No. 07-1223

IN THE

Supreme Court of the United States

EDWARD NATHANIEL BELL,
Petitioner,

vs.

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 *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

In a case where the state habeas court has rejected on the merits the petitioner's claim of ineffective assistance of counsel, while assuming in his favor any genuinely disputed material questions of fact:

1) May the District Court order an evidentiary hearing without finding that one of the exceptions to 28 U. S. C. § 2254(d) applies?

2) Does the claim become a new "claim," exempt from the restriction of § 2254(d), simply by the introduction of significant new evidence in support of the claim?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to represent the interests of victims of crime and the law-abiding public in the criminal justice system. In this case, Petitioner asks this Court to effectively repeal the cornerstone reform of landmark legislation enacted to safeguard victims' rights to a reasonably timely disposition of capital cases. This request is contrary to the interests CJLF was formed to protect.

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

SUMMARY OF FACTS AND CASE

On October 29, 1999, petitioner Edward Bell murdered Winchester, Virginia, Police Sergeant Timbrook by shooting him in the face as Timbrook was attempting to arrest him. *Bell* v. *Commonwealth*, 264 Va. 172, 178-182, 563 S. E. 2d 695, 701-703 (2002).

A jury convicted Bell of capital murder and recommended a sentence of death. The Supreme Court of Virginia affirmed. *Id*., at 178, 209, 563 S. E. 2d, at 700, 719. The state court promptly appointed two attorneys, and the defense team also had an investigator. See Brief for Respondent 11-12. The attorneys filed a habeas petition with 14 claims, including ineffective assistance of counsel. See App. to Pet. for Cert. 29a-30a. "In a lengthy opinion, the Supreme Court of Virginia . . . granted the state's motion to dismiss Bell's habeas petition." *Id*., at 30a; *id*., at 231a-261a.

Although Petitioner's question presented in this Court refers to "evidence of prejudice the state court refused to consider," Brief for Petitioner i, his description of the state habeas proceedings in his Statement of the Case does not indicate any evidence the state court refused to consider. See *id*., at 11-12. The opinion indicates that the state court accepted all the proffered evidence at face value and determined on the basis of that evidence and the trial record that the criteria for relief based on ineffective assistance of counsel had not been met. App. to Pet. for Cert. 237a-240a.

On federal habeas, Bell made twelve claims. *Id*., at 31a-32a. The District Court dismissed eleven of them without an evidentiary hearing. *Id*., at 167a. However, the District Court ordered an evidentiary hearing on the ineffective assistance claim without finding that Bell had qualified for an exception to 28 U. S. C.

§ 2254(d) but only finding a colorable claim that he did. *Id*., at 83a-84a.

After the hearing, the District Court issued an oral ruling finding that Bell had met the performance prong but not the prejudice prong of the *Strickland* standard. Neither the Virginia Supreme Court decision nor the § 2254(d) standard is mentioned in the opinion. The Fourth Circuit affirmed, reading the District Court's order as applying the § 2254(d) standard despite the lack of any mention of it, *id*., at 12a, n. 2, and agreeing that the Virginia Supreme Court decision was a reasonable application of controlling precedent. *Id*., at 16a-17a.

SUMMARY OF ARGUMENT

Achieving an effective death penalty was the central purpose of the habeas reform chapter of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Act must be construed with constant attention to that purpose. Petitioner's proposal that he can escape the restriction of the cornerstone reform of this act merely by alleged "significant" additional facts for his ineffective assistance claim—a claim made in virtually every capital case—would amount to a judicial repeal of this provision in the circumstances Congress was primarily concerned with. Given the unlimited nature of mitigation under *Lockett*, there is no limit to what habeas counsel can come up with.

Subsection 2254(d) is a modified rule of res judicata, like § 2244(b). The word "claim" has the same meaning in both sections and the same meaning as "ground" in the prior law. That meaning refers to a particular legal right claimed to have been violated. Alleging new facts to support the claim does not make a new claim, a

principle well understood before AEDPA and not changed by it.

Whether § 2254(d) does or does not preclude relief on a claim must be determined entirely from the state court record. If it does, ordering an evidentiary hearing is an abuse of discretion. Ordering the hearing was an abuse of discretion in this case.

