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 Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

This brief is submitted on behalf of the National Association of Federal Defenders ("NAFD") and the National Association of Criminal Defense Lawyers ("NACDL") as amici 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 and petitioners in federal court, including those seeking collateral review under 28 U.S.C. §§ 2254, 2255, and 2241 where the federal court has appointed counsel as a discretionary matter under 18 U.S.C. § 3006A(a)(2)(B).

NAFD files amicus briefs regularly, when we have special knowledge regarding a topic that would benefit the Court. And NAFD's members 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), regarding the scope of § 2255(e) and use of the habeas remedy at § 2241.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for any party authored this brief in whole or in part, and no entity or person other than amici curiae, its members, and its counsel made any monetary contribution toward the preparation and submission of this brief.

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 many cases relating to the scope of that writ, including *Jones v. Hendrix*, 599 U.S. 465 (2023), *Banister v. Davis*, 590 U.S. 504 (2020), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

SUMMARY OF ARGUMENT

This case is about a habeas petitioner's[2] ability to litigate all viable claims in a single proceeding. The dispute is whether, if the district court has denied a first habeas petition and an appeal is pending, the petitioner may litigate a motion to supplement or amend the claims in the petition, or whether the motion is an improper second or successive petition under 28 U.S.C. § 2244(b).

A mid-appeal amendment request is not a second or successive petition. "[A]ppeals from the habeas court's judgment . . . are not second or successive; rather, they are further iterations of the first habeas application." *Banister v. Davis*, 590 U.S. 504, 512 (2020). If the district court indicates a mid-appeal amendment request has merit under Civil Rule 62.1, and if the appellate court remands for consideration of the motion under Appellate Rule 12.1, the limited remand is a mere offshoot of the original appeal itself. *See* Appellate Rule 12.1 ("[T]he court of appeals may remand for further proceedings but retains jurisdiction."). So, logically, if the entire appeal is part of the first habeas application, then a mid-appeal amendment request and a corresponding limited remand likewise remain part of the first application.

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[2] A pleading by a state prisoner under 28 U.S.C. § 2254 is styled as a habeas petition. A pleading by a federal prisoner under 28 U.S.C. § 2255 is styled as a motion. The question presented implicates both proceedings. For convenience, this brief refers to habeas petitions as opposed to § 2255 motions, but the arguments apply to both proceedings.

The decision below erroneously applied § 2244(b) to this mid-appeal amendment procedure. The applicable statute is 28 U.S.C. § 2242, not § 2244(b). *See* Pet. Br. at 16-25. In any event, § 2244(b) does not apply while the initial habeas appeal remains pending. *Id.* at 25-41. That statute precludes "collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders v. United States*, 373 U.S. 1, 18 (1963); *cf. Banister*, 590 U.S. at 511-13 (explaining the Court's methodology for interpreting the statute). As our experience shows, mid-appeal amendment requests are not vexatious; rather, they are made in good faith for reasons consistent with the "equitable principles" underlying § 2244(b). *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

These mid-appeal motions are a rarely invoked but vital tool. It is highly unusual to pursue this procedure when an attorney represents a petitioner both in the district court and on appeal. The procedure is more likely to be necessary when the petitioner was pro se in the district court and secures counsel for the first time on appeal, although strategic considerations may dissuade attorneys from requesting amendment in most cases. *See* Pet. Br. at 44-45. But in exceptional cases—typically, cases where pro se litigants neglected to plead meritorious legal theories or develop critical facts through no fault of their own, and where the procedural rules otherwise allow the district court to consider those theories or facts—the procedure may be necessary to ensure petitioners receive "one full opportunity to seek collateral review." *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.).

Although mid-appeal amendment requests are typically brought in good faith, it's conceivable a pro se petitioner (or an attorney) might occasionally file such a motion in improper situations. But in these unusual cases, the existing rules give courts ample discretion to quickly deny those requests. *See* Civil Rule 62.1(a) (allowing the district court to "defer" or "deny" the motion); Appellate Rule 12.1(b) (stating that if the district court issues a favorable indicative ruling, the appellate court "may," not must, order a remand). Because many mid-appeal amendment requests are at least arguably valid, and because courts can easily resolve the requests that are not, the specter of baseless motions is not a compelling consideration when defining the scope of the second or successive bar.

