No. 07-1223

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,
v.
LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

Robert Lee
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(434) 817-2970

James G. Connell, III
Jonathan P. Sheldon
Randi R. Vickers
DEVINE, CONNELL & SHELDON, PLC
10621 Jones Street
Suite 301A
Fairfax, VA 22030
(703) 691-8410

Maureen E. Mahoney
Richard P. Bress*
J. Scott Ballenger
Matthew K. Roskoski
LATHAM & WATKINS LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

* *Counsel of Record*

QUESTION PRESENTED

Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court habeas proceedings, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. The question presented is:

Did the Fourth Circuit err when it applied the restrictive standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reprinted at Pet. App. 1a.[1] Its order denying rehearing and rehearing *en banc* is reprinted at Pet. App. 178a. The decision of the United States District Court for the Western District of Virginia is reported at *Bell v. True*, 413 F. Supp. 2d 657 (W.D. Va. 2006), and reprinted at Pet. App. 18a. The district court's oral ruling is unreported and reprinted at Pet. App. 168a.

JURISDICTION

The Fourth Circuit denied rehearing and rehearing *en banc* on January 29, 2008. Pet. App. 178a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Sixth Amendment, U.S. Const. amend. VI, and the relevant provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2254, are reproduced at Pet. App. 179a-80a.

STATEMENT OF THE CASE

This case comes to the Court with an undisturbed finding that the petitioner, Edward Nathaniel Bell, "diligently developed the factual basis of" his ineffective-assistance-of-counsel claim "in state

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[1] The appendix filed with the Petition is cited as "Pet. App." The joint appendix filed concurrently herewith is cited as "JA," while the appendix filed with the Fourth Circuit is cited as "CAJA."

court," such that "an evidentiary hearing is not barred by [28 U.S.C.] § 2254(e)(2)." Pet. App. 84a. On the basis of that finding, the district court granted a hearing, at which Bell uncovered and presented a wealth of new mitigating evidence that the state court never considered in its post-conviction review. The Warden has never disputed the district court's (e)(2) finding. While she challenged the district court's discretionary decision to conduct a hearing, the Fourth Circuit did not rule on her objection, and she did not reassert that objection in her brief in opposition.

After the evidentiary hearing, the district court held that the performance of Bell's trial counsel in the sentencing phase of his trial was constitutionally deficient within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 171a, 175a. The court nonetheless denied relief, however, because it concluded that the state court's finding that Bell had not been prejudiced was reasonable within the meaning of 28 U.S.C. § 2254(d). Pet. App. 12a & n.2, 175a. The Fourth Circuit affirmed for the same reason. Pet. App. 12a-13a, 16a-17a.

The question before this Court is whether § 2254(d) limited the federal courts to considering the reasonability of the state court's judgment—or whether they were instead required to decide for themselves whether Bell was prejudiced by his counsel's deficient performance—where no state court had ever considered the totality of available mitigating evidence.

The Underlying Facts. Bell is a Jamaican national, born in Jamaica to Rosaline and Oswald Bell. Bell's mother had twelve other children by four

different men. JA-268, 306. He spent his early childhood in a two-room shack in a rural Jamaican town. JA-306. Starting from early childhood, Bell's family regularly gave him drugs and alcohol, JA-173-74, 275, 304, 312, and he exhibited cognitive limitations that were exacerbated by a later severe head injury, earning him the nickname "Slow." JA-309-16, 363, 428, 504-10. His relationship with his father was both distant and troubled. For six months out of the year, Oswald was absent, performing farm labor in the United States. JA-306, 321. When he was home, Oswald saw his son's slowness as laziness—and responded by beating Bell with electrical cords, belts, wood planks, brooms, or whatever weapon was handy. JA-269, 323-28, 504-07. While Bell volunteered with police youth groups, JA-589, he never graduated high school, Pet. App. 80a, and could only secure the most menial work. JA-309-10, 507-08, 587-88.

Bell's family long nurtured a goal of emigrating to the United States. Bell's mother found a job in America in 1986 and began the process of bringing her family to join her. JA-271. That year, Bell's roommate Carol Anderson introduced him to her sister, Barbara Williams, JA-586, whom Bell later married and who gave birth to his first child, Kamille. JA-591. Though she was pregnant and ill when Bell's opportunity to emigrate came, Barbara was "happy" that the family's plan came to fruition. JA-598-99. While their marriage eventually failed, Barbara still speaks warmly of Bell and Kamille visits him to this day. JA-589-95.

In America, Bell met Dawn Jones. They settled together in West Virginia, and had Bell's second

child, Kydesha. JA-542. Kydesha was premature, and Jones would later describe for the federal court the long nights Bell spent by her incubator, praying for her survival. JA-515, 542-43. Eventually, Bell and Jones also separated, but again, Bell maintained a close relationship with his daughter, JA-544-45, and Jones respected Bell's efforts to be a good father to Kydesha. JA-546.

In Winchester, Bell met Tracy Nicholson, the daughter of Joanne Nicholson. JA-515-17, 562. Tracy already had a child, Alyse, whom Bell raised as his own. JA-563. Over time, Tracy and Bell had three more children: Diontre, Eddie, Jr., and Xavian. JA-233-49, 561.

During those years, Bell had only minor, "essentially non-violent," brushes with the law, Pet. App. 80a, and was never convicted of a felony or sentenced to serve even a single day in jail. JA-175-81. In 1999, however, Bell was arrested and charged with the murder of Sergeant Richard Timbrook. The Supreme Court of Virginia summarized the evidence at guilt/innocence as follows:

> Sergeant Timbrook chased Bell along several streets and down an alley between two houses . . . . These houses were separated by a fence approximately two or three feet in height. As Sergeant Timbrook started to climb over the fence, a shot rang out.
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> * * *
>
> Sergeant Timbrook's body was found lying on the ground with his feet close to the fence and his upper torso leaning against a wall. His gun was still in its holster. Sergeant

> Timbrook was transported to a local hospital where he was pronounced dead. The cause of death was a single gunshot wound above his right eye, caused by a bullet which was fired from a distance of between six and eighteen inches.
>
> * * *
>
> The evening Sergeant Timbrook was shot was not the first encounter between Timbrook and Bell. Sergeant Timbrook had arrested Bell for carrying a concealed weapon in May 1997. The following year, in September 1998, Sergeant Timbrook was present during the execution of an Immigration and Naturalization Service order to detain Bell. Eight months later, Sergeant Timbrook assisted in executing a search warrant at Bell's home. Bell was present during that search. In the summer of 1999, one of Bell's friends heard Bell state, as Sergeant Timbrook drove by in a vehicle, "Somebody needs to bust a cap in his ass." Another of Bell's acquaintances testified that she heard Bell say that he would like to see Sergeant Timbrook dead, and that if he ever came face to face with Sergeant Timbrook, he would shoot Sergeant Timbrook in the head because he knew that Sergeant Timbrook wore a bullet-proof vest.

Pet. App. 184a-85a, 187a-88a. In January of 2001, a Virginia jury convicted Bell and sentenced him to death.

Pretrial Preparation. Bell's early defense

team consisted of Jud Fischel and Lloyd Snook. JA-41; Pet. App. 78a-79a. Snook was responsible for preparing the mitigation case, and Fischel assumed that Snook was doing so. JA-46; Pet. App. 79a. But Snook completely abdicated that responsibility and ultimately withdrew from the case. JA-45-55; Pet. App. 78a-79a. At the hearing on Snook's withdrawal, Fischel advised the court that he was "witnessing ineffective assistance of counsel in the midst of the case," JA-46, 665, and considered the mitigation case at that point to be "nonexistent." JA-661.

Fischel then asked the court to appoint Mark Williams, his "close personal friend," to replace Snook. JA-634-35, 666. Williams had no capital experience and was not on the Commonwealth's list of qualified capital defense attorneys. JA-55, 666; Pet. App. 79a. Yet Fischel delegated the entire mitigation case to him. JA-199, 203; Pet. App. 173a.

Williams failed miserably in his task. After only cursory interviews with Bell, two of his sisters, and their mother, Williams leapt to the conclusion that "there [wa]s little evidence that would assist in mitigating the case against Mr. Bell." JA-667, 805. Fischel recognized that Williams' conclusion was "premature," JA-667-68, but he did not direct further investigation. Neither thought to seek mitigation evidence from a host of other obvious witnesses that—as post-conviction counsel would later prove—were readily available and would have provided powerful mitigating testimony, including

- *Barbara Bell Williams*: Bell's wife and the mother of his first child, Kamille. JA-186; Pet. App. 171a-72a.

- *Carol Anderson*: Barbara's sister, and Bell's platonic housemate for over a year in Jamaica. JA-605-06; Pet. App. 172a.
- *Dawn Jones*: the mother of Bell's second child, Kydesha, and a prosecution witness. JA-193; Pet. App. 171a.
- *Tracy Nicholson*: the mother of Bell's youngest children, Diontre, Eddie, Jr., and Xavian, with whom he lived for six years. JA-188, 570-71, 705-06.
- *Joanne Nicholson*: Tracy's mother and thus the grandmother of the couple's children. JA-190-91; Pet. App. 172a.
- *Precious Henderson*: a co-worker of Bell's. JA-580; Pet. App. 172a.

Bell's counsel also failed to use the full panoply of resources made available to them by the state trial court. The trial court granted Bell the means to hire a fact investigator and a mitigation specialist. JA-749-50; CAJA 986. Bell's counsel never thought to deploy the fact investigator. JA-199, 664, 755-56. Snook did retain one mitigation specialist, Marie Deans, but he prevented her from doing any significant investigation. JA-195-96, 199, 204, 476-80, 483-85; Pet. App. 79a-80a. Deans, a veteran of over two hundred capital investigations, would later describe this as "[t]he most disorganized case" she had ever worked on—"it reached a level of absurdity, really." JA-481. After Williams took over for Snook, the court authorized another mitigation specialist—but Williams declined to hire one. JA-204, 281-82, 657, 687-88.