Subsection 2254(d) is a limit on the district court's authority to grant relief on the merits, not deny relief on the merits. As with unexhausted claims, a meritless claim may simply be denied as such, and it should be when the lack of merit is obvious, other grounds for denial involve difficult problems, and denial on the merits is the most efficient route. In this case, deciding the merits *de novo* was not the preferred path, but the District Court did, and the decision was correct.

ARGUMENT

I. Petitioner's proposed interpretation would amount to a judicial repeal of the cornerstone reform of the Antiterrorism and *Effective Death Penalty* Act for the very cases Congress was primarily concerned with.

Petitioner proposes that the lower federal courts be authorized to bypass the standard of 28 U. S. C. § 2254(d) and decide an ineffective assistance claim *de novo* whenever (1) the federal court receives additional evidence of mitigation that trial counsel might have introduced and (2) this additional evidence is "significant" enough that it might have tipped the balance in the determination of prejudice. Brief for Petitioner 25. This, to use petitioner's words, "cannot be the law." Cf. Brief for Petitioner 21. The proposal would make *de novo* review the norm and not the exception in the

capital cases that Congress was primarily concerned with when it enacted § 2254(d). It would vest a nearly unlimited power to escape the restraint imposed by Congress in the very courts that Congress decided had abused their authority and needed to be restrained: the lower federal courts.

A. The Purpose of AEDPA's Habeas Reform.

The central purpose of Congress's reform of habeas corpus in 1996 is right in the title of the act: The Antiterrorism and *Effective Death Penalty* Act of 1996, 110 Stat. 1214, § 1 (1996) (AEDPA) (emphasis added). The death penalty was ineffective, and in most states still is, because capital cases were subjected to too many reviews. At several points in the debate, supporters of the reform cited appalling large numbers of reviews of a single case, typically involving no substantial question of actual innocence. See, *e.g.*, 141 Cong. Rec. 15,018-15,020 (1995) (statement of Sen. Specter); 142 Cong. Rec. 7574-7575 (1996) (statement of Sen. Gorton).

In enacting AEDPA, " 'Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law' . . . . It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Terry Williams* v. *Taylor*, 529 U. S. 362, 404 (2000). The statute must be construed with reference to this purpose of curbing delays and preventing retrials, particularly for capital cases. An interpretation which would make relitigation the norm rather than the exception is not correct.

Limiting reconsideration of cases and particularly of claims that had already been considered is a theme that runs throughout the act. See Parts II and III, *infra*.

Another theme is renewed respect for state courts. The old assumption that a federal court's resolution of a case was necessarily superior to the state court's resolution of the case was abandoned. "State courts, in many respects, are just as good, if not better, than the Federal courts—in these areas, just as good." 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch); see also *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). Along with renewed confidence in state courts, there is a strong element of frustration with the lower federal courts and a sense that they had not been properly exercising the authority they had been granted. The debacle of the Ninth Circuit's handling of the Robert Alton Harris case, see *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992); *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-768) was cited repeatedly by the supporters. 141 Cong. Rec. 4111-4112 (1995) (statement of Mr. Cox); *id*., at 14,734, col. 1 (statement of Sen. Feinstein); see *id*., 15,019 (1995) (statement of Sen. Specter).

Following enactment of AEDPA, many federal courts chafed at the restriction of § 2254(d), and many times this Court has found failures to obey that statute to be so patently erroneous as to warrant summary reversal. See *Early* v. *Packer*, 537 U. S. 3, 4 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U. S. 19, 20 (2002) (*per curiam*); *Yarborough* v. *Gentry*, 540 U. S. 1, 2 (2003) (*per curiam*); *Mitchell* v. *Esparza*, 540 U. S. 12, 13 (2003) (*per curiam*); *Middleton* v. *McNeil*, 541 U. S. 433, 434 (2004) (*per curiam*); *Bell* v. *Cone*, 543 U. S. 447 (2005) (*per curiam*); *Kane* v. *Garcia Espitia*, 546 U. S. 9 (2005) (*per curiam*); *Bradshaw* v. *Richey*, 546 U. S. 74 (2005) (*per curiam*); *Wright* v. *Van Patten*, 552 U. S. __, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (*per curiam*). An elastic escape clause from § 2254(d) would legalize the evasion of Congress's intent that this Court has so often needed to enforce.