Without this procedure, a wide swath of claims—some implicating innocence, some implicating core constitutional rights—will simply fail by default, because so few types of second or successive claims are eligible for authorization under § 2244(b). They will therefore never be considered on the merits, even though the petitioner successfully unearthed them before the first habeas case became final, and even though there is a generally applicable procedure for situations like this.

Given these "equitable principles," *Felker*, 518 U.S. at 664, a mid-appeal amendment request remains part of the petitioner's initial habeas application and does not amount to a "vex[atious]" second or successive petition in disguise, *Sanders*, 373 U.S. at 18. The Court should retain this narrow but critical path to review.

ARGUMENT

I. Petitioners will pursue mid-appeal amendments only in rare circumstances.

Under the generally applicable civil and appellate rules, a litigant whose case is pending on appeal may file a motion, such as a Civil Rule 15 motion for leave to amend or supplement a pleading, in the district court and then seek a limited remand from the appellate court. *See* Pet. Br. at 17-22. Although the district court cannot grant certain motions because the court of appeals has jurisdiction, Civil Rule 62.1(a) allows the district court to defer those motions, deny them, or issue an indicative ruling suggesting the motion has merit. If the district court issues a favorable indicative ruling, Appellate Rule 12.1(b) gives the appellate court discretion to remand so the district court can resolve the motion.

Although this mid-appeal amendment procedure provides an important stopgap in habeas cases, its use will be rare, both in cases where the petitioner had counsel in the district court and where counsel is appointed or retained for the first time on appeal. In either setting, attorneys are very unlikely to seek a mid-appeal amendment in the average case. Rather, attorneys will resort to the process only when the amendment is essential for the litigation. The procedure is therefore a limited tool—regardless of when (or if) counsel gets involved in the case. Even if pro se petitioners (or some attorneys) file the occasional improper request, courts have wide discretion to deny those requests. The mid-appeal amendment procedure therefore is not a likely target for abuse.

A. When the petitioner had counsel in the district court, counsel is unlikely to seek to amend on appeal absent unexpected developments.

In cases where an attorney represented a petitioner in the district court, it's unlikely an appellate lawyer will seek to amend the habeas petition. Rather, attorneys front-load their work by focusing on issue-spotting and fact-development at the initial stages of the district court litigation—not during the appeal. By the time of an appeal, only the strongest issues remain, and attorneys will not divert the appellate court's attention from those issues by way of a mid-appeal amendment request unless unusual and compelling circumstances exist.

If an attorney represents a petitioner in the district court, the attorney will typically file a counseled petition as one of the first steps in the case. *See, e.g.*, *Robertson v. Williams, et al.*, No. 2:24-cv-1821-RFB-DJA, 2024 WL 5294607, at *2 (D. Nev. Dec. 4, 2024) (provisionally appointing counsel and expressing an intent to allow counsel to file an amended petition). The counseled petition identifies the specific claims for relief and the facts supporting those claims. Filing the counseled petition is a critical juncture in the case, and attorneys have a professional obligation to ensure the petition raises the strongest possible claims and all the relevant facts necessary to support those claims.

When applying best practices, the process of identifying claims and developing facts can be laborious and involves multiple steps.

At the outset, attorneys typically assemble and review the prior records in the court file, including pleadings, trial transcripts, trial exhibits, and other material. Attorneys also attempt to obtain and review prior counsel's file, including documents produced before trial by the prosecution, correspondence between prior counsel and the client, and other relevant information.

Following this review, attorneys identify the universe of potential claims that were raised in the prior proceedings, including written motions, oral trial objections, and issues raised on appeal (or prior collateral review proceedings). Attorneys also attempt to issue-spot claims that were never identified in the prior proceedings.

The initial work sometimes includes investigation. For example, if habeas counsel suspects trial counsel neglected to call a potentially exculpatory alibi witness, habeas counsel may attempt to interview that witness to support an alibi-related trial-counsel-ineffectiveness claim under *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g.*, *Upshaw v. Stephenson*, 97 F.4th 365, 371-72 (6th Cir. 2024) ("Many courts . . . have found ineffective assistance . . . where a defendant's trial counsel . . . fails adequately to investigate potential alibi witnesses.") (cleaned up).