Bell's counsel did obtain the services of Dr.

William Stejskal, a psychological expert appointed under Virginia Code § 19.2-264.3:1. JA-412. Stejskal explained to counsel that his statutory role was heavily circumscribed. He made clear that he could not be relied on as a "one-stop shop" for mitigation services, JA-452, but instead would *only* analyze Bell's psychological development. JA-412-15, 434-39, 459-63, 677-83. Bell's counsel nonetheless relied entirely on Stejskal, and as a result no competent mitigation investigation was ever done. Pet. App. 173a-74a. Having heard their live testimony and judged their credibility, the district court on habeas review later found counsel's reliance on Stejskal unreasonable and their overall investigation "constitutionally deficient." Pet. App. 173a-75a.

Sentencing. Under Virginia law and the jury instructions, Bell was eligible for the death penalty only if the prosecution proved a statutory aggravating circumstance "beyond a reasonable doubt." Va. Code Ann. § 19.2-264.2; JA-158-59. The sole death-eligibility factor in this case was future dangerousness. JA-158-59. The prosecution argued that Bell is a violent man who harbors specific animus towards law enforcement officers, and that he would therefore be a threat to prison guards if sentenced to life in prison. JA-142-43.

To support its argument that Bell is violent by nature, the prosecution called two of Bell's former girlfriends. One, Billy Jo Swartz, claimed that Bell assaulted her—violently groping her, slamming her head into his car, and holding a gun to her head—and when Bell's then-pregnant girlfriend, Tracy Nicholson, arrived at the scene, he "hit [Tracy] and

knocked her down." JA-109-11. According to Swartz, Tracy then jumped on the hood of Bell's car, and Bell "stomped on the brakes" to knock her off. JA-110. Another former girlfriend, Dawn Jones, along with her friend Patrick Morrison, described an occasion on which Bell came into Jones' trailer and exhibited a gun during an argument. JA-115-18.

To support its argument that Bell poses a specific and ongoing threat to law enforcement, the prosecution relied primarily on the facts of the crime itself but also called two employees at the jail where Bell was confined pre-trial. Michael Bridge, a janitor, testified that Bell threatened him and called him a liar. JA-95-96. Officer Craig Robinson testified that, while Bell was handcuffed behind bars, Bell said "if you take these off, then you will see what happens." JA-97.[2]

Members of Sergeant Timbrook's family gave victim impact testimony. His father, mother, and sister all testified about Sergeant Timbrook, personalizing him and the loss they experienced with his death. JA-121-29. Sergeant Timbrook's widow

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[2] The prosecution also called other police witnesses. Sergeant W.D. Walker, of West Virginia, testified that Bell once gave him a false name and ran from him. JA-83-89. Sergeant Joe Adams testified that he once searched Bell and found legal ammunition. JA-90-93. A third officer said he once found a gun in Bell's trunk. JA-119-20. Corporal David Sheriff, a Jamaican officer, testified that Bell was convicted of assault and "malicious destruction of property" for tearing another boy's shirt. JA-101-06. None of these witnesses were probative of future dangerousness—the prosecution conceded that they had not done "that much damage," CAJA 189, 191-92, and the district court characterized these events as "essentially non-violent." Pet. App. 80a.

testified about her loss, and the experience of giving birth and raising her child after her husband's death. JA-129-33.

In contrast, the defense put on "no mitigating evidence" at all. JA-793. Over the course of the later federal evidentiary hearing, the district court characterized Bell's trial counsel's utter failure as "zero mitigating evidence," JA-793, "literally no mitigating evidence," JA-647, and not "one iota of mitigation." JA-648. Bell's counsel did call two witnesses during the penalty phase of the trial, but as the district court noted, counsel did not ask either of them "a single question . . . about Mr. Bell, about his background, about anything about him." JA-647. Williams called Bell's sister, Marjorie, but she only described how her children were harassed because of their relationship to Bell. JA-134-36, 714. Despite having never met or interviewed him prior to trial, Williams called Bell's father, Oswald, to testify and asked him on the fly how he "fe[lt] about this whole tragedy"—to which Oswald replied that, if Bell was guilty, he should be punished. JA-137-38, 207, 756-57. Oswald then asked for an opportunity to plead for his son's life. JA-138-39. When the court ruled that Oswald could testify further only in response to a question, Williams could not think of one to ask. JA-138-39, 714-15. In his closing argument, Williams conceded that "testimony that was offered was very graphic about a violent man," and that defense counsel "didn't rebut" or "try to defend . . . [or] refute" the prosecution's evidence in aggravation. JA-145.

In the Commonwealth's closing, the prosecution seized on the complete absence of mitigation

evidence as an affirmative reason for the jury to return a death sentence. The prosecution invoked the utter lack of mitigation evidence six times, and suggested that a death sentence was warranted because Bell could not find a single person in the world willing to stand up for him. JA-141-43, 148-50, 786-87.

Despite the one-sided sentencing phase, Bell's jury nonetheless struggled with the sentencing decision, asking the court whether, if they imposed a life sentence, there would be "any other way to be released from prison." Pet. App. 222a. The trial court declined to answer the jury's question. *Id*. Ultimately, having been provided no reason to spare Bell's life, the jury sentenced him to death. Pet. App. 2a. The Supreme Court of Virginia affirmed the conviction and sentence on June 7, 2002, Pet. App. 181a-230a, and this Court denied certiorari, *Bell v. Virginia*, 537 U.S. 1123 (2003).

State Post-Conviction Review. On state habeas, Bell asserted that his trial counsel was ineffective for having failed to investigate, identify, or present mitigating evidence. Pet. App. 237a-40a. Bell sought expert and investigative assistance, discovery, and an evidentiary hearing to develop and present his case. Pet. App. 29a. The Supreme Court of Virginia denied those requests, Pet. App. 30a, 261a, and then dismissed Bell's petition for failure of proof. Pet. App. 30a, 231a.

The state court found that Bell's ineffective-assistance claim did not satisfy either the deficient performance or the prejudice prong of *Strickland*. Pet. App. 238a-40a. In the same order in which the court denied Bell's request for an investigator and an

evidentiary hearing, it faulted Bell for "fail[ing] to proffer additional information that counsel should have discovered or presented during the penalty phase." Pet. App. 239a. The court concluded that the evidence Bell claimed his trial counsel missed was "'cross-purpose evidence' capable of aggravation and mitigation," and that counsel is, as a matter of law, never ineffective for failing to present such evidence. *Id.* Ultimately, the court saw no "reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigating evidence, the result of the proceeding would have been different." *Id.*

Federal Post-Conviction Review. Bell timely filed a federal habeas corpus petition in the United States District Court for the Western District of Virginia. The district court denied the Warden's motion to dismiss Bell's ineffective-assistance-of-counsel claim, held that Bell's diligence satisfied § 2254(e)(2), and ruled that Bell's allegations warranted an evidentiary hearing. Pet. App. 84a.

Unlike the state court, the district court granted Bell funds for an investigator to develop the factual basis of his challenge. CAJA 979-80, 989. With that assistance and the help of a mitigation specialist, federal post-conviction counsel uncovered a wealth of readily available evidence that (a) undercut generally and specifically the prosecution's case in aggravation, (b) established that Bell had been abused as a child, and (c) demonstrated redeeming aspects of Bell's character and relations to others. The district court also received testimony directly addressing the effect the omitted evidence would have had on Bell's jury.

Rebuttal of Aggravating Evidence. Neither the jury nor the Supreme Court of Virginia had heard from multiple witnesses who would have contradicted the prosecution's narrative of Bell as an irredeemably violent criminal who particularly hated law enforcement officers. Only the federal court heard Barbara Bell Williams testify that Bell was an active participant in police youth clubs and worked closely with police officers in performing community service projects. JA-588-89. Barbara, and Carmeta Albarus, both testified that Bell "had a lot of police friends" and a strong bond with at least two particular Jamaican officers. JA-513-14, 588-89. Dawn Jones and Joanne Nicholson testified that in their many years with Bell they never heard him threaten police or any other authority figure. JA-558, 578. Barbara, Carol Anderson, and Precious Henderson all testified that killing a police officer was inconsistent with Bell's character. JA-584, 593, 603.

Evidence newly adduced on federal habeas—and unseen by either the jury or the state court—would also have contravened the prosecution's direct evidence of animus. For example, the jury heard Officer Robinson testify that Bell threatened him. But neither the jury nor the state habeas court learned that Enos Davenport, incarcerated with Bell at the jail, saw Robinson "scream[] and yell[] at the top of his lungs directly in Mr. Bell's face" and that Bell held his composure and did not "disrespect this officer in any way." JA-250-51.

Bell's jury also heard Billy Jo Swartz claim that Bell assaulted her. The Supreme Court of Virginia saw affidavits from Tracy and Joanne Nicholson

explaining that the incident actually involved a fight between Swartz and Tracy and that Bell only sought to break it up. JA-188, 191. But only the federal court heard Joanne's live testimony disputing Swartz's account. JA-564-65. Although the state court speculated that the Nicholsons could have been impeached, the federal court *actually saw* the Warden's counsel directly confront Joanne Nicholson, overtly challenge her honesty, and present the most potent impeachment evidence counsel could find. JA-575-76. Having seen (as opposed to merely imagining) all of that, the federal court found Joanne Nicholson credible. Pet. App. 169a-70a, 172a.

