister v. Davis*, 140 S.Ct. 1698, 1705 (2020)(quoting *Slack v. McDonald*, 529 U.S. 473, 486 (2000); *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007)). That being said, it is generally acknowledged that the phrase does not refer to all habeas petitions that happen to be filed after an initial application. *Magwood v. Patterson*, 561 U.S. 320, 332 (2010); *Panetti*, 551 U.S. at 944. Instead, it takes its meaning from "historical habeas doctrine and practice" predating the enactment of the AEDPA. *Banister*, 140 S.Ct. at 1705 (citing *Slack*, 529 U.S. at 486; *Panetti*, 551 U.S. at 944). In seeking to apply the term, courts have usually relied on the pre-AEDPA abuse-of-the-writ doctrine. Under that doctrine, a numerically second petition is "second or successive" if it raises a claim that could have been brought in an initial petition, but was not, either through deliberate abandonment or inexcusable neglect.

As amended by the AEDPA, the provisions of 28 U.S.C. §§ 2244(b) and 2255(h) "codified the longstanding abuse-of-the writ doctrine." *Boumediene*

v. Bush, 553 U.S. 723, 774 (2008)(citing *Felker v. Turbin*, 518 U.S. 651, 664 (1996); *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). The limits on entertaining a second or successive habeas petition, however, are more stringent under the AEDPA than before its passage. *Banister*, 140 S.Ct. at 1707. Prior to the AEDPA, the government bore the burden of pleading abuse of the writ. To meet this burden, the government had to show, with "clarity and particularity," the petitioner's prior writ history, identify the claims that appear for the first time, and allege that the petitioner abused the writ. Abuse of the writ could be established by showing that the petitioner failed to raise a claim through "inexcusable neglect." Once the government satisfied its burden, the burden to disprove abuse shifted to the petitioner. To excuse his failure, the petitioner had to show cause – *e.g.*, that he was impeded by some objective factor external to his defense, such as government interference or the reasonable unavailability of the factual basis for the claim. In addition to establishing cause, the petitioner had to establish prejudice resulting from the errors complained of. *McCleskey*, 499 U.S. at 489-96.

During the latter half of the twentieth century, the convergence of judicial trends and societal changes led to a large increase in the number of habeas petitions filed in federal courts each year. In response to these changes, Congress passed the AEDPA, which among other "fixes" changed the rules regarding the filing of second or successive habeas petitions. Under the AEDPA, specifically 28 U.S.C. § 2244(b)(1), a claim that was presented in a prior petition "shall be dismissed." Subsection (b)(2) of the statute deals with new claims that were not presented in a prior petition.

It provides that such claims shall be dismissed unless (1) the claim relies on a new rule of constitutional law that has been made retroactive by the Supreme Court and was previously unavailable or (2) the factual predicate of the claim could not have been discovered previously through due diligence and the facts underlying the claim establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the petitioner guilty.

In addition to these substantive changes, § 2244 made substantial changes to the procedure that must be followed before a successive petition can be entertained. Section 2244(b)(3) eliminated the government's burden of pleading abuse of the writ with a cumbersome procedure that requires the petitioner to obtain permission to file a subsequent petition by filing an application in the appropriate court of appeals that makes a prima facie showing of compliance with the statute's standards for successive petitions. If the petitioner succeeds in the appellate court, his petition is transmitted to the district court, which is charged with making a second, independent review of the petition to ensure that his claims meet the requirements of the statute. *See* 28 U.S.C. § 2244(b)(4).