B. Routine, Not Rare.

Petitioner's proposal has only two elements needed for the federal court to escape the harness of § 2254(d). First, new evidence must be properly introduced in federal habeas. Second, the new evidence must "affect[] the court's application of the relevant constitutional rule or its impression of the relevant facts . . . ." Brief for Petitioner 22. Petitioner assures this Court that such cases would be "rare." *Ibid*. Far from it. In some circuits, at least, *every* capital case would come under this rule. One might as well propose a judicial repeal of § 2254(d).

Petitioner's proposed requirement that a release from § 2254(d) be limited to cases where the new evidence has been "properly" received has two significant problems. First, the decision to hold an evidentiary hearing remains discretionary, and this Court has not yet mapped out the lower end of the bounds of discretion. This point is addressed further in Part IV, *infra*.

Second, there is a circularity problem here. Subsection 2254(d) is important in determining what is properly received.

> "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. See, *e.g.*, *Mayes* v. *Gibson*, 210 F. 3d 1284, 1287 (CA10 2000). Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Schriro* v. *Landrigan*, 550 U. S. __, 127 S. Ct. 1933, 1940, 167 L. Ed. 2d 836, 844 (2007).

If "significant" new evidence is enough to escape the § 2254(d) bar, then a hearing would be proper, perhaps even required, in *every* case where a defendant makes a mere allegation of facts that, if true, would entitle him to relief in the District Court's *de novo* judgment, so long as a "significant" portion was not presented to the state court and is not barred by the permissive standard of *Michael Williams* v. *Taylor*, 529 U. S. 420 (2000). For the penalty phase of capital cases, the central concern of Congress when it enacted AEDPA, that would be nearly every case.

A large part of the problem, once again, is *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion), and its progeny. By throwing open the doors of mitigating evidence to everything including the kitchen sink, *Lockett* created an inexhaustible supply of potential mitigation evidence that habeas counsel can *always* claim trial counsel should have found and introduced.[2]

Among the supposedly significant mitigating evidence that petitioner claims in the present case is his supposedly high quality family relationships testified to by the *three* women who have borne his children, see Brief for Petitioner 15-17, two of whom he abandoned for others during their pregnancy. See J. A. 553-554, 590. That is not quite as absurd as Justice Thomas's famous example of "mitigating" sociopathy, see *Gra-*

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2. The sweeping mandate of the *Lockett* plurality was wrongly decided as an initial matter. See *id.*, at 623 (White, J., concurring in the judgment); *Walton* v. *Arizona*, 497 U. S. 639, 662 (1990) (Scalia, J., concurring); see also *Graham* v. *Collins*, 506 U. S. 461, 489-492 (1993) (Thomas, J., concurring) (*Lockett* defensible if narrowly construed, but *Penry* expansion is not). The mandate remains by force of *stare decisis*, not original correctness. In an appropriate case, this Court should consider whether the heavy constitutional tax on the system of justice imposed by this decision warrants overruling it.

ham v. *Collins*, 506 U. S. 461, 500 (1993) (concurring opinion), but it is in the same league.

When potential mitigation includes the defendant's entire life, there simply is no case where a second-guesser cannot come up with something new, claim it is significant, and demand an evidentiary hearing. The new evidence need not have been concealed by, or even known to, the prosecution. It is sufficient that the petitioner was not at fault for not producing it in state habeas, *Michael Williams*, 529 U. S., at 432, an elastic standard. Provable facts are not required. Allegations will do. The flimsy evidence of childhood abuse in this case, ultimately rejected by the District Court, see J. A. 802-803, illustrates how easy it is to make the allegation. If the federal court wants to evade § 2254(d), and we know from 12 years of experience that far too many do, see *supra*, at 6, petitioner's proposal would pave an interstate highway to that result.

In order to achieve the result Congress sought—an effective death penalty—§ 2254(d) must be construed to make an evidentiary hearing unnecessary in most capital cases. Petitioner's proposal would do just the opposite. A result contrary to the statute's purpose would be in order only if it were unmistakably compelled by the statutory language. That is not the case here. We will return to what the word "claim" means in Part III, *infra*, but first it is necessary to clarify the nature of the § 2254(d) rule.