And Bell's jury heard Dawn Jones testify about the day Bell entered her trailer with a gun after she ended their relationship. JA-117-18, 194. Bell's "[c]ounsel [were] unable to effectively cross-examine [Jones] because they had not interviewed her prior to trial," Pet. App. 171a, and in fact did not attempt to cross-examine her *at all*. JA-118. Neither the jury nor the Supreme Court of Virginia learned, therefore, that Bell never threatened anyone with the gun or that Jones and Bell made up soon after. JA-545-46, 552.

Child Abuse. The Supreme Court of Virginia had no idea that Bell was physically abused as a child. Only the federal court learned that Oswald would severely beat Bell using "electrical cords, belts, wood planks, and brooms." JA-323, 326, 422, 505. Only the federal court learned that Bell would be awakened at night by blows to the head from his father, and that Bell's body still bears scars from the buckle of his father's belt. JA-323. And only the

federal court learned that Oswald forced Bell's sisters to deprive him of food, JA-307, 323, and that Bell often fled the home to escape treatment his family refused to admit was child abuse. JA-326, 505.

Redeeming Aspects of Bell's Character and Relations. The Supreme Court of Virginia received an affidavit from Barbara Bell Williams affirming that Bell was a "caring" and "loving" father to their daughter, Kamille. JA-186. But the state habeas court did not learn that, while they lived together, Bell worked to make a good home for Barbara, cleaning the house and even cleaning her shoes. JA-587. The state habeas court did not hear that Bell regularly sent (and, indeed, still sends) letters and cards to Kamille. JA-591-92, 594. The state habeas court also did not learn that Kamille travels to the United States every year to visit her father, JA-591, or how Bell's incarceration has already traumatized Kamille. JA-592. Given how close Kamille is to her father, and how his incarceration has already affected her, Barbara believes that if Bell were executed Kamille might well "end up in a psychiatric ward at the psychiatric hospital." *Id.* Only the federal court learned those facts.

The jury and state habeas court also did not hear from Carol Anderson. Anderson testified on federal habeas that, because she was wary of living alone, she had asked Bell to stay with her. JA-601. Bell's jury heard (and the state habeas court read) Swartz's allegations of Bell's sexual infidelity and violence against women. Only the federal court learned the other side of Bell, hearing that with Anderson he behaved as a "[p]erfect young man,"

living in a separate room and making no advances towards her, keeping the house clean, and cooking her meals when she worked late. JA-601-02. Bell would routinely walk three miles round trip at night to escort Anderson home from work, so that she would not have to walk alone in an unsafe neighborhood. JA-602.

The Supreme Court of Virginia received an affidavit from Dawn Jones stating that Bell was a "loving and affectionate" father to their daughter Kydesha, and relating an incident when she found Bell at the hospital caring for Kydesha. JA-193. On federal habeas, Jones explained that Kydesha was chronically ill, requiring Bell to "spen[d] a lot of time taking [her] to the doctor and the hospital," JA-543, and Albarus described Bell's prayers for Kydesha's survival. JA-515, 542-43. Bell also cared for Jones when she suffered from toxemia, JA-541-42, and would cook and clean the house, while working a job to care for Jones and Kydesha. JA-542-43. After Bell and Jones parted ways, he worked to maintain a nurturing relationship with Kydesha, and Kydesha cherished her time with her father. JA-544-45, 550-51. Jones testified that Kydesha "loves [Bell] very much" and would be "devastated" by his execution. JA-551. Only the federal court learned those facts.

The Supreme Court of Virginia received written affidavits from Tracy and Joanne Nicholson, in which they described Bell as a "protective," "involved and loving father." JA-188, 190. But only the federal court actually met the children of Bell and Tracy Nicholson. *See* JA-561 (Joanne introducing the children to the district court, testimony the court characterized as "very relevant"); JA-233-49

(pictures of the Bell children and cards they sent to their father). Neither the jury nor the state habeas court saw Joanne Nicholson break down imagining the loss of Bell, JA-568, or heard her describe Bell's tears when his first son was born. JA-562. Nicholson also testified on federal habeas that Bell raised Tracy's daughter, Alyse, as though she were his own. JA-563; *see also* JA-240, 249.

Probable Jury Reaction. The Supreme Court of Virginia also heard no testimony about the weight a jury would likely attach to the undiscovered mitigating evidence. The federal court, however, received the testimony of Craig Cooley, Dr. Cunningham, and Dr. Stejskal. Cooley and Cunningham explained that a jury asked to decide whether a defendant is so irredeemably evil as to require execution will give great weight to positive aspects of a defendant's character, but will draw an adverse inference if no witness is willing to speak up on the defendant's behalf. JA-403-04, 764. Stejskal explained that the mitigation evidence presented on federal habeas could have been "presented . . . very effectively and very persuasively by . . . lay witnesses." JA-422, 437. The state habeas court had the benefit of none of this testimony.

District Court Decision. After the evidentiary hearing, the district court held that counsel's performance in the sentencing phase of Bell's trial was constitutionally deficient under *Strickland*, and that the state court's contrary ruling was unreasonable within the meaning of § 2254(d)—a finding that remains undisturbed today. Pet. App. 171a. Yet the district court nonetheless denied Bell's petition for lack of prejudice. Pet. App. 175a. The

district court never decided for itself whether counsel's ineffective representation prejudiced Bell by depriving him of a fair sentencing proceeding. It determined only that the state court's finding that Bell suffered no such prejudice was reasonable. *See* Pet. App. 12a-14a.

Appellate Proceedings. On appeal, Bell argued that the district court erred in applying § 2254(d) instead of reviewing the prejudice issue *de novo*. Bell argued that the additional mitigating evidence that he uncovered on federal habeas gave rise to a new claim that had not been adjudicated on the merits by the Supreme Court of Virginia, and that § 2254(d) therefore did not apply. *See* Brief of Petitioner-Appellant at 37-38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007); Reply Brief of Petitioner-Appellant at 23 n.9, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007). The Fourth Circuit rejected that argument without explanation. Accordingly, instead of determining Bell's claim on the merits, the court of appeals also applied § 2254(d)'s reasonableness standard, which it characterized as "substantially higher" than mere error. Pet. App. 12a-13a. In its brief, unpublished opinion, the court of appeals upheld the district court's finding that the state court's no-prejudice finding was reasonable. Pet. App. 13a-14a.

The Fourth Circuit denied Bell's petition for rehearing and rehearing *en banc* on January 29, 2008. Pet. App. 178a. Bell timely petitioned for a writ of certiorari, which this Court granted on May 12, 2008. *Bell v. Kelly,* 128 S. Ct. 2108 (2008).

SUMMARY OF THE ARGUMENT

The overwhelming majority of petitions for federal habeas review are resolved on an evidentiary record identical to, or very nearly identical to, the record utilized by the state court during its own post-conviction proceedings. In those cases, the claims adjudicated by the state and federal courts are the same, and § 2254(d) therefore applies to limit the federal court's power to grant relief.

In a small minority of cases, however, the evidentiary record will expand or change to such an extent that the claim adjudicated by the federal court will differ significantly from the claim before the state court. Modern procedural restrictions on the availability of fact development opportunities in federal habeas—mainly, § 2254(e)(2)'s prohibition on evidentiary hearings for petitioners who "failed to develop" the facts in state court—make such cases rare. And the reality that what a litigant alleges cannot always be fully proven in court makes them rarer still. But where, as here, a petitioner establishes his entitlement to fact development and proves facts not before the state court that significantly affect the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts, then the claim adjudicated by the state court ceases to be susceptible to meaningful review under § 2254(d).

Section 2254(d) does not apply in these circumstances. By its plain language, it applies only to "claims" that were "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). A "claim" is the application of governing law to a particular set of

facts. The admission of significant new evidence on federal habeas, therefore, may give rise to a new "claim" that no state court has previously "adjudicated on the merits." In *Holland v. Jackson*, 542 U.S. 649, 653 (2004), this Court assumed that proposition to be true. And the idea that new facts can give rise to a new claim in a way that controls the application of § 2254(d) finds considerable support in this Court's jurisprudence. *See also Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Price v. Vincent*, 538 U.S. 634, 638 (2003); *Vasquez v. Hillery*, 474 U.S. 254, 258-60 (1986).

Moreover, no other interpretation can be reconciled with the overall structure of § 2254. Section 2254(e)(1) provides that, although "a determination of a factual issue made by a State court shall be presumed to be correct," that presumption may be rebutted "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). And § 2254(e)(2) authorizes evidentiary hearings where a petitioner diligently attempted to develop the factual basis of a claim in state court. *Michael Williams v. Taylor*, 529 U.S. 420, 431-33 (2000). As (e)(1) presumes the state court has made relevant "determination[s] of factual issue[s]," Congress clearly expected federal courts to hold (e)(2) hearings in cases where a state court previously addressed at least some of the facts upon which a federal petitioner relies. In *Holland* and related cases, however, this Court made clear that (d)(1) cannot be satisfied using new evidence not before the state court, 542 U.S. at 652, and (d)(2)'s plain text contains a similar limitation. If new evidence cannot give rise to a new "claim" not subject to the strictures of § 2254(d), then the evidence adduced at

an (e)(2) hearing will have no work to do, even where it clearly and convincingly disproves a state court factual finding pursuant to (e)(1). That cannot be the law.