Attorneys may also consult with experts. For example, if habeas counsel has reason to believe the petitioner was convicted based on faulty forensic evidence, counsel may retain an expert to provide an opinion about that evidence. *See, e.g.*, *Gimenez v.*

Ochoa, 821 F.3d 1136, 1145 (9th Cir. 2016) (recognizing a due process claim involving faulty forensic evidence); *see also Hanson v. Baker*, 766 F. App'x 501 (9th Cir. 2019) (affirming a grant of relief under *Gimenez* involving scientifically erroneous trial testimony about shaken baby syndrome).

Once the attorney's research, review, and fact development is complete, the attorney is ethically obligated to make strategic decisions about what claims to raise and facts to include in the counseled petition. The strategy depends on many factors, including (but not limited to):

- Whether time remains on the statute of limitations such that the claim will be timely, *see* 28 U.S.C. § 2244(d); if not, whether the claim will relate back to the filing date of a timely pro se petition, *see Mayle v. Felix*, 545 U.S. 644 (2005); and if not, whether an exception to the statute of limitations applies, *see McQuiggin v. Perkins*, 569 U.S. 383 (2013) (discussing innocence); *Holland v. Florida*, 560 U.S. 631 (2010) (discussing equitable tolling).

- Whether the claim is exhausted, *see* 28 U.S.C. § 2254(b); and if not, whether the attorney could plausibly seek a stay from the federal district court to litigate the claim in state court in the first instance, *see Rhines v. Weber*, 544 U.S. 269 (2005).

- Whether the state court rejected a claim for a state law procedural reason, *see Coleman v. Thompson*, 501 U.S. 722 (1991); and if so, whether the procedural default doctrine (or an exception) applies,

see, e.g., *Strickler v. Greene*, 527 U.S. 263 (1999) (discussing the prosecutor's suppression of evidence as a basis to avoid a procedural default).

- Whether additional fact development is permissible in federal court, *see* 28 U.S.C. § 2254(e)(2); *Shinn v. Ramirez*, 596 U.S. 366 (2022) (discussing § 2254(e)(2)); *cf. Shoop v. Twyford*, 596 U.S. 811 (2022) (similar).

- Whether, if the state court adjudicated the claim on the merits, the state court decision is likely to be entitled to deference, *see* 28 U.S.C. § 2254(d); *see also, e.g.*, *Harrington v. Richter*, 562 U.S. 86 (2011) (discussing Section 2254(d)(1)).

- Whether the claim has merit, including whether the error was harmful, *see Brecht v. Abrahamson*, 507 U.S. 619 (1993).

The overarching goal for the counseled petition is to set out a group of claims with the highest likelihood of success both procedurally and on the merits. *Cf. Jones v. Barnes*, 463 U.S. 745, 752 (1983) ("There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.").

Once habeas counsel files a counseled petition, counsel is unlikely absent unexpected circumstances to seek leave to amend to add further claims. Counsel has already invested substantial time and effort into working up the case and has made strategic decisions about what claims to include. Counsel is unlikely to revisit those decisions without compelling

circumstances. Indeed, if an attorney seeks leave to amend simply due to a perceived prior tactical error, district courts may well deny leave. *Cf. Melendez v. Neven*, No. 2:15-cv-2076-JAD-VCF, 2020 WL 1434437, at *2 (D. Nev. Mar. 24, 2020) ("Counsel's request does not demonstrate good cause for a do-over in strategy at this late stage. The arguments and evidence upon which he relies are not new as they were all available to his predecessor. . . . Where the only new development is an internal staffing change, the interests of justice do not support additional briefing.")

Following further proceedings, the district court will either grant, deny, or dismiss the petition. If the court declines to grant relief, it will simultaneously consider whether to grant a certificate of appealability on one or more claims or procedural issues. *See* 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In our experience, when a district court grants relief or a certificate of appealability, it does so only for a limited number of claims; those claims typically represent the best (or among the best) issues in the case.