II. Subsection 2254(d), like 2244(b), is a modified rule of res judicata.

The central issue in this case is the meaning of "claim" in 28 U. S. C. § 2254(d). That meaning is illuminated by understanding the nature of the rule enacted by that subdivision. The rule is commonly

referred to as a rule of "deference" in the case law, see, *e.g.*, *Bell* v. *Cone*, 543 U. S. 447, 448 (2005) (*per curiam*), just as it was during the floor debate. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945 (1998). However, this convenient shorthand expression is not a substitute for a close examination of the nature of the rule in a case where its exact nature matters.

A. The Language of the Statute.

The place to begin is the language of the statute. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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* . . . ." 28 U. S. C. § 2254(d) (emphasis added).

This states the general rule. What follows the "unless" are exceptions to the general rule. This rule is a prohibition against granting relief to a party who has already litigated and lost the same claim. It falls into the same family of rules as the doctrines of res judicata, law of the case, successive petitions, and *Stone* v. *Powell*, 428 U. S. 465 (1976). Rules of this class forbid relitigation of a dispute, with certain exceptions, because of the unfairness to the party who prevailed in the first suit of being forced to fight the same battle over again. "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden); Scheidegger, 98 Colum. L. Rev., at 946.

B. Habeas Corpus and Prior Adjudications.

Far from being a radical innovation, § 2254(d) brings federal habeas for state prisoners back toward the mainstream of Anglo-American jurisprudence. The procedure is still unique, but it is less anomalous than it was before.

The traditional general rule is res judicata. State court judgments have res judicata effect in federal court, even if the federal court disagrees with the result. That has been the rule, if not from day one, at least from year two, the Full Faith and Credit Act of 1790. See Scheidegger, *supra*, 98 Colum. L. Rev., at 912; see also *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947) (correctness of state decision is immaterial); *Allen* v. *McCurry*, 449 U. S. 90, 103 (1980) (no right to relitigate federal right in federal court).

At common law, the habeas court was *not* free to ignore the res judicata effect of other judgments, especially a judgment of conviction. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830), holds unambiguously to the contrary. See Scheidegger, *supra*, 98 Colum. L. Rev., at 928-932 (discussing *Watkins*).

The subsequent history has been discussed many times and need not be repeated here. Suffice it to say that before *Brown* v. *Allen*, 344 U. S. 443 (1953), this Court had developed two discretionary rules of prior adjudication. First, contrary to the common law rule, a judge presented with a successive petition could, but need not, consider the prior denial, even to the point of giving it controlling weight. *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924); see *McCleskey* v. *Zant*, 499 U. S. 467, 481-482 (1991).

Second, *Darr* v. *Burford*, 339 U. S. 200, 215 (1950), overruled on other grounds, *Fay* v. *Noia*, 372 U. S. 391, 435-436 (1963), held that following state review and

denial of certiorari, the habeas court "*may* decline to examine further into the merits *because they have already been decided against the petitioner*. [Footnote citing *Salinger*.]" *Id*., at 215 (emphasis added). Words can hardly be more clear. *Darr* was a rule of prior adjudication, albeit a flexible, discretionary one.

The *Salinger* rule of successive petitions evolved from one of amorphous discretion to the very lax rule of *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963), to the more structured rule of *McCleskey*, *supra*, 499 U. S., at 493, and finally into the codified rule of 28 U. S. C. § 2244(b). The effect of the prior state adjudication of the claim has followed a similar, though not parallel, evolution. *Brown*, *supra*, effectively reduced the state decision to a mere precedent from another jurisdiction, albeit a particularly pertinent one. See *Wright* v. *West*, 505 U. S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). In § 2254(d), Congress has done with *Darr* just what *McCleskey* and § 2244(b) did with *Salinger*; it has restored the spirit of the pre-1953 discretionary rule but replaced it with a structured and more tightly limited rule.