Of course, not all new evidence will suffice to give rise to a new "claim" not subject to § 2254(d). Rather, new evidence on federal habeas must significantly alter the claim presented in state court, in order to give rise to a new "claim" upon which the state court did not rule. By any standard, however, the new evidence presented on federal habeas in this case was sufficient to render § 2254(d) inapplicable. The only death-eligibility factor argued in Bell's case was future dangerousness, and evidence the state habeas court never saw contradicted that factor—both generally, by depicting Bell as non-violent and specifically, by contravening individual items of testimony upon which the prosecution relied. Moreover, evidence the state habeas court never saw provided independent reasons a jury might have chosen to spare Bell's life, as their instructions permitted them to do, even if they found future dangerousness—evidence both that Bell was abused as a child and that there are positive aspects of his character and relationships with others that might have moved his jury to mercy. Finally, only the federal court received expert testimony directly relating this mitigating evidence to the probable deliberations of Bell's jury.

The record before the federal court thus presented a new "claim," the "merits" of which no state court had ever adjudicated. Section 2254(d) therefore did not apply, and this Court should reverse.

Independently, even if § 2254(d) did apply, it was satisfied because the Supreme Court of Virginia's decision rested on unreasonable application of clearly established federal law. The state habeas court resolved important factual disputes without affording Bell a full and fair hearing on them. Pet. App. 84a. In so doing, that court unreasonably applied *McNeal v. Culver*, 365 U.S. 109 (1961), and *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956), both of which require a hearing in such circumstances. The state court's judgment thus rested on "an antecedent unreasonable application of federal law," satisfying § 2254(d) and permitting this Court to "resolve [Bell's] claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007).

ARGUMENT

The proper introduction on federal habeas of new evidence that affects the court's application of the relevant constitutional rule or its impression of the relevant facts gives rise to a "claim" that has not been "adjudicated on the merits" within the meaning of § 2254(d)—such that § 2254(d) by its own terms does not apply. In those rare cases, the federal court must decide *de novo* whether the claim entitles the prisoner to relief. That conclusion is clear from the language of § 2254(d), this Court's prior precedents, and the structure and history of AEDPA. The statute does not require federal courts to defer to a state court's resolution of a claim it never considered.

Yet that is exactly what the courts below did in this case. The federal court received new evidence demonstrating that trial counsel's deficient

investigation led them to miss opportunities to rebut key prosecution themes and evidence in aggravation, left them (and the jury) unaware that Bell was abused as a child, and prevented them from showing the jury positive aspects of Bell's character through the testimony of innocent women and children who love Bell and would be devastated by his death. Also, only the federal court received expert testimony evaluating the effect such evidence would have on a jury. The evidence newly developed on federal habeas is clearly sufficient to relieve Bell's claim of the strictures of § 2254(d).

I. 28 U.S.C. § 2254(D) DOES NOT APPLY WHEN SIGNIFICANT NEW EVIDENCE PROPERLY IS INTRODUCED ON FEDERAL HABEAS

Before AEDPA, this Court debated the standard federal habeas courts should apply in § 2254 cases when evaluating state court judgments pursuant to which a prisoner is detained. In *Wright v. West*, 505 U.S. 277 (1992), for example, three Justices of this Court suggested that such judgments should be upheld unless they are unreasonable, *see id.* at 285-95 (Thomas, J.), while three more contended that federal review should be *de novo*, *see id.* at 297-308 (O'Connor, J. concurring). Congress stepped into that debate in 1996, and with the passage of AEDPA codified a reasonability standard, limited to a specific set of issues. The balance Congress struck is reflected in the current text of § 2254(d), which reads as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

> judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As its opening clause makes clear, § 2254(d) does not raise the bar for *all* habeas petitions brought on behalf of state prisoners. Rather, it limits a federal court's authority to grant the writ only with respect to "claim[s] that [were] adjudicated on the merits in State court proceedings." Any claim or component thereof that is properly before a federal court and was *not* adjudicated on the merits in state court falls outside of the constraints imposed by § 2254(d)—and is therefore reviewed *de novo* on its merits by the federal court.

For example, in *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), this Court examined "the issue of prejudice . . . *de novo*" because "the state courts found the representation adequate" and hence "never reached the issue of prejudice." *See also Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (similar). Similarly, where a state court avoids addressing the merits of a federal claim by means of a flawed procedural ruling, the courts of appeals unanimously

hold that § 2254(d) does not apply to a federal court's later review of the merits. *See, e.g.*, *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001) (holding that § 2254(d) does not apply where state court resolves a claim on procedural grounds); *Hudson v. Hunt*, 235 F.3d 892, 895 (4th Cir. 2000) (similar); *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000) (similar), *cert. denied*, 531 U.S. 1182 (2001); *Graves v. Dretke*, 442 F.3d 334, 339 (5th Cir.) (similar), *cert. denied*, 127 S. Ct. 374 (2006); *see generally* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 32.2 (5th ed. 2007).

That much is common ground. The question in this case is whether a federal court should similarly forego application of § 2254(d) and apply *de novo* review when it properly receives on habeas significant new evidence that the state court did not hear. As this Court assumed in *Holland*, and as several circuit courts of appeals have already recognized, this question must also be answered in the affirmative. A federal court that permissibly takes significant new evidence has before it a "claim" different from the one "adjudicated on the merits" by the state court. *See Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003) (admission of new *Brady* material on federal habeas takes claim out of § 2254(d) because "no state court considered" the totality of exculpatory evidence seen by federal court); *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006) (similar); *Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002) (similar); *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (where *Strickland* claim is based in part on evidence wrongly disregarded by the state court, "the

prejudice flowing from *all* of counsel's deficient performance . . . has never been made in the state courts, so we have no state decision to defer to under § 2254(d)"). The plain language of § 2254(d), this Court's prior precedents, and the structure and history of the statute all confirm that interpretation.

A. The Plain Language Of § 2254(d) Establishes That The Admission Of Sufficient New Evidence On Federal Habeas Will Transform A Claim Into One Not Previously Adjudicated On The Merits In State Court

The operative words of § 2254(d)'s opening clause are "claim . . . adjudicated on the merits." This Court has "ma[d]e clear that [the word] 'claim' as used in" similar provisions of AEDPA "is an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530 (defining "claim" as used in 28 U.S.C. § 2244). A federal basis for relief, in turn, consists of governing federal law applied to a particular set of facts. Indeed, *Black's Law Dictionary* 264 (8th ed. 2004) defines "claim" as "[t]he aggregate of operative facts giving rise to a right enforceable by a court."[3] The courts of appeals share that understanding. *See, e.g.*, *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414,

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[3] It is well-settled that where Congress uses a legal term, that term should be defined in its legal sense. *See, e.g.*, *Bradley v. United States*, 410 U.S. 605, 609 (1973) ("Rather than using terms in their everyday sense, 'the law uses familiar legal expressions in their familiar legal sense.'") (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920)); *see also Boumediene v. Bush*, 128 S. Ct. 2229, 2242-43 (2008) (relying on *Black's Law Dictionary* to define "habeas corpus").

418 (2d Cir. 1989) (defining the word "claim" in the context of Rule 54(b) as "the aggregate of operative facts which give rise to a right enforceable in the courts'") (citation omitted). By its own terms, therefore, § 2254(d) applies only where the state courts previously applied the federal law at issue to the same basic set of operative facts.

Section 2254(d)'s reference to an adjudication "on the merits" reinforces the point, as a judgment is "on the merits" when it is "based on the evidence rather than on technical or procedural grounds." *Black's Law Dictionary* 860; *see also Gonzalez*, 545 U.S. at 532 n.4 ("The term 'on the merits' has multiple usages. . . . We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § 2254(a) and (d). When a movant asserts one of those grounds . . . he is making a habeas corpus claim."). At every turn, the opening clause of § 2254(d) ties its applicability to the state court's analysis of the law and facts that comprise a petitioner's claim.

Because the identity of a federal habeas "claim" is tied inexorably to the aggregate of operative facts to which governing federal law applies, it follows that any significant change in the aggregate facts will change the "claim" as well. *See, e.g.*, *Joseph*, 469 F.3d at 469 (claim predicated in part on evidence "discovered only during federal habeas proceedings" "is *not the same* as the" claim brought in state court) (emphasis added).

B. This Court's Precedents Confirm That Sufficient New Evidence Will Create A New Claim

This Court has repeatedly recognized that the applicability of § 2254(d) is inextricably tied to the facts presented, respectively, to the state and federal courts. The Court first recognized that relationship in *Price*, where the respondent had raised a double jeopardy claim in both state and federal court. 538 U.S. at 638. The Court explained that the "double jeopardy claim . . . *arises out of the same set of facts* upon which [respondent] based his direct appeal, and the State Supreme Court's holding that no double jeopardy violation occurred *therefore* constituted an adjudication of this claim on the merits" triggering the application of § 2254(d). *Id.* (emphasis added). The *factual* identity between Vincent's double-jeopardy claim on state direct appeal and his double-jeopardy claim on federal habeas was essential to this Court's conclusion that § 2254(d) applied.

This Court confronted the issue more directly in *Holland*. There, the Sixth Circuit had found a state court's application of *Strickland* "unreasonable on the basis of evidence not properly before the state court"—namely, a proffer of witness testimony that was not submitted to the state court until after it had already denied relief. 542 U.S. at 652. This Court noted that, "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer." *Id.* at 653. Although this Court "assume[d], *arguendo*" that this approach was correct, the absence of a

lower court finding that § 2254(e)(2) permitted consideration of Jackson's new evidence made further consideration of § 2254(d)'s applicability unnecessary. *Id.* at 652-53.