Needless to say, the present version of § 2244(b) makes it extremely difficult, if not impossible, for petitioners to bring meritorious constitutional claims in a successive habeas petition. *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 Conn. L. Rev. 919, 942 n. 4 (2001) ("[b]y enacting Section 2244(b)(2), Congress has created the illusion that the

federal courts are willing to consider successor petitions in cases of innocence, while insuring at the same time that no inmate will be able to satisfy its stringent demands."). Indeed, some claims that affect the fairness of a petitioner's trial cannot be raised in a second or successive petition because they are not directly relevant to guilt or innocence. *See, e.g., Outlaw v. Sternes*, 223 F.3d 453, 454-55 (7th Cir. 2000)(holding that evidence of judicial bias did not satisfy § 2244(b)(2)(B) in part because it was not relevant to the prisoner's innocence); *Villafuerta v. Stewart*, 142 F.3d 1124, 1126 (9th Cir. 1998)(holding that evidence of judicial bias does not satisfy § 2244(b)(2)(B) because it "does not add to or subtract from the evidence of . . . guilt"). A claim based on newly discovered evidence that the petitioner's jury venire was selected in violation of the Sixth Amendment, or that the petitioner was singled out for prosecution because of her race or gender, also would not qualify. *See* Wayne R. LaFave, Jerold H. Israel, et al., 7 Criminal Procedure § 28.5(d) (4th ed. 2015).

In addition to the trial errors mentioned above, the strictures of § 2244 prevent petitioners from bringing ineffective assistance claims that, although viable in an initial habeas petition, are not relevant to guilt or innocence and therefore cannot be raised in a successive petition. *See In re McFadden*, 826 F.3d 706, 708 (4th Cir. 2016)(prisoner was not entitled to file a second or successive petition based on newly-discovered evidence of a favorable plea offer that was not communicated to him by his attorney absent evidence that, but for counsel's inaction, no reasonable factfinder would have found him guilty; the evidence petitioner offered, "a supposed plea offer, would simply have no bearing on the deliberations of a 'reasonable

factfinder' regarding [petitioner's] innocence or guilt"); *In re Bryan*, 244 F.3d 803, 805 (11th Cir. 2000)(ruling that § 2244(b)(2)(B) was not satisfied because evidence that defense counsel was an active alcoholic did not call into question the jury's determination of guilt).

The language of § 2244(b)(2)(B)(ii) – which requires a showing that "no reasonable factfinder would have found the applicant guilty of the underlying offense" -- also excludes claims involving sentencing errors. *See, e.g., Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997)("We conclude that a successive motion under 28 U.S.C. § 2255 (and presumably a successive petition for habeas corpus under section 2254, governing habeas corpus for state prisoners, which has materially identical language) may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence."); *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997)(§ 2244(b)(2)(B) forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence"); *In re Webster*, 605 F.3d 256, 258-59 (5th Cir. 2010).

Section 2244(b)(2)(A), which allows for the filing of a second or successive petition that is based on a "new rule of constitutional law" does not apply to a petitioner who is legally innocent because the statute under which he has been convicted is interpreted to exclude his conduct. *Jones v. Hendrix*, 599 U.S. 465, 471 (2023)(noting that a claim of statutory interpretation is neither newly discovered evidence nor a rule of constitutional law that can satisfy § 2255(h)'s gateway conditions for a second or successive §2255 motion); *In re Blackshire*, 98 F.3d 1293, 1294 (11th Cir. 1996)(rejecting petitioner's argument that *Bailey v. United States*, 516 U.S. 137 (1995), expressed a new

rule of constitutional law because it merely interpreted a substantive criminal statute using rules of statutory construction); *In re King*, 697 F.3d 1189 (5th Cir. 2012)(denying request to file second or successive 28 U.S.C. § 2254 petition because petitioner could not make a prima facie showing that his case involved "a new rule of constitutional law"); *United States v. Reyes*, 358 F.3d 1095 (9th Cir. 2004).

One can easily imagine a scenario where the Supreme Court issues a decision that interprets a statute that renders a petitioner innocent while he is appealing the denial of his habeas petition. Although the Supreme Court's decision may render his conduct non-criminal, he would have no ability to challenge his conviction. Under the rule adopted by the Fifth Circuit in this case, he could not file an amended petition because it would be deemed successive and it would be dismissed for lack of jurisdiction. And, he could not file a successful application to proceed with a second or successive petition in the circuit court because, although he is legally innocent, his claim is not grounded in a new rule of constitutional law. As a result, although innocent, the petitioner would be forced to carry out his time in prison and serve out his sentence.