Throughout American history, the availability of federal habeas for state prisoners has varied as a function of confidence in state courts relative to federal courts. It was forbidden in the beginning, when federal courts were a feared innovation. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. It was expanded during Reconstruction, retracted in the late nineteenth century, see, *e.g.*, *In re Wood*, 140 U. S. 278, 285-286 (1891), expanded again in the 1950s and 1960s during the civil rights struggle, see *Brown*, *supra*; *Fay* v. *Noia*, *supra*, and retracted again in the last quarter of the twentieth century in *Stone* v. *Powell*, 428 U. S. 465 (1976), *Teague* v. *Lane*, 489 U. S. 288 (1989), *Coleman* v. *Thompson*, 501 U. S. 722 (1991), and other cases.

The enactment of a qualified prior adjudication bar is the next logical step in this evolution. It takes us back to the principle that relitigation is the exception and finality of judgments is the rule. See *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) ("not ordinarily re-examine"). It does so based on the recognition that state courts today are far different from what they were in 1953 or 1963, that they warrant more confidence, and that their judgments deserve more respect.

The nature of this rule is plain and found on the surface. Cf. *Ex parte Siebold*, 100 U. S. 371, 393 (1880). It forbids granting a claim previously rejected by a coordinate court, unless an exception applies. Understanding § 2254(d) as a modified rule of res judicata is important to understand what the word "claim" means in the statute. That word has the same meaning that it has in § 2244(b), the same act's other "modified res judicata rule." See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996).

III. The word "claim" has the same meaning in §§ 2254(d) and 2244(b), and ineffective assistance is one "claim."

"[A] basic canon of statutory construction" tells us "that identical terms within an Act have the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 479 (1992). The word "claim," as a noun referring to claims by the habeas petitioner, is used repeatedly in the habeas statutes. See 28 U. S. C. §§ 2244(b)(1), (b)(2), (b)(2)(A), (b)(2)(B)(i), (b)(2)(B)(ii), (b)(4), (d), (d)(1)(D), (d)(2), 2254(d), (e)(2), (e)(2)(A), (e)(2)(B), 2255(f)(4), 2264(a), (a)(3), (b), 2265(a). The word should have the same meaning in all these usages absent a strong indication that Congress intended

different meanings, and no such reason is apparent from the face of the statute or the legislative history. In particular, the word should have the same meaning for §§ 2244(b) and 2254(d) because these are both rules of the same class—preclusion of claims on which the petitioner has received or could have received a decision in a previous proceeding.

A. Successive Petition Cases.

The pre-AEDPA habeas statute and rules used the term "ground" instead of "claim" in the successive petition context. See 28 U. S. C. former § 2244(b) (1994 ed.); Rule 9 of the Rules Governing Section 2254 Cases in the Federal District Courts, 28 U. S. C. foll. § 2254 (1994 ed.). However, the word "claim" was used interchangeably with "ground" by this Court in its thorough examination of the abuse-of-the-writ doctrine in *McCleskey* v. *Zant*, 499 U. S. 467, 471 (1991), and in discussions of the exhaustion rule. See *infra*, at 20. Congress's change from "ground" to "claim" is therefore probably an updating of language rather than a substantive change.

Sanders v. *United States*, 373 U. S. 1, 16 (1963), has a brief discussion of what a "ground" is.

> "By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations."

Sanders must be considered with caution, because it was part of a series of habeas decisions that this Court subsequently abandoned as giving too little weight to the state's interest in finality. See *McCleskey*, 499 U. S., at 506 (Marshall, J., dissenting) ("repudiates a line of judicial decisions . . ."); *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (overruling *Fay* v. *Noia*, 372 U. S. 391 (1963), for giving insufficient weight to finality). Immediately after the passage quoted above, *Sanders* makes the unsupported comment, "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders*, 373 U. S., at 16. That is precisely the kind of tilt in the petitioner's favor that this Court found unjustified in *Coleman*, and this statement should not be considered authoritative.

For its illustration of "ground," however, *Sanders* is not inconsistent with subsequent cases. It is, though, completely inconsistent with petitioner's proposal that a factual difference that merely affects the application of the relevant rule or changes the impression of relevant facts constitutes a new "claim." Psychological ploys and physical coercion would certainly make different impressions and they call for different applications of law to very different facts.