This Court made the same assumption one year later in *Gonzalez*. In *Gonzalez*, this Court considered whether a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) should be analyzed as a successive habeas petition under 28 U.S.C. § 2244. 545 U.S. at 529-30. The Court noted that the text of "'§ 2244(b) applies only'" to "'a prisoner's "application" for a writ of habeas corpus.'" *Id.* at 530 (citations omitted). An "application," in turn, was "a filing that contains one or more 'claims.'" *Id.* This Court concluded that *some*, but not *all* Rule 60(b)(2) motions would raise "claims"—i.e., "asserted federal bas[es] for relief"—and thus constitute "application[s]" for a writ of habeas corpus. *Id.* The Court noted that a Rule 60(b)(2) "motion [that] seek[s] leave to present 'newly discovered evidence' . . . in support of a claim previously denied" would raise a "claim." *Id.* at 531. The Court "assume[ed]" without deciding "that reliance on a new factual predicate [would] cause[]" such a motion "to escape" the "prohibition of *claims*" previously presented. *Id.* at 530-31 (emphasis added). Just as a new factual predicate may create a new "claim" not barred by § 2244(b)(1)'s prohibition, so too may such evidence alter "the merits" of a "claim" previously "adjudicated" by a state court within the meaning of § 2254(d).

Indeed, that principle was embedded in this Court's jurisprudence long before AEDPA was enacted. In *Vasquez*, this Court considered an

assertion that blacks had been unlawfully excluded from the petitioner's grand jury. 474 U.S. at 256. On federal habeas, the district court supplemented the record by allowing the parties to "provide more figures" on the racial composition of the relevant community, as well as statistical analyses. *Id.* at 258. Respondent urged that such additional factual development on federal habeas constituted a circumvention of the exhaustion requirement. *Id.* at 257. This Court recognized that new facts presented on federal habeas could in appropriate circumstances "fundamentally alter the legal claim already considered by the state courts," but held that the supplemental evidence in the case before it did not rise to that level. *Id.* at 260.

In sum, this Court has repeatedly recognized that the identity of a habeas "claim" is inextricably intertwined with its factual predicate, and that significant new facts will change that identity, giving rise to a new claim that was not "adjudicated on the merits" in state court within the meaning of § 2254(d).

C. The Structure Of § 2254 Confirms That Sufficient New Evidence Will Transform A Post-Conviction Challenge Into A New Claim That Is Not Subject To § 2254(d)

If this Court were to hold that, despite the introduction of significant new evidence, a federal court must still assess the merits of the modified claim under § 2254(d), with reference to the prior state court decision rendered on an outdated evidentiary record, that holding would effectively nullify core aspects of § 2254(e). A statute should of course be interpreted, where possible, to give

meaning to all of its text. So too here. These AEDPA provisions can and should be reconciled by recognizing that the introduction of substantial new evidence will create a new claim, never before adjudicated on the merits, that is not subject to the strictures of § 2254(d).

Section 2254(e) reads, in relevant part, as follows:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

Although such hearings are meant to be relatively rare, subsection (e)(1) makes clear that Congress envisioned evidentiary hearings on federal habeas in cases in which state courts have previously ruled on some of the facts upon which a federal petitioner later relies. Among other circumstances, Congress authorized federal evidentiary hearings where a petitioner attempted diligently to develop his claim in state court. *Michael Williams*, 529 U.S. at 432-33. And Congress contemplated that the evidence adduced at such a hearing might clearly and convincingly rebut a state court's earlier factual findings.

If this Court were to reject petitioner's interpretation of § 2254(d), however, a factual rebuttal under § 2254(e) could not affect the *judgment* of a federal court entertaining a habeas petition because the petitioner could not, through use of the new evidence, satisfy the conditions of (d)(1) or (d)(2). *See* 28 U.S.C. § 2254(d) (absent satisfaction of (d)(1) or (d)(2), "a writ of habeas corpus . . . shall not be granted").

This Court's precedents with respect to (d)(1) are abundantly clear. In *Holland*, the Sixth Circuit had found a state court's application of *Strickland* "unreasonable on the basis of evidence not properly before the state court." 542 U.S. at 652. This Court reversed, holding that "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* And *Holland* broke no new ground in that respect. Rather, it cited *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (*per curiam*), as "denying relief where state

court's application of federal law was 'supported by the record,'" *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003), as requiring that the "reasonableness of [a] state court's factual finding [be] assessed 'in light of the record before the court,'" and *Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002), as "declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law." 542 U.S. at 652. Under *Holland* and the authorities it cites, a federal court is unequivocally foreclosed from considering evidence newly admitted on federal habeas in determining whether a petitioner has satisfied (d)(1).[4]

With respect to (d)(2), the text of the statute is itself dispositive. The plain language of (d)(2) requires federal courts to assess factual unreasonability "in light of the evidence presented in the State court proceeding," a formulation that leaves no room for the consideration of evidence newly received on federal habeas.

The provision in § 2254(e) for rebutting state court factual determinations with new evidence admitted in federal evidentiary hearings can retain vitality, therefore, only if the petitioners' claims in those circumstances are viewed as new claims, not subject to the requirements of § 2254(d), as

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[4] Just as the "unreasonable application" clause of (d)(1) is closed to new evidence, so too is the "contrary to" clause. *See Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000) (holding that the "contrary to" clause is tested against the "set of facts" that "the *state court confronts*," leaving no room for new evidence received on federal habeas) (emphasis added); *see also Holland*, 542 U.S. at 652 (construing *Bell v. Cone* to hold that new evidence cannot establish that a state court's "decision was contrary to federal law").

petitioner suggests. If, as the Fourth Circuit held, no amount of new evidence can result in a new "claim" for these purposes, then "a writ of habeas corpus . . . *shall not* [ever] be granted" based on § 2254(e)'s provision for rebuttal of state court factual determinations, rendering that provision a dead letter. That cannot be correct. Congress plainly intended the mechanism for rebutting a state court's factual determinations by clear and convincing evidence under (e)(1) in an evidentiary hearing conducted pursuant to (e)(2) to have some real-world impact. Congress cannot have intended the federal courts to hold purely advisory evidentiary hearings.

In *Michael Williams*, this Court interpreted § 2254(e) in a way that would "avoid[] putting it in needless tension with § 2254(d)." 529 U.S. at 434. The *Michael Williams* Court saw "no indication that Congress" intended a "harsh reading" of § 2254(e)'s "failed to develop" language that would bar a petitioner who had "pursued [a claim] with diligence" from receiving an evidentiary hearing "even if he could satisfy § 2254(d)." *Id*. at 434-35. It would be similarly implausible to believe that Congress intended through § 2254(d) categorically to bar relief for a petitioner who pursued his claim with diligence and thus qualified for a § 2244(e) evidentiary hearing at which he rebutted the state court's factual findings with clear and convincing evidence. *See also Castro v. United States*, 540 U.S. 375, 380 (2003) (rejecting construction of AEDPA that would "produce troublesome results" and "create procedural anomalies"). If a claim based on significant new evidence is excluded by the opening clause of § 2254(d) from the strictures of that

provision, subsections (d) and (e) work in harmony, with the former governing challenges based on the record before the state court, and the latter governing challenges based on new evidence. That is the only interpretation that reconciles and gives meaning to both subsections, and thus the only interpretation that makes sense in light of the structure of the statute.

D. Petitioner's Interpretation Better Balances The Relevant Policy Interests

It is undisputed that § 2254(d) was intended to increase respect for state court judgments on the merits of federal claims. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2855 (2007) (AEDPA intended "to 'further the principles of comity, finality, and federalism'"). Section 2254(d) accomplishes this objective by providing that, where a federal court finds constitutional error in a claim previously "adjudicated on the merits in State court proceedings," the federal court may remedy that error only if it is further convinced that the state court's adjudication was unreasonable or contrary to federal law within the meaning of § 2254(d)(1)-(2). Thus, where the federal court merely disagrees with the state court, the state court outcome stands; but where the state court's adjudication of the merits was demonstrably defective, § 2254(d) permits the federal court to give effect to its own judgment by issuing the writ. To function properly, this scheme requires that the merits of the claims passed upon by the state and federal courts be substantially the same. As a practical matter, a prior state court adjudication conducted on a materially incomplete record cannot be meaningfully evaluated under

§ 2254(d)(1) or (2) by a federal court applying the Constitution to a record completed after the state court proceedings concluded.

Indeed, this court has recognized that the principles of comity, finality, and federalism AEDPA promotes are implicated most strongly "where a federal court makes its determination based on the identical record that was considered by the state appellate court." *Sumner v. Mata*, 449 U.S. 539, 547 (1981). Where the records are identical, or nearly so, the potential affront to federalism and comity comes from permitting a federal court to second-guess the decision of a state court. Section 2254(d) speaks to that concern by forbidding federal habeas relief unless the state court's decision was not only incorrect, but unreasonably so.

On the other hand, where a federal habeas petitioner asserts that the state court did not permit him properly to develop the facts, and thus seeks to develop on federal habeas a record different from that reviewed by the state court, the potential affront to comity and federalism lies in the decision to permit the petitioner to re-open and expand upon the state court record. *That* concern is the domain of § 2254(e). *See Michael Williams*, 529 U.S. at 436 (finding § 2254(e) reflective of "Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus"). As *Michael Williams* teaches, § 2254(e) embodies "[p]rinciples of exhaustion" and "comity," which "dictate[] that . . . the state courts should have the first *opportunity* to review [a] claim and provide any necessary relief." *Id.* at 436-37 (citations omitted) (emphasis added). "For state courts to have their rightful *opportunity* to

adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error." *Id.* at 437 (emphasis added). Where a prisoner was diligent, however, and the state court simply did not avail itself of the opportunity to hear his claim, *Michael Williams* holds that "comity is not served by" forbidding an evidentiary hearing. *Id.*

If federalism and comity do not prevent a federal court from *receiving* new evidence, then those principles similarly should not prevent that court from *considering* the evidence it has received. *See id.* at 444 (holding that petitioner's diligence in state court "should suffice to establish cause for any procedural default" the prisoner "may have committed in not presenting [his] claims to the Virginia courts in the first instance"). Just as this Court in *Michael Williams* refused to "attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners," *id.* at 434, so too it should not attribute to Congress a purpose or design to withhold relief for claims that *no* court has ever considered on the merits. Yet the rule embraced by the Fourth Circuit would do exactly that. The Supreme Court of Virginia did not consider Bell's current claim on the merits because it elected not to permit development of the aggregate set of operative facts that defines the claim, and the federal courts took an unwarrantedly deferential view of Bell's claim because they erroneously believed they were constrained to do so by § 2254(d). Under a proper understanding of § 2254, the work of protecting federalism and comity in a case like this one is done by the diligence requirement of § 2254(e), not the heightened burden of (d). The powerful check of

§ 2254(e)'s diligence requirement, moreover, will guard against any urge by defense counsel to sandbag the state courts. *See Monroe*, 323 F.3d at 299 n.19 (section 2254(e)'s diligence requirement provides a sufficient check, such that declining to apply § 2254(d) to a new claim predicated on newly developed facts does not "encourage [petitioners] to be lax in their state court efforts").