Other claims – such as *Brady* and most ineffective assistance claims – can be brought in a successive petition.[4] But to prevail on a successive petition, a prisoner must satisfy a much more demanding prejudice standard than that required to obtain relief on an initial petition. To establish a *Brady* violation, for example, a petitioner must show that (1)

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[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

favorable evidence was suppressed by the government, and (2) the evidence was material to the guilt or innocence of the defendant. Evidence is favorable if it is exculpatory or impeaches a prosecution witness and suppression occurs when favorable evidence known to the police or the prosecution is not disclosed, either willfully or inadvertently. Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different." A reasonable probability of a different result exists when the government's evidentiary suppression undermines confidence in the outcome of a trial. *United States v. Lopez*, 577 F.3d 1053 (9th Cir. 2009).

Ineffective assistance of counsel claims involve the same test for prejudice as that articulated in *Brady* and its progeny. In order to establish a claim of ineffective assistance of counsel, a petitioner must show (1) that his lawyer's performance "fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The standards imposed by *Brady* and *Strickland* can be difficult to meet. But, if raised in a second or successive petition, it becomes exponentially more difficult to achieve success on such claims. Under both § 2254(b)(2) and § 2255(h), a petitioner filing a successive petition needs to establish by clear and convincing evidence that, but for the constitutional violation, no reasonable factfinder would have found

him guilty. As a result, federal courts are unable to resolve an entire subset of *Brady* and ineffective assistance claims – those where the petitioner can establish that his constitutional injury establishes a reasonable probability of a different result and is therefore material under *Brady* or meets the prejudice test in *Strickland*, but do not show by clear and convincing evidence that, but for the constitutional injury, no reasonable juror would have voted to convict. *Lopez*, 577 F.3d at 1064.

This result becomes all the more problematic when one considers the fact that a *Brady* violation necessarily involves the concealment – sometimes purposely – of exculpatory evidence. An unscrupulous prosecutor can prevent a petitioner from presenting a viable *Brady* claim by simply withholding favorable evidence throughout the post-conviction process. In the event it is discovered after the first petition has been fully adjudicated, the chances of success on even a meritorious *Brady* claim is, in most cases, unlikely. The same can be said for ineffective assistance claims where, on occasion, unethical defense lawyers conceal evidence of their unprofessional performance. A petitioner forced to file a successive petition to challenge that lawyer's performance faces a nearly impossible task of showing by clear and convincing evidence that but for the attorney's ineffective representation no reasonable factfinder would have found him guilty. *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015); *United States v. Buenrostro*, 638 F.3d 720 (9th Cir. 2011).

In sum, the restrictions placed on second or successive habeas petitions come at a high cost. For the government and the courts, the cumbersome

process that must be undertaken before a successive petition can be entertained results in delay, piecemeal litigation, and the unnecessary expenditure of time and resources. The costs to petitioners are even greater in that the standards that must be met to file a successive petition are virtually impossible to meet. They also work to prevent the filing of claims that, although meritorious, cannot be raised in a successive petition. These costs may be justified in cases where the petitioner has had "one bite of the apple" and has fully litigated an initial habeas petition. But they are costly and disruptive in cases where the petitioner attempts to amend a pending petition, even if the petition is pending appeal. To avoid this result, this Court should hold that a petition is not second or successive if it is filed while the initial petition is pending in either the district court or on appeal.

II. Habeas petitioners, who are often poorly educated and proceeding *pro se*, lack the expertise and resources necessary to uncover legal and factual support for a claim of actual or legal innocence. This Court should therefore overrule the Fifth Circuit and adopt the holdings of the Third and Second Circuit in order to give them a greater opportunity to bring viable claims challenging their convictions and sentences.