If the district court denies relief and further denies a certificate of appealability, and if the petitioner wants to appeal, the petitioner must seek a certificate of appealability from the court of appeals. Counseled applications in the courts of appeals likewise typically feature a limited number of proposed claims for certification, selected based on their relative strength. *See Jones*, 463 U.S. at 752 ("Most cases present only one, two, or three significant questions.") (cleaned up).

Thus, by the time the case reaches a full appeal—either because the warden is appealing a grant of relief, or because the district or appellate court has issued a certificate of appealability—the case has gone through a substantial winnowing process. Counsel has frontloaded the work and carefully selected the claims in the counseled petition. The district court has reviewed those claims with the benefit of briefing from both parties. When the district court grants relief or a certificate of appealability, the court has typically identified the strongest issues. When we seek a certificate of appealability from the appellate court, we have likewise attempted to identify the strongest issues.

This iterative process usually results in an appeal focused on the most important, and only the most important, claims. At this stage, it's highly unlikely we will pursue a mid-appeal amendment, because we have laid the groundwork and made the relevant strategic decisions well before the case reaches that point.

If an attorney seeks to amend in this category of case, it's likely because significant information has come to light for the first time on appeal through no fault of the attorney. For example, in *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), the petitioner proceeded with counsel in the district court. He alleged the prosecution suppressed exculpatory evidence, namely that the prosecution provided monetary benefits to an important witness. *See Brady v. Maryland*, 373 U.S. 83 (1963). Yet the petitioner lacked proof of his allegations, and the district court denied the petition. While the appeal was

pending, the relevant witness elected to provide a declaration confirming that he did receive compensation for his cooperation. The petitioner then filed a motion to remand, which the appellate court granted. It was clear the petitioner "did exercise reasonable diligence yet was unable to acquire this information earlier." *Quezada,* 611 F.3d at 1168. The court summarily rejected the warden's argument that the petitioner "must seek leave to file a successive habeas petition." *Ibid.*

Notably, the court in *Quezada* rejected the warden's argument about the second or successive bar despite prior circuit precedent applying the bar in an arguably analogous procedural scenario. *See Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020) (applying this precedent). Thus, even if a court of appeals applies § 2244(b) to mid-appeal amendment requests as a general matter, those courts may find it necessary to make exceptions in cases involving new evidence of prosecutorial misconduct. *See also Douglas v. Workman*, 560 F.3d 1156, 1187-96 (10th Cir. 2009) (granting relief in a case where a witness executed a mid-appeal affidavit raising allegations of prosecutorial misconduct). Those exceptions show the decision below creates an unworkable rule.

In sum, when an attorney represents the petitioner in the district court, it's unlikely the attorney will pursue a mid-appeal amendment. If counsel makes such a request, it's typically only in the most extraordinary circumstances, such as new evidence proving prior allegations of prosecutorial misconduct. In this category of case, the mid-appeal

amendment procedure will be used in limited fashion, in the rare situation where amendment is paramount. And if counsel seeks to invoke the procedure in less compelling circumstances, the district and appellate courts both have ample discretion under Civil Rule 62.1 and Appellate Rule 12.1 to simply deny the request. The procedure is therefore not vexatious and is consistent with the equitable principles underlying § 2244(b).

B. When the petitioner was pro se below, a new appellate attorney may more frequently consider amendment, but the procedure is often inadvisable.

In cases where the petitioner proceeded pro se in the district court but secures counsel for the first time on appeal—for example, cases where a district court grants a certificate of appealability to a pro se petitioner, and the appellate court appoints an attorney to handle the appeal—the mid-appeal amendment procedure may be more useful, because a pro se petitioner may have omitted legal theories or neglected to present relevant facts despite diligent efforts. But even in this category of case, strategic and legal considerations will often dissuade appellate counsel from seeking to amend.

1. An amendment request is somewhat more likely in this scenario because pro se petitioners can miss issues or facts through no fault of their own.

Even if a pro se petitioner proceeded diligently in the district court, the petitioner may have omitted meritorious legal theories or facts. If a petitioner

made a good faith error, a mid-appeal amendment request should not be deemed vexatious.