At bottom, the federalism and comity concerns implicated by this case are addressed by § 2254(e), not § 2254(d). The rigorous diligence standard this Court set forth in *Michael Williams* amply protects state courts' right to have the first opportunity to adjudicate a federal constitutional claim raised by a prisoner in state custody. In order to be relieved from the strictures of § 2254(d), a habeas petitioner must

- Be found not to have "failed to develop" the factual basis of his claim, so that introduction of new evidence on federal habeas is permitted by § 2254(e)(2). *See Michael Williams*, 529 U.S. at 437; *Holland*, 542 U.S. at 653.
- Allege facts that, if proven, entitle him to relief and establish the propriety of a federal evidentiary hearing. *See Townsend v. Sain*, 372 U.S. 293, 313 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).
- Actually prove facts unseen by the state court that significantly affect the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts.

And even then, § 2254(d)'s strictures are lifted *only* with respect to the component of the petitioner's claim that is affected by the new evidence. *See, e.g.*, *Wiggins*, 539 U.S. at 534 (applying § 2254(d) to deficient performance, but not to prejudice, where state court never adjudicated prejudice); *Rompilla*, 545 U.S. at 390 (similar); *Monroe*, 323 F.3d 298-99 (only the materiality prong of petitioner's *Brady* claim excused from § 2254(d)'s strictures by virtue of new evidence); *Cargle*, 317 F.3d at 1212 (only the prejudice prong of petitioner's *Strickland* claim excused from § 2254(d)'s strictures by virtue of new evidence). Where these restrictive conditions are met, neither federalism nor comity require a federal court to pretend to defer to a state court's resolution of a question the state court was never asked.

II. THE NEW EVIDENCE THAT THE DISTRICT COURT PROPERLY RECEIVED ON FEDERAL HABEAS IN THIS CASE WAS SUFFICIENT TO REMOVE BELL'S CLAIM FROM THE STRICTURES OF § 2254(D)

Having denied Bell investigative resources and an evidentiary hearing, the Supreme Court of Virginia never saw or considered the significant new evidence that defined Bell's claim in federal court. Because the state court had never adjudicated that claim on the merits, the district court should have considered the claim *de novo*, and decided for itself whether Bell "is in custody in violation of the Constitution" under § 2254(a).

In saying this, petitioner does not suggest that all new evidence introduced on federal habeas will alter a claim sufficiently to render § 2254(d) inapplicable. But where, as here, new evidence significantly

affects the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts, then the claim adjudicated by the state court ceases to be susceptible to meaningful review under § 2254(d).

Whether in any particular case new evidence is significant enough to render § 2254(d) inapplicable will turn in part on the legal elements the petitioner is required to prove in order to secure relief, because the underlying legal doctrine will affect the relevance of the new facts. Where evidence is either missed by ineffective counsel or suppressed by a prosecutor, it is quite likely to be significant to a determination of *Strickland* prejudice or *Brady* materiality, because in making those determinations the "evidence [must be] considered collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995); *see also Wiggins*, 539 U.S. at 534 (*Strickland* prejudice analysis requires court to "reweigh the evidence [in support of the verdict] against the totality of available [contrary] evidence"). In these contexts, newly discovered evidence not presented to the state court will change the totality of evidence to be reweighed, often significantly enough to take a claim out of § 2254(d).

The Fourth Circuit recognized this in *Monroe*. Obliged to "assess the materiality of exculpatory evidence 'collectively, not item by item,'" the *Monroe* court reasoned that it was "unable to accord AEDPA deference on an item-by-item basis" to omitted evidence. 323 F.3d at 297-99. Accordingly, the Fourth Circuit found "no way of deferring to an earlier state court adjudication of materiality because no state court considered all of the *Brady*

material presented here." *Id.*

Of course, the fact that new evidence is more *likely* to be significant to a *Strickland* claim does not mean that it *always* will. Evidence that is technically new may often be trivial, such that its introduction will have no significant effect on the claim considered by the state court. *See id*. at 299 n.19. Conversely, though, the mere fact that some of the operative facts presented to the federal court were also developed before the state court will not always mean the claim remains the same. In *Cargle*, for example, the Tenth Circuit considered an ineffective-assistance-of-counsel claim predicated on a mix of evidence, some of which the state court considered and some of which it did not. 317 F.3d at 1212. Noting that no state court had assessed "the prejudice flowing from *all* of counsel's deficient performance," the Tenth Circuit found "no state decision to defer to under § 2254(d) on this issue." *Id.* Similarly, in *Monroe*, the Fourth Circuit faced a *Brady* claim predicated in part on "four items of exculpatory material considered in state court" and in part on "material that has surfaced for the first time during federal proceedings." 323 F.3d at 297-98. The Fourth Circuit found § 2254(d) inapplicable as "no state court considered *all* of the *Brady* material presented here." *Id.* at 299 (emphasis added).

In this case, the new evidence received on federal habeas fell into three broad categories. First, the federal court heard new evidence undermining the sole death-eligibility factor—evidence that might have left Bell's jury with a reasonable doubt about his future dangerousness if sentenced to life in

prison. Second, even assuming the jury would have found future dangerousness, the federal court heard new evidence that would have provided the jury independent reasons to spare Bell's life—evidence of abuse he suffered as a child, and evidence of redeeming aspects of his character and relationships. Finally, the federal court received expert testimony bearing directly on the jury's probable reaction to Bell's new mitigating evidence—a direct evaluation of prejudice that contextualized the other new evidence and was itself significant. Each of these categories of new evidence would alone be enough to significantly affect application of the *Strickland* prejudice standard and determination of the facts to which that standard must be applied. And considered in the aggregate, along with the evidence the state court *did* see, this new evidence unquestionably presented the district court with a claim different from that adjudicated by the Supreme Court of Virginia.

A. Evidence Rebutting The Sole Death-Eligibility Factor Argued By The Commonwealth

Before Bell's jury could decide whether the death penalty was the appropriate sentence, they first had to decide whether it was a permissible sentence. Under Virginia law and the jury instructions in this case, the jury could not impose a death sentence unless it found that the Commonwealth proved Bell's future dangerousness beyond a reasonable doubt. JA-158-59. New evidence undercutting that death-eligibility factor could therefore be highly significant in assessing whether Bell was prejudiced by his counsel's failings. *See, e.g.*, *Strickland*, 466 U.S. at

695 (where prosecution must prove a fact beyond a reasonable doubt, prejudice is shown if "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt").

In fact, new evidence that Bell presented on federal habeas had precisely that significance, as it contradicted the core theme of the prosecution's future-dangerousness case—that Bell is an irredeemably violent man who hates those involved in law enforcement. The state habeas court did not hear the witnesses who later testified in district court that Bell is not violent by nature, and that the crime of murder was completely out of character for him. JA-513, 584, 593, 603. Nor did the state court learn that Bell had been close friends with police officers and had actively participated in police youth clubs. JA-513-14, 578, 588-89, 603. The state court also did not learn of Enos Davenport, a witness who would contradict Robinson's testimony that Bell threatened him in jail. JA-250-51.

And while the state court did receive affidavits from Joanne and Tracy Nicholson, in which they contradicted Swartz's testimony of domestic violence, it did not hear Joanne's live testimony adamantly disputing Swartz's account, did not see Joanne's honesty challenged by the Warden, and did not observe her demeanor, which the district court found credible. JA-564-65, 575-76; Pet. App. 169a-70a, 172a. Nor did the state court hear Dawn Jones, the Commonwealth's own witness, provide context to her trial testimony that contradicted the prosecution's portrait of an irredeemably violent man. JA-540-51; Pet. App. 171a.

The difference between the Supreme Court of

Virginia's review of a cold record and the district court's live hearing of Bell's mitigation witnesses was itself significant, as this Court has previously recognized. In *Massaro v. United States*, 538 U.S. 500, 504 (2003), this Court held that petitioners in federal custody may raise ineffective-assistance-of-counsel claims for the first time on habeas. It adopted that rule in part because it appreciated that district courts are "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505. The Court explained that a district court enjoys a significant advantage over an appellate court because "'the district court hears spoken words we can see only in print and sees expressions we will never see.'" *Id.* at 506 (citations omitted). In addition to receiving evidence that was never introduced in state court in any form, the district court here had that same advantage over the state court, because unlike the state court the district court invited live testimony portraying vibrantly the mitigation case that competent counsel could and should have offered at trial. *See also Wainwright v. Witt*, 469 U.S. 412, 428 n.9 (1985) ("The manner of [a witness] while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen [on live testimony], but cannot always be spread upon the [written] record.") (citation omitted).