Exact numbers are hard to come by, but it is nevertheless a hard truth that post-conviction litigants

are rarely afforded counsel. According to one study conducted by Vanderbilt University and the National Center for State Courts – which is admittedly somewhat dated – 95% of its sample of non-capital federal habeas petitioners were *pro se* at the beginning of their case.[5] Of the 5% that did have a lawyer at the beginning of their case, half of the attorneys were retained and four were appointed. Only 74 of the petitioners who started *pro se* received counsel at some point in the case. Some, as is common in the Ninth Circuit, likely received appointed counsel on appeal. But overall, 92.3% remained *pro se* throughout the litigation of their case. [6] *See* Vanderbilt Study at 23.

These numbers are reflective of the practice in state courts as few states provide for a right to counsel during the post-conviction process in non-capital cases. Those that do often appoint counsel only when certain conditions are met, such as when an evidentiary hearing is ordered or a court determines that the petitioner's claims have potential merit. *See, e.g.,* Nev. Rev. Stat. § 34.750(1); Mont. Code Ann. § 46-8-104; Idaho Code § 15:16; Haw. R. Pen. P. 40(i).

Without "the guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), *pro se* litigants are often faced with an impossible task in litigating their

[5] Available at https://www.prisonlegalnews.org/media/publications/habeas_litigation_in_federal_courts_vanderbilt_study_2007.pdf

[6] The sample size of the study consisted of 2,271 non-capital petitioners who had challenged their state court convictions. *Id.* at 23.

post-conviction claims. Claims of factual and legal innocence require resources and legal knowledge that most prisoners – who are plagued by poverty, low rates of literacy, high rates of learning disabilities, and mental illness – simply do not possess.

By their nature, factual innocence claims are fact intensive. In addition to examining the record evidence, litigating such claims often requires petitioners to gather and consider additional evidence in the form of subsequently discovered facts. Factual innocence claims may also involve the evaluation of subsequent scientific research on the validity of forensic evidence and other technical matters. *See, e.g.,* Dana Difilippo, "Appeals court agrees shaken baby syndrome is 'junk science' in some cases," *The New Jersey Monitor* (Sept. 13, 2023).[7] Regardless how they come about, factual innocence claims involve collecting additional evidence and assessing how and whether it discounts prior evidence of the petitioner's guilt.

An indigent, *pro se* habeas petitioner is in a poor position to establish actual innocence. For one, incarceration severely hampers his ability to investigate his case, track down witnesses, and collect evidence, which is often under the control of persons unwilling to turn it over. New scientific research bearing on his claim of innocence is probably unavailable in a prison setting and being indigent, the prisoner would be precluded from presenting such

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[7] Available at https://newjerseymonitor.com/2023/09/13/appeals-court-agrees-shaken-baby-syndrome-is-junk-science-in-some-cases/

evidence in an understandable way without the assistance of an expert.

Claims of legal innocence present problems of their own for *pro se* petitioners. In order to evaluate a claim of legal innocence, it is often necessary to review the statute of conviction to determine whether the petitioner's conduct, as established at trial or in a plea agreement, was actually prohibited by law. They may also require an in-depth knowledge of constitutional law in cases where a defendant is convicted of conduct that cannot be constitutionally criminalized. Untrained in the law, a *pro se* petitioner may not initially appreciate the significance of a new case bearing on his legal innocence.

As a result of these impediments, *pro se* litigants may not discover a viable claim of innocence – or other types of claims that have a bearing on innocence, such as a *Brady* or ineffective assistance of counsel claim – until late into the litigation. Sometimes these claims are concealed from the petitioner by unethical prosecutors or defense lawyers. *See, e.g., In re McFadden*, 826 F.3d 706, 708 (4th Cir. 2016); *United States v. Lopez*, 557 F.3d 1053, 1064 (9th Cir. 2009). In such cases, the petitioner should be allowed to amend his petition, even if it has been denied by the district court, so long as it remains pending on appeal. Otherwise, due to the strict requirements attendant to second or successive petitions, the petitioner may lose his chance to establish his innocence and escape an unjust prison sentence. *Jones v. Hendrix*, 599 U.S. 465, 470(2023) (the statutory holding in *Rehaif v. United States*, 139 S.Ct. 2191 (2023), did not satisfy § 2255(h)'s gateway conditions for a second or successive 28 U.S.C. § 2255 motion).