Pro se litigants occasionally make mistakes simply by virtue of their lack of legal training. "A document filed pro se is to be liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (cleaned up). A pro se pleading, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Ibid.* (cleaned up). A court must "ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). As these doctrines recognize, untrained pro se litigants may reasonably make good faith legal mistakes in their pleadings, and courts shouldn't penalize pro se litigants for such errors.

The decision in *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020), provides an example of this type of pleading error. The pro se petitioner raised a claim challenging the admission at trial of his police interrogation. The petitioner challenged the interrogation under one legal theory: the police coerced his confession in part through promises of leniency. Yet the petitioner failed to raise a factually related but distinct legal theory: the police provided a materially incomplete warning under *Miranda v. Arizona*, 384 U.S. 436 (1966). If a pro se petitioner failed to plead a proper legal theory, and if an appellate attorney seeks to amend to fix the "inartfully

pleaded" petition, *Erickson*, 551 U.S. at 94, the request isn't vexatious; rather, it's consistent with the solicitude courts typically afford pro se litigants.

One reason that pro se petitioners—who are nearly always incarcerated—may unintentionally omit claims or facts from their petition is because they often have difficulty obtaining files from their prior attorneys. The instant case is one such example. Petitioner "Rivers began asking his lawyers to send him his client file" back in 2013. Pet. Br. at 8. The attorneys neglected to respond to his requests, and he "eventually resorted to filing a formal grievance with the Texas state bar." *Id.* at 9. While his federal habeas case was pending on appeal, he "finally received the client file that he first requested in 2013" and discovered exculpatory information supporting a trial-counsel-ineffectiveness claim. *Id.* at 10.

In our experience, Petitioner's situation is unfortunately common. Pro se inmates often face difficulties obtaining prior counsel's file, even though in most jurisdictions prior counsel is obligated to promptly send the file upon request. *See, e.g.,* NRS 7.055(1) ("An attorney who has been discharged by his client shall, upon demand . . . immediately deliver to the client all [files] . . . which belong to or were prepared for that client."); Model R. Prof. C. 1.16(d) ("Upon termination of representation, a lawyer shall . . . surrender[] papers and property to which the client is entitled."); *cf. Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) ("[I]t is unrealistic to expect a habeas petitioner to prepare and file a meaningful petition on his own . . . without access to

his legal file.") (cleaned up). If a petitioner receives prior counsel's file for the first time while the case is pending on appeal—perhaps because the appellate court appointed an attorney, to whom prior counsel finally responded—an ensuing amendment request cannot reasonably be viewed as vexatious.

Pro se litigants also may neglect to develop the facts because of logistical challenges. Post-conviction claims "often require investigative work," and investigative work requires "an effective attorney." *Martinez v. Ryan*, 566 U.S. 1, 11-12 (2012). As a practical matter, an incarcerated and indigent litigant is highly unlikely to be able to identify and hire an investigator. If a pro se petitioner made diligent but unsuccessful efforts to litigate a claim requiring fact development (for example, a trial-counsel-ineffectiveness claim involving an omitted alibi defense), and if an attorney appears in the first instance on appeal, the attorney may elect to conduct that investigation. If the investigation is fruitful, and if the attorney then concludes an amendment is necessary, the request is proper, not vexatious.

Similar issues arise with experts. As a practical matter, an incarcerated and indigent litigant is highly unlikely to be able to identify and hire an expert. If a pro se petitioner made diligent efforts to litigate a claim requiring expert assistance (for example, a claim involving faulty forensic testimony), and if counsel appears for the first time on appeal, counsel may elect to consult with an expert. If the consultation is fruitful, and if counsel then concludes amendment is necessary, the request is once again proper, not vexatious.

Finally, pro se litigants may be incapable of discovering evidence that the prosecution previously suppressed. As we explain above, evidence of prosecutorial misconduct may arise for the first time on appeal even when the petitioner had counsel in the district court and even when counsel diligently investigated the misconduct allegations. The same scenario may equally befall a petitioner who was pro se in the district court.