Petitioner does not suggest that the difference between reading a transcript and seeing live testimony will *always* be significant enough to render § 2254(d) inapplicable to a claim. In many cases, for example where expert testimony is involved, there may be little difference. In this case,

however, the demeanor of Bell's fact witnesses was clearly significant. The district court expressly relied on its "opportunity to observe the witnesses and make judgment[s] about their credibility," Pet. App. 169a-70a, characterized Barbara Williams as a "[v]ery nice person" who was "[v]ery respectful appearing," JA-694, characterized both Carol Anderson and Joanne Nicholson as "helpful" witnesses, Pet. App. 172a, and witnessed not just Joanne's testimony but also her emotional reaction to the prospect of Bell's execution. JA-568.

This Court need not decide whether, ultimately, the jury would have believed Bell's witnesses over the prosecution's with respect to his future dangerousness. Prejudice is established by a "reasonable probability" that the result would have been different. *Strickland*, 466 U.S. at 694-95; *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000). Had the jury heard the evidence that Bell's trial counsel failed to introduce, there is certainly a reasonable probability that they would come away with a different view of the likelihood that he would pose a danger if sentenced to life in prison. This Court has recognized that a jury will likely "give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization would suggest." *Rompilla*, 545 U.S. at 386 n.5. It is equally reasonable to assume that a jury will attach more weight to unadjudicated bad acts where, as here, trial counsel missed an opportunity to diminish their significance. Had counsel done their job, and introduced at trial the substantial rebuttal evidence later adduced on federal habeas, this Court cannot

be confident that the jury's decision would have been the same.

B. Affirmatively Mitigating Evidence, Heard For The First Time On Federal Habeas

Even if Bell's jury would have found future dangerousness beyond a reasonable doubt, had counsel performed competently that would only have made him *eligible* for a death sentence. To determine whether a death sentence was *appropriate*, Bell's jury was required next to consider "any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may" warrant a sentence less than death. JA-159. If the jury believed, based on all the evidence, "that the death penalty [wa]s not justified," it was required to impose a sentence of life imprisonment. JA-158.

Evidence omitted at trial due to trial counsel's inadequate performance provided two distinct sets of circumstances that a jury could easily have found "in fairness or mercy" warranted a sentence less than death: (1) evidence that Bell was abused as a child and (2) evidence that, despite the crime, Bell is a loving man who has formed deep and positive relationships with his partners, children, and step-daughter. Because most of this evidence was presented for the first time on federal habeas, the district court heard a case for prejudicial impact that was significantly different from and more powerful than the one adjudicated on the merits by the Supreme Court of Virginia.

1. Evidence of Child Abuse

The Supreme Court of Virginia never learned

that, when Bell's father was home, he frequently beat Bell with "electrical cords, belts, wood planks, and brooms," leaving scars Bell still bears today. JA-323; *see also* JA-326, 422, 505. Nor did that court learn that Bell was often awakened at night by blows to the head from his father, or that their father forced Bell's sisters to deprive him of food. JA-307, 323. That sort of evidence, of child abuse that may have caused or exacerbated a defendant's developmental and emotional difficulties, may carry tremendous weight with a jury considering whether justice and mercy argue for a sentence other than death. Indeed, this Court has thrice relied on evidence of child abuse unseen by a capital defendant's jury to find *Strickland* prejudice. *See Terry Williams*, 529 U.S. at 395, 398 (finding prejudice where counsel's errors kept the jury from learning "that Williams had been severely and repeatedly beaten by his father"); *Wiggins*, 539 U.S. at 535-37 (describing evidence of child abuse as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability," and finding prejudice from its omission); *Rompilla*, 545 U.S. at 392-93 (finding prejudice from failure to inform the jury that Rompilla "'was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks'") (citation omitted). Yet the state court, having denied Bell both investigative resources and a hearing, never considered whether the totality of the abuse Bell suffered would have reduced his culpability sufficiently, in the minds of his jury, to justify choosing life without parole instead of death. While the evidence of abuse suffered by Bell was less extreme than the abuse at issue in *Williams*,

Wiggins, and *Rompilla*, it may nonetheless have swayed a jury in these circumstances, and its introduction in the federal habeas proceedings gave rise to a claim not adjudicated on the merits by the state court, displacing the application of § 2254(d).

2. Evidence About Bell's Relationships And Redeeming Aspects of His Character

This Court has made abundantly clear that evidence of good character is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)). In *Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987), this Court recognized as mitigating the fact that "petitioner had been a fond and affectionate uncle to the children of one of his brothers." Bell adduced solely on federal habeas substantial similar evidence—the testimony of Barbara Bell Williams, Dawn Jones, and Joanne Nicholson regarding his strong and positive relationships with them and with his children, Kamille, Kydesha, Diontre, Eddie, Jr., and Xavian; the trauma these children will suffer if their father is executed; Barbara's description of Bell's community contributions, cleaning churches and ministering to the sick, the elderly, and other shut-ins; and Bell's efforts to support Barbara, Dawn, Tracy, and their children. JA-233-49, 541-42, 551, 561-63, 581-82, 589, 591-94.

That new evidence would certainly have been important to the jury's sentencing decision, and its introduction on federal habeas unquestionably changed the totality of mitigation evidence

significantly enough to transform the claim heard earlier by the Supreme Court of Virginia. Indeed, the courts of appeals have readily found similar positive character evidence sufficient alone to warrant habeas relief. In *Harris v. Dugger*, 874 F.2d 756, 761-64 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1989), for example, the court found prejudice from trial counsel's failure to present witnesses who "would have described Harris to the sentencing jury as a kind, decent man, a dependable employee, a family man, dedicated to his son, his niece and his ex-wife's other children. All of the witnesses found value in the appellant's life . . . ." In *Collier v. Turpin*, 177 F.3d 1184, 1201-04 (11th Cir. 1999), the court similarly found prejudice from trial counsel's failure to present witnesses who would have told the jury that the defendant, convicted of killing a police officer, was "generally a good family man and a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives." And in *Marshall v. Cathel*, 428 F.3d 452, 470-74 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006), the court found prejudice from trial counsel's failure to call the defendant's sons, who would have told the jury that their "'father was a loving father, and devoted to'" them and who would have asked the jury not to take their father away. Bell should not go to his death without any court having weighed for itself the impact that the totality of such mitigating evidence may have had on the jury had his trial counsel not failed him.

C. Evidence Regarding The Jury's Likely Reaction To The Mitigation Evidence, Heard For The First Time On Federal Habeas

At the federal evidentiary hearing, Bell offered direct, uncontradicted evidence of the prejudice he suffered from his attorneys' failure to offer the available mitigation evidence at the penalty phase of his trial. Craig Cooley is a veteran of over sixty capital cases. JA-373. Cooley is regularly approached to testify in ineffective-assistance cases, but declines "about 90 percent of the requests" because he is unwilling to second-guess trial counsel. JA-374. Cooley only serves when he perceives counsel's "omissions to be beyond the pale" such that his "ethical duty requires" him to testify. JA-608-09. From his extensive experience, Cooley testified in this case that evidence of "redeemable qualities, other things that either endeared [the defendant] to folks or were acts of kindness" is critical to give jurors "a justification . . . to select life without parole as opposed to a death penalty." JA-404. Cooley also testified that if, as here, counsel fails to give the jury "anything" that "they can hang their hat on" to "justif[y] them picking the lesser of these two very harsh penalties," then counsel not only "limit[s] their ability to go in that direction" but also invites jurors to infer that "there must not be anything at all out there" positive about the defendant—a devastating inference. JA-407-08. Dr. Cunningham agreed with Cooley's assessment. JA-763-64; *see also* JA-291-96, 759-60 (Cunningham's qualifications). And Dr. Stejskal testified that the lay witnesses trial counsel could have used would have been "potentially very

effective[] and very persuasive[]" to the jury. JA-422; *see also* JA-437. This testimony directly analyzing the likely effect on the jury's deliberations of the gap between what Bell's jury was presented and what they could have seen was sufficiently significant to Bell's *Strickland* claim as to render review of the state habeas decision under § 2254(d) inappropriate.

D. The Totality Of Available Mitigating Evidence Establishes Prejudice

As discussed, each of the categories of mitigating evidence newly developed on federal habeas was sufficiently significant, even when viewed in isolation, to give rise to a claim not previously adjudicated on the merits, and thereby to render § 2254(d) inapplicable. But it is unnecessary, and indeed would be incorrect, to view each of these categories of evidence in isolation. The *Strickland* prejudice inquiry requires courts to "reweigh the evidence [in support of the verdict] against the *totality* of available [contrary] evidence." *Wiggins*, 539 U.S. at 534 (emphasis added). When the totality of evidence—all of the evidence seen by the state habeas court and all of the evidence newly received on federal habeas—is assessed, it is abundantly clear that Bell was prejudiced by his trial counsel's failings.

The totality of mitigating evidence consists of all of the evidence received by the federal court—evidence rebutting the prosecution's themes and witnesses, evidence that Bell was abused as a child, evidence of positive aspects of Bell's character, and expert testimony regarding a jury's likely reaction to those facts, *plus* the evidence the Supreme Court of

Virginia received—for example, evidence establishing that, at the formative age of 3, Bell's older relatives routinely provided him rum drinks because they liked to watch him dance when he was under the influence. JA-173-74, 275, 304, 312. The state court also learned that, when Bell was 6, his family began supplying him with marijuana. JA-312. And the state court received evidence that dosing a toddler with drugs and alcohol causes lasting brain damage, because it "interfere[s] with . . . brain development." CAJA 310; *see also* JA-312-13 (childhood exposure to drugs and alcohol "blocks the developmental tasks including growth in maturity and coping capabilities, adaptive socialization, and responsible achievement"). The jury that sentenced Bell to death heard none of this evidence.