In the interval between *Sanders* and *McCleskey*, there was a significant difference between a second petition presenting a new "ground" and one that reasserted a previous ground with new support. *Molina* v. *Rison*, 886 F. 2d 1124, 1128-1129 (CA9 1989), has a useful survey of court of appeals cases on the meaning of "ground" in this interval. For the convenience of the Court, we have reproduced this survey in the Appendix to this brief.

Molina's survey concludes that "despite the similarity or differences in the factual context of the claim, a ground is successive [the same ground, as opposed to a new one] if the basic thrust or 'gravamen' of the legal claim is the same . . . ." The focus is on the federal constitutional right of the defendant alleged to have been violated and not on the particular facts proffered to support that claim. The cases unequivocally reject arguments equivalent to petitioner's "tied inexorably to the aggregate of operative facts" thesis. *Cunningham* v. *Estelle*, 536 F. 2d 82, 83 (CA5 1976) (*per curiam*), is squarely on point, holding that an ineffective assistance claim "simply . . . varying the factors that he claims demonstrate incompetency" was the same ground as the prior claim.

To accept petitioner's fact-centered thesis, the Court would have to accept either (1) that Congress intended "claim" to have one meaning in § 2244 and a radically different meaning in § 2254, or (2) that Congress intended "claim" to have a radically different meaning in the new § 2244 than "ground" had in the old one, despite the interchangeable use of those terms in this Court's cases. Neither alternative is plausible.

From *McCleskey* to AEDPA, there was little discussion of what was an old ground and what was a new one, because the same exceptions applied to both "successive and abusive claims," as they were known. For example, *Sawyer* v. *Whitley*, 505 U. S. 333, 348-349 (1992), explored the "miscarriage of justice" exception but never specified which category Sawyer's claims fell in, because it did not matter. After AEDPA, the issue has not been extensively litigated because the distinction rarely changes the result in § 2244(b) cases. While paragraph (1) has no exceptions at all, paragraph (2) has exceptions so tight that very few petitioners have even a colorable claim to meet them. Even so, the

distinction is there, and the first step in a § 2244 analysis is to identify which paragraph governs, *i.e.*, whether the "claim" is the same or a new one. See *Gonzalez* v. *Crosby*, 545 U. S. 524, 530 (2005).

Gonzalez defined "claim" as "an asserted federal basis for relief." *Ibid*. This definition tracks *Sanders*' "sufficient legal basis for granting the relief sought" language, which was understood in the cases collected in *Molina* to be inconsistent with a fact-centered approach such as the one petitioner proposes. *Gonzalez* did not, and did not need to, definitively answer whether "a new factual predicate" could make a new claim, see *id*., at 531, because the main issue in the case was claims versus nonclaims, not new claims versus old claims. The "even assuming" language of this passage seems to express serious doubt of that proposition but reserves resolution for a future case. Petitioner grasps at a straw by relying on *Gonzalez*'s skeptical assumption as if it were authority, but he implicitly agrees that "claim" has the same meaning in § 2254(d) that it has in § 2244(b). See Brief for Petitioner 29.

Only a few post-AEDPA successive petition cases in the courts of appeals have addressed the definition of a "claim" in distinguishing new claims from repeated claims. Those few have understood "claim" in a much broader sense than petitioner proposes. *United States* v. *Allen*, 157 F. 3d 661 (CA9 1998), was a second § 2255 petition by a federal prisoner. Allen repeated the allegations of attorney ineffectiveness from the first petition and added significant new ones. See *id*., at 664. The court held this to be the same ground, applying the "thrust or gravamen" approach of *Molina*, *supra*, and following *Cunningham* v. *Estelle*, *supra*. *Ibid*.

Babbitt v. *Woodford*, 177 F. 3d 744 (CA9 1999) (*per curiam*), involved a motion to file a second federal petition by a state prisoner. In the first petition, he had

alleged ineffective assistance based on failure to present PTSD evidence but now he had newly discovered evidence of trial counsel's alcohol abuse. *Id*., at 746. Notwithstanding the completely different factual basis, the court held it was the same claim, following *Allen*, and dismissed under § 2244(b)(1). *Ibid*.