For these reasons, pro se petitioners may make diligent efforts in the district court yet omit important claims or facts. If an attorney appears for the first time on appeal, occasionally that newly involved attorney will make a good faith request to amend based on an understandable and consequential pro se mistake. And if an amendment request falls outside that category—i.e., in the unusual situation where a newly involved appellate attorney makes a misguided attempt to invoke the procedure for reasons other than fixing a good faith pro se error—the district and appellate courts both have ample discretion under Civil Rule 62.1 and Appellate Rule 12.1 to simply deny the request. In sum, this process is not a vexatious category of litigation that should trigger § 2244(b)'s specialized procedure for second or successive petitions.

2. Even where amendment may be appropriate to fix a pro se omission, appellate counsel may forego a request for strategic reasons.

Even in a case where a newly involved appellate attorney concludes that the operative petition omits

important claims or facts, counsel may elect not to seek to amend due to practical concerns.

To start, an amendment request may be inadvisable where the certified issue on appeal is strong. If the district court has granted relief on a claim, it has concluded the claim has merit; if the district or appellate court has issued a certificate of appealability, the court has indicated the claim has at least arguable merit. An amendment request, if filed, would "hint[] at lack of confidence in" the issues raised on appeal, *Jones*, 463 U.S. at 752, because the attorney is asking the appellate court to defer resolution of those issues—which involve at least potentially meritorious claims—pending additional proceedings in the district court. That is, the mid-appeal amendment strategy will often "dilute and weaken a good case and will not save a bad one." *Ibid* (cleaned up). The wiser course will often be to continue with the existing appeal.

Further, an amendment request risks additional delay. Some of our post-conviction clients serve relatively short prison terms, and the habeas proceedings at the district court level can take years—sometimes many years—to resolve, despite a petitioner's diligent efforts. Thus, habeas petitioners may receive parole or may discharge their prison terms while their federal habeas case is pending. While those events do not always render moot a claim challenging the conviction, *see Carafas v. Lavalle*, 391 U.S. 234 (1968), they can render moot a claim challenging the length of a prison term, *see United States v. Meyers*, 200 F.3d 715, 718-23 (10th Cir. 2000), and they can otherwise eliminate much of the practical

benefit of securing habeas relief. If a petitioner's case is pending on appeal and the petitioner is eligible to receive parole or likely to discharge a prison term soon, the petitioner may prefer to litigate the existing appeal rather than renew proceedings in the district court.

And an amendment request may be unlikely to succeed. No one is asserting that a petitioner has an absolute right to amend or supplement on appeal. Rather, to secure a mid-appeal amendment, both the district and appellate courts must agree to the amendment and the remand as a discretionary matter under Civil Rule 62.1 and Appellate Rule 12.1. Either court might refuse a request for any number of discretionary reasons, such as "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings." *In re Morris*, 363 F.3d 891, 894 (9th Cir. 2004) (cleaned up) (involving motions for leave to amend). If there's any reason to believe the petitioner is "engag[ing] in abusive litigation tactics or intentional delay," a court might reasonably refuse the request. *Rhines*, 544 U.S. at 278 (involving stays in the district court for further state court litigation). For example, an appellate court might decline a request if the petitioner belatedly makes the request after briefing is concluded and the case is submitted for decision. If an attorney thinks it's unlikely that both courts would exercise their discretion to authorize the mid-appeal amendment, the attorney may elect to avoid invoking the process.

What's more, the omitted claim that would be the focus of the amendment or supplement may face procedural or merits-based problems. Those potential problems include, among others, whether (1) any new claim is timely, (2) any new claim is exhausted, (3) the procedural default doctrine applies, (4) additional fact development is permissible in federal court, (5) any state court merits determinations will be entitled to deference, and (6) any new claim has merit and amounted to harmful error. If one or more of those concerns applies, amendment may not be worth the effort, and the attorney would probably continue with the existing appeal.