It is impossible to be confident that, had they seen the totality of available mitigating evidence, Bell's jury would nevertheless have sentenced him to death. The complete set of omitted evidence covers all aspects of a case in mitigation: witnesses would have undermined the sole death-eligibility factor, Bell's abuse as a child and mental limitations may have mitigated his culpability, and Bell's bond with his children provided an affirmative reason to spare his life. Had his counsel not failed, the jury might have entertained a reasonable doubt about whether Bell's hatred of law enforcement was so virulent that he could not safely be imprisoned for life without parole. *See* JA-158-59 (future dangerousness must be proven "beyond a reasonable doubt"). Had his counsel not failed, a reasonable juror might have found Bell's culpability mitigated by his abusive childhood and his cognitive impairments,

circumstances this Court has thrice found to establish prejudice. *See Terry Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 535-37; *Rompilla*, 545 U.S. at 392-93. And had his counsel not failed, a reasonable juror might have decided to spare Bell's life, because he is not irredeemably evil and out of consideration for the women and children who love him and would grieve his loss. *See Hitchcock*, 481 U.S. at 397-98 (relationship between defendant and nephew mitigating); *Marshall*, 428 F.3d at 470-72 (prejudice from failure to call sons who would implore jury not to take their father away); *Harris*, 874 F.2d at 761-64 (prejudice from failure to call witnesses who "found value in the appellant's life"); *Collier*, 177 F.3d at 1202 (same). Even seeing *no* evidence in mitigation, the jury struggled with its decision to sentence Bell to death. Pet. App. 222a. This Court cannot be confident that adding a fulsome mitigation case to the picture would have made no difference to the result.

Certainly the prosecutor's closing reveals that he found the absence of mitigation to be critical, so much so that it was worth repeating six times. JA-141-43, 148-50, 786-87. If the prosecutor—who watched the sentencing case closely, evaluated the credibility of his own witnesses, and observed the jury's reaction—found the absence of mitigation evidence that critical, this Court should find it important enough to demonstrate prejudice. *See Banks v. Dretke*, 540 U.S. 668, 700 (2004) (relying on prosecutor's penalty-phase summation in assessing materiality of excluded evidence under *Brady*).

The Supreme Court of Virginia and the Fourth Circuit both erred in relying on the ostensible "cross-

purpose" or "double-edged" aspect of Bell's mitigating evidence in reaching their contrary conclusions. The Warden has repeatedly insisted that the witnesses not called by trial counsel could have been forced, on cross-examination, to admit to additional incidents of domestic violence. That argument smacks of *post-hoc* rationalization. The prosecution had Dawn Jones on the stand and did not even attempt to elicit testimony regarding domestic violence. JA-116-18. Moreover, Bell's jury had already heard accusations of domestic violence against Bell. *See* JA-106-12 (Swartz); JA-70-71 (Officer Bowerman, who responded to a "domestic" at Bell's home). Although allegations of domestic violence are never to be taken lightly, the best testimony the Warden could elicit at the evidentiary hearing was quite modest. Jones testified that she and Bell had only three or four altercations over five years, and that she never needed medical attention or legal protection as a result. JA-552-53. The two remained friends after their relationship ended. JA-545-46. Joanne Nicholson testified that Bell was never violent with her daughter, JA-190, 563-64; Pet. App. 172a, and that he "worked hard at the[ir] relationship." JA-190. No one, not even the Warden, has ever suggested that Bell was ever violent towards Barbara Williams or Carol Anderson. And the larger picture, unseen by Bell's jury, is that each of these women still cared enough for Bell to be willing to testify on his behalf.

The Warden's insistence that a jury would react negatively to Bell's "abandonment" of Barbara Williams is also dubious. Barbara did not characterize Bell as having "abandoned" her—only the Warden has ever used that term. Quite to the

contrary, Barbara supported Bell's decision to emigrate, JA-598-99, and knew that the timing was outside of Bell's control. JA-590-91. Kamille's deep and ongoing relationship with Bell, and her relationship with her half-sister Kydesha, further undermines the Warden's suggestion. JA-559, 591-92.

The notion that Bell's mitigating evidence could have been undercut by the suggestion that he did not support his children, JA-648-49, is similarly belied by the facts. None of Bell's partners has ever sought a child support order, JA-577, 702, and each recognized Bell's good-faith efforts to provide money and gifts for the children whenever he could. JA-218, 543, 554-55, 559-60, 591-94. Indeed, even while imprisoned, Bell continues to send his children money from his commissary account. JA-594. Nor, finally, could Bell's mitigating evidence have been undercut by claims of his sexual promiscuity. The jury *already knew* that Bell had multiple partners, JA-407-09, 704-06, and Bell's relationships were not mere casual dalliances; each spanned years during which Bell supported his partner and their children. *See* JA-218, 554-55, 567-68, 587-90.

The Supreme Court of Virginia faithfully applies federal law just as this Court does. If the totality of available mitigating evidence undermines this Court's confidence in Bell's sentence, this Court should conclude that it would have undermined the state court's confidence as well—and thus that the new evidence not considered by the state court was significant. This Court should hold that the evidence Bell developed on federal habeas gave rise to an ineffective-assistance-of-counsel claim not

previously adjudicated on the merits by the Supreme Court of Virginia, rendering review under § 2254(d) inapplicable, find prejudice, and remand with instructions to grant habeas relief. *See, e.g.*, *Rompilla*, 545 U.S. at 393.

III. INDEPENDENTLY, THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT § 2254(D) WAS NOT SATISFIED, BECAUSE THE STATE COURT'S FAILURE TO CONDUCT A HEARING ITSELF CONSTITUTED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

As explained, this Court can and should resolve this case on the grounds that § 2254(d) simply does not apply to Bell's ineffective-assistance-of-counsel claim. If this Court concludes to the contrary, however, it should hold that § 2254(d)(1) is satisfied, because the state court's resolution of disputed factual claims without an evidentiary hearing constituted an unreasonable application of clearly established federal law.

In *Panetti*, 127 S. Ct. at 2855-59, this Court held that "clearly established Federal law" within the meaning of § 2254(d)(1) includes not merely the substantive rules announced by this Court—in *Panetti*, the prohibition on executing the incompetent announced in *Ford v. Wainwright*, 477 U.S. 399 (1986)—but also the *procedural* requirements this Court establishes for adjudicating such claims. The state court in *Panetti* unreasonably applied *Ford* by relying on "factfinding procedures" that, under clearly established federal law, were "'not adequate for reaching reasonably correct

results.'" 127 S. Ct. at 2859 (citation omitted). The procedures followed by the Supreme Court of Virginia in this case founder on the same ground.

Under clearly established federal law, state courts must hold an evidentiary hearing when, as here, a claimant presents a well-pleaded allegation of a constitutional violation, involving a factual dispute outside the record, on which the petitioner will be entitled to relief if he can prove his charge. In *McNeal*, a state prisoner sought habeas corpus from the Supreme Court of Florida, alleging that the State unlawfully failed to appoint counsel for him. 365 U.S. at 110. The state court rejected McNeal's claim on the papers, resting on the warden's return, and "without any hearing upon petitioner's allegations, discharged the writ." *Id.* at 111. This Court reversed, holding that petitioner's "allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are." *Id.* at 117; *see also Pennsylvania ex rel. Herman*, 350 U.S. at 120-21, 123 (where state habeas petitioner raises serious allegations in habeas petition, implicating "matters not shown by the record," and return does not establish that they are "frivolous or false," petitioner "cannot be denied a hearing"); *cf. Carter v. Texas*, 177 U.S. 442, 448 (1900) (state court may not "'refuse[] to hear any evidence'" and fail to "'investigat[e] into the truth or falsity of the allegations'") (citation omitted); *Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (error to resolve claim when "petitioner was not permitted to offer evidence to support his claim").

Just as in *McNeal,* the Supreme Court of Virginia resolved Bell's claim on a motion to dismiss, without

a hearing. Pet. App. 29a-30a. In the process, the state court resolved important factual disputes against him—concluding that Bell's proposed impeachment witnesses could have, themselves, been impeached by the Commonwealth, and that the ostensible "cross-purpose" aspect of mitigation evidence omitted by Bell's counsel justified omitting it. Pet. App. 239a-40a. The district court found that the Supreme Court of Virginia relied on a fact finding procedure that was "'not adequate to afford a full and fair hearing,'" Pet. App. 84a (citation omitted), and the Warden has never disputed that conclusion.

If the Court finds that the strictures of § 2254(d) apply at all to Bell's claim, therefore, it should hold that the Fourth Circuit erred in its application of § 2254(d) by not acknowledging that the state court unreasonably failed to apply clearly established federal law. To the extent that § 2254(d) applied to Bell's *Strickland* claim, because the "state court's adjudication of [his] claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied." *Panetti*, 127 S. Ct. at 2858. This Court should therefore "resolve [Bell's] claim without the deference AEDPA otherwise requires." *Id.*

CONCLUSION

The judgment of the Fourth Circuit should be reversed, and the case remanded with instructions to grant habeas relief.

Respectfully submitted,

Robert Lee
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(434) 817-2970

James G. Connell, III
Jonathan P. Sheldon
Randi R. Vickers
DEVINE, CONNELL &
SHELDON, PLC
10621 Jones Street
Suite 301A
Fairfax, VA 22030
(703) 691-8410

Maureen E. Mahoney
Richard P. Bress*
J. Scott Ballenger
Matthew K. Roskoski
LATHAM & WATKINS
LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

* *Counsel of Record*