III. A ruling in petitioner's favor will not result in a flood of late and abusive litigation.

A petitioner seeking to amend his habeas petition after it has been denied by the district court does not face an easy task and there are guardrails in place that prevent the filing of frivolous requests. The federal rules governing the amendment process provide a safeguard against vexatious litigation and abuse of the process.

To begin with, any new claim deemed an amendment to the original petition must satisfy the demanding relation-back requirement of Federal Rule of Civil Procedure 15(c)(2), as interpreted by the Supreme Court in *Mayle v. Felix*, 545 U.S. 644 (2005).[8] In *Mayle*, the Court held that, under Rule 15(c)(2), a petitioner can amend his habeas petition to add claims after the statute of limitations has expired only if the claims he seeks to add "relate back" to his original petition. An amendment relates back to the original petition when it "asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." In light of the goals and special rules that govern habeas proceedings, the Court held that the relation back provisions of Rule 15(c)(2) should be interpreted narrowly in § 2254 and § 2255 cases. Amendment in these proceedings are allowed only when both the "original and amended petitions state claims that are

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[8] Rule 15(c)(2) has been renumbered and is now codified at Rule 15(c)(1)(B).

tied to a common core of operative facts." *Mayle*, 545 U.S. at 664.

Further, although amendments to pleadings should be liberally permitted, courts still retain broad discretion to deny leave to amend in cases where the petitioner unduly delayed raising the claim, the request for leave to amend is made in bad faith or with a dilatory motive, the amendment would be futile, or the respondent would suffer undue prejudice. *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2016). In light of this discretion, courts are well-equipped to deny requests to amend when the petitioner seeks to add a claim that is meritless, procedurally defaulted, unexhausted, or cannot meet the demanding requirements of 28 U.S.C. § 2254(d).

Beyond the protections afforded by Rule 15, a petitioner seeking to amend a petition after it has been denied and is on appeal will likely have to seek an indicative ruling and a remand under Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1. The process outlined by these rules already provides multiple opportunities for courts to weed out frivolous or abusive requests. In order to seek a limited remand under these rules, the petitioner must convince both the district court and the court of appeals that remand is appropriate and is not sought for improper reasons.

The procedural and legal gate-keeping provisions are sufficient to ensure that courts will not be overwhelmed by abusive litigation tactics perpetrated by habeas petitioners. But beyond the requirements and restrictions set forth in the federal rules, there is statistical evidence that the rule urged

by the petitioner will not result in an explosion of frivolous requests for amendment.

As noted, the Second Circuit issued its decision in *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002), which allows petitioners to amend a habeas petition after it has been denied but is on appeal. Its experience over the past 22 years indicates that it has issued relevant orders in no more than two dozen cases.[9] The dearth of requests to amend supports the conclusion that petitioners are not taking advantage of *Ching* by seeking relief for purely vexatious purposes. Instead, it appears that most petitioners simply go through the appeal process; when they do seek to return to the district court, it is likely that they do so because it is necessary to properly litigate their case. Even in the infrequent event that a petitioner does attempt to abuse the process, there are a number of gatekeeping provisions that can be invoked to weed out his abusive request.

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[9] This estimate was reached by searching Second Circuit dockets through the docket search functions offered by Westlaw and Lexis. For example, a Westlaw Second Circuit docket search with the terms "adv: (habeas or prisoner) & Ching & remand" returns 10 results. An equivalent search in Lexis returns 17 results. A Westlaw search with the terms "adv: habeas & (remand! /p "motion to amend")" returns 24 results. An equivalent search in Lexis returns 16 results. These search results are potentially over or underinclusive and are intended to provide a general sense of how often the issue may recur.

CONCLUSION

Amici respectfully urge the Court to grant certiorari to consider the important issues in this case.

Respectfully submitted,

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