For these reasons, counsel is likely to invoke the mid-appeal amendment procedure sparingly, even in cases where the petitioner was pro se in the district court. Indeed, the Second Circuit has correctly declined to apply the second or successive bar to these requests. *See Ching*, 298 F.3d at 178-79. But there's no indication the Second Circuit has received an unmanageable volume of mid-appeal amendment motions in habeas cases. *See* Pet. Br. at 45. Because the procedure is a limited but critical tool for correcting consequential mistakes made in good faith by pro se litigants, the procedure should not be deemed a vexatious filing category that would trigger the bar on second or successive petitions.

C. When the petitioner is pro se on appeal, courts can easily resolve any meritless amendment requests.

As explained above, if an attorney represents a petitioner on appeal, it's unlikely the attorney will

seek a mid-appeal amendment except in unique circumstances where amendment is critical. However, it's conceivable that a petitioner who continues to proceed pro se on appeal (or even an attorney) may seek to amend in inappropriate situations. In those rare situations, courts have wide flexibility to deny those motions.

For example, if a pro se petitioner wants to pursue a mid-appeal amendment or supplement, the petitioner would need to convince the district court to issue a favorable indicative ruling under Civil Rule 62.1; the district court might elect to simply deny the pro se motion or defer the motion until the appeal is over (at which point the restrictions on second or successive proceedings would indisputably be triggered). Even if the district court issues a favorable indicative ruling, the pro se petitioner would then need to convince the appellate court to authorize the remand as a discretionary matter under Appellate Rule 12.1. The appellate court might exercise its discretion to reject the request and simply resolve the existing appeal.

For these reasons, it's unnecessary for the Court to import the second or successive bar to the anomalous context of a case that remains pending on appeal, simply as a method to prevent baseless amendment requests. Rather, the district and appellate courts are well equipped to handle meritless motions under the existing civil and appellate rules.

II. In exceptional cases, the mid-appeal amendment procedure is a vital tool for ensuring petitioners have a fair opportunity at habeas review.

If a petitioner receives critical new information for the first time on appeal, a mid-appeal amendment may be an essential tool for ensuring that federal courts can consider the information, in a single proceeding. But according to the erroneous decision below, a mid-appeal amendment is a second or successive petition. Under that incorrect rule, multiple categories of new information will be unreviewable even if the information is identified during the initial habeas appeal. The Court should refrain from applying the second or successive bar to these claims when the initial appeal remains pending.

Under the existing framework, if a second or successive petition under § 2254 raises a claim that was presented in a prior petition, the claim shall be dismissed—even if the petitioner has identified significant new facts supporting the claim. 28 U.S.C. § 2244(b)(1); *see Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999). Thus, if a pro se § 2254 petitioner litigates a prosecutorial misconduct claim in the district court based on a belief that the prosecution suppressed exculpatory information, and if the petitioner discovers evidence for the first time on appeal (through no fault of the petitioner) confirming the misconduct allegation, then under the Fifth Circuit's erroneous rule, the petitioner will have no opportunity, ever, to bring that evidence to the federal courts' attention. Or, if a pro se § 2254 petitioner litigates a trial-counsel-ineffectiveness claim in the

district court based on an alibi defense and during the appeal locates a credible alibi witness, the federal courts must turn a blind eye to the exonerating witness.

Where a petitioner seeks to litigate an entirely new claim in a second or successive petition, the claim is barred unless it relies on (A) a new, previously unavailable rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or (B) new, previously unavailable facts that demonstrate the petitioner's innocence by clear and convincing evidence. By adopting this standard, Congress intended to foreclose review in most cases after a petitioner has already received "one full opportunity to seek collateral review." *Ching*, 298 F.3d at 177. But Congress surely didn't intend to close the courthouse doors on claims that are identified while the initial habeas appeal remains pending, such as the following:

- A petitioner may be convicted based on a broad interpretation of a criminal statute; this Court may subsequently apply principles of statutory interpretation and narrow the scope of the statute. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137 (1995). If a petitioner on appeal is unable to pursue a mid-appeal amendment to raise a claim under this new case, the second or successive bar will preclude review of this sort of claim forever, although the rule on which it would be based would be substantive in nature and therefore retroactively applicable, *see Bousley v. United States*, 523 U.S. 614 (1998), and the claim would be timely, *see* 28 U.S.C.