The Seventh Circuit has reached a similar conclusion, at least with regard to ineffective assistance claims. In *Brannigan* v. *United States*, 249 F. 3d 584, 587-588 (CA7 2001), the court noted that it was tempting to borrow the answer from civil claim-preclusion law but concluded that could not be right, because then every collateral attack on a criminal judgment would only have one "claim" and all successive claims would be precluded. *Id*., at 587. *Brannigan* goes on to conclude that all challenges to a single step in the case are one claim regardless of legal theory, *id*., at 588, but that conclusion cannot be squared with a long line of authority from *Sanders* to *Gray* v. *Netherland*, 518 U. S. 152, 165 (1996). However, *Brannigan* is consistent with *Babbitt* that ineffective assistance is a single claim, although the statement is arguably dictum because *Brannigan* was not an ineffective assistance case. 249 F. 3d, at 589.

A second opinion of the Seventh Circuit, also by Judge Easterbrook, directly addressed a successive ineffective assistance claim. In *Peoples* v. *United States*, 403 F. 3d 844, 846 (CA7 2005), the petitioner had been before the court three times, and each time he had alleged ineffective assistance of counsel. The first two times the Seventh Circuit resolved the claim on the merits, and "that is enough (if not once more than enough), and we decline to revisit the subject." *Ibid*.

> "Peoples presented ineffective-assistance arguments in his two prior appeals. That ground was resolved adversely to him on the merits, twice.

> Although Peoples now wants to present new instances of supposed shortcomings, ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief." *Id*., at 847-848, citing *Bell* v. *Cone*, 535 U. S. 685, 697 (2002), and *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984).[3]

Petitioner contends that the rule that counsel's work must be considered as a whole requires that a claim be considered a new claim when one more significant dollop of evidence is added to the petitioner's side of the scale. See Brief for Petitioner 39-40. He has it precisely backwards, according to *Peoples*.

B. Exhaustion Cases.

Petitioner relies on a pre-AEDPA exhaustion case, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), for his definition of "claim," see Brief for Petitioner 29-30, but he places more weight on a negative inference than it will bear. *Hillery* was a carefully limited decision that held merely that the new evidence in that case did not so fundamentally alter the claim so as to require a return to state court. See *id*., at 260. It did not hold that a greater quantum *would* make a new claim. Quite the contrary, "We have never held that presentation of additional facts . . . evades the exhaustion requirement when the prisoner has presented the substance of his

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3. *Peoples* notes in passing that "[d]iscovery of previously withheld evidence also might reopen the subject," citing *United States* v. *Taglia*, 922 F. 2d 413, 418 (CA7 1991). But *Taglia* is a pre-AEDPA case, and the point cited discusses exceptions to rules against relitigating claims, not the definition of "claim."

claim to the state courts." *Id*., at 257-258, citing *Picard* v. *Connor*, 404 U. S. 270, 278 (1971). And where does *Picard* look for guidance on what is the substance of a claim? To *Sanders*. See *Picard*, *supra*, at 277-278. The word "claim" in the pre-AEDPA exhaustion cases means the same thing as "ground" in the pre-AEDPA successive petition cases.

C. Monroe.

Monroe v. *Angelone*, 323 F. 3d 286, 297-298 (CA4 2003), is, of course, contrary to the understanding of "claim" in the extensive body of case law described above. But the *Monroe* opinion is superficial and concerns itself primarily with the word "deference," which is not in the statute, rather than "claim," which is. *Monroe* makes no effort to reconcile its understanding of the scope of a "claim" in this part of the statute with the usage elsewhere in the same statute. It is oblivious to the body of the pre-AEDPA case law and the light it sheds on Congress's intent. This opinion and other similar opinions are entitled to little weight.

D. Consistency of § 2254(d) and (e).

Petitioner notes correctly that in § 2254(e)(1) "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." Brief for Petitioner 32. However, his claim that the fact rebuttal provisions of subsection (e) are rendered "a dead letter" unless the facts can reopen federal claims decided on the merits in state court by relieving them from the operation of subdivision (d), Brief for Petitioner 34, is a non sequitur.