§ 2255(f)(3)—even where the new decision establishes that the petitioner is actually innocent of the only offense of conviction. This is solely because the second or successive rules require not only that the new rule be issued by the Supreme Court and retroactively applicable, but also that it be constitutional in nature. *See Jones v. Hendrix*, 599 U.S. 465 (2023); *see also* 28 U.S.C. § 2255(h)(2).

- While the case is pending on appeal, a petitioner might identify sentencing errors; perhaps the petitioner was sentenced above the statutory maximum. The second or successive bar precludes claims challenging merely the sentence, *see, e.g.*, *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997), although claims alleging an unlawful sentence are generally cognizable on habeas review. Under the Fifth Circuit's rule, a mid-appeal amendment is unavailable to fix the sentencing error.

- On appeal, a petitioner may discover facts showing that the trial judge was biased within the meaning of the due process clause. *Cf. United States v. Hernandez-Zamora*, No. 3:21-cr-62-MAH, Dkt. No. 330 (D. Alaska Sept. 27, 2024) (sealed) (appearing to grant a motion for a new trial based on inappropriate relationships between the trial judge and members of the U.S. Attorney's office). Yet the second or successive bar precludes review of judicial bias claims because those claims aren't tethered to new evidence of innocence. *See, e.g.*, *Villafeurte v. Stewart*, 142 F.3d 1124, 1126 (9th Cir. 1998). Under the Fifth Circuit's rule, the petitioner may not seek a mid-appeal amendment for purposes of demon-

strating intolerable judicial bias. The same logic applies to other significant structural errors, including (among others) the prosecution's improper use of race-based peremptory strikes, *see Batson v. Kentucky*, 476 U.S. 79 (1986); improper courtroom closures, *see, e.g.*, *Waller v. Georgia*, 467 U.S. 39 (1984); or the constructive denial of counsel, *see United States v. Cronic*, 466 U.S. 648 (1984).

- A petitioner may have omitted at the district court level a trial-counsel-ineffectiveness claim that lacks a nexus with innocence. For example, trial counsel may have ineffectively failed to seek suppression of incriminating evidence like an improperly induced confession or illegally seized physical evidence. Likewise, the trial attorney may have ineffectively failed to communicate a favorable plea offer. *See Missouri v. Frye*, 566 U.S. 134 (2012). Those claims don't rely on facts demonstrating innocence, so a mid-appeal amendment would be barred under the Fifth Circuit's rule.

- And some claims that *do* implicate innocence may become apparent at the appellate level but would likely be barred under the second or successive rules—for example, a prosecutorial misconduct claim involving suppressed exculpatory evidence or testimony the prosecutor knew was false, or a trial-counsel-ineffectiveness claim involving an omitted alibi defense. To prove a claim under *Strickland* or *Brady*, the petitioner must demonstrate the omitted evidence would have generated a reasonable probability of a different outcome at trial; to prove a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), the petitioner must show only a reasonable likelihood of a

different outcome. *See Banks v. Dretke*, 540 U.S. 668, 699 (2004); *Strickland*, 466 U.S. at 694; *United States v. Agurs*, 427 U.S. 97, 103 (1976). But to receive authorization for a second or successive petition, the petitioner must demonstrate innocence by clear and convincing evidence—a much higher burden. *See* Pet. Br. at 36-37.

* * *

For all these types of claims, the mid-appeal amendment procedure is critical for ensuring petitioners receive one fair shot at habeas review.

To be sure, the mid-appeal amendment procedure is itself daunting. An attempt to invoke the procedure may suggest a lack of confidence in the issues already teed up on appeal. The request may invite potentially fruitless delay—or, conversely, be interpreted as an inappropriate attempt to cause delay. The petitioner must convince both the district court and the appellate court to authorize the amendment and the remand as a discretionary matter; it may be that, in some cases, even a valid request is denied for discretionary reasons. The claim must be free of procedural problems. And the claim must ultimately be successful on the merits.

Given all this, petitioners are unlikely to attempt (much less secure) a mid-appeal amendment in the typical case. But in exceptional cases, the procedure provides a necessary method of ensuring our clients receive "one full opportunity to seek collateral review." *Ching*, 298 F.3d at 177.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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