Subdivision (e)(1) applies to any "determination of a factual issue." It is not limited to factual determinations made in the course of deciding the same claim

that the petitioner makes in federal court. Although the exhaustion and procedural default rules, in tandem, *generally* require that the petitioner make the claim to the state courts in time to receive a determination on the merits, that requirement is not remotely close to watertight. A claim that is procedurally defaulted in state court may nonetheless be considered on federal habeas if the federal court finds that the state ground is inadequate, see *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002), or not independent, *Park* v. *California*, 202 F. 3d 1146, 1151 (CA9 2000), cert. denied, 531 U. S. 918 (2000), if the petitioner meets the "cause and prejudice" test, see *Strickler* v. *Greene*, 527 U. S. 263, 289 (1999), or in extremely rare cases if there has been a miscarriage of justice. See *House* v. *Bell*, 547 U. S. 518 (2006).

Even though the federal claim was never made to the state court, the state court may have made factual findings that are relevant to or even dispositive of the federal claim. States often have rules of state law that are closely analogous to federal constitutional rules. If a California trial judge makes a finding under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), that a prosecutor's race-neutral explanation for a peremptory challenge was genuine, that fact would be rebuttably presumed correct in federal court under § 2254(e)(1) in a subsequent claim under *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Section 2254(d) would not bar the *Batson* claim if it was not timely made in state court and therefore not decided on the merits. The procedural default rule would not bar the claim if the petitioner succeeds in getting around that rule, as petitioners in the Ninth Circuit very often do. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216.

Subdivision (e) can also come into play when a petitioner succeeds in establishing one of the exceptions

to subdivision (d) but does not in the same stroke establish an entitlement to relief. In *Woodford* v. *Visciotti*, 537 U. S. 19, 21-22 (2002) (*per curiam*), the Ninth Circuit believed that the California Supreme Court had applied the wrong standard for judging an ineffective assistance claim. The Ninth was mistaken and this Court reversed, *id*., at 27, but such a case is certainly possible. In that event, the § 2254(d) bar to relief would be lifted, but the petitioner would still have to establish that he is entitled to relief under the correct standard. Any findings of fact made by the state court would still receive the subdivision (e) presumption.

As a final example, facts found by a state court may be relevant to a procedural question before the federal habeas court, as opposed to the merits of a claim. In a course of deciding that a case is procedurally defaulted under state law, a state court may make findings of historical fact regarding what counsel knew, when he knew it, and when he should have known it. See, *e.g.*, *In re Robbins*, 18 Cal. 4th 770, 781, 959 P. 2d 311, 318 (1998). The cause-and-prejudice exception to the federal default rule often involves such factual issues. See, *e.g.*, *Strickler* v. *Greene*, 527 U. S. 263, 284 (1999).

We could provide other examples, but these will more than suffice. Petitioner's claim that his interpretation of subdivision (d) is essential to give meaning to subdivision (e) is completely without merit.

In summary, then, "claim" has a consistent meaning in the current habeas statute, and it is the same as the meaning of "ground" in the prior statute. A habeas petitioner's claim that a particular legal right was violated, entitling him to relief, is one "claim," regardless of how many different facts are alleged to make the case. This was the understanding before AEDPA, and there is no indication Congress intended to change it.

This understanding of § 2254(d) is fully consistent with the rebuttable presumption of factual findings provided in § 2254(e). As applied specifically to the claim in this case, ineffective assistance of counsel is one "claim," at least as to each stage of the trial: guilt and sentencing.

IV. Whether § 2254(d) precludes a grant of relief must be determined on the state court record, and where it does granting an evidentiary hearing is an abuse of discretion.

On one point, the petitioner is correct. The question of whether a claim is barred by 28 U. S. C. § 2254(d) must be considered entirely on the state court record. Brief for Petitioner 33. As to the facts, paragraph (d)(2) is unmistakably clear: "in light of the evidence presented in the state court proceeding." The reasonableness of the state court's application of precedent under paragraph (d)(1) only makes sense if the application is to those same facts.

Schriro v. *Landrigan*, 550 U. S. __, 127 S. Ct. 1933, 1937, 167 L. Ed. 2d 836, 841 (2007), was a case where the District Court denied an evidentiary hearing and the Court of Appeals held that a hearing was mandatory. The case therefore directly addresses only the limit on the court's discretion to deny a hearing, not the limit on the court's discretion to grant one.

Landrigan discusses how AEDPA changed the factors to be considered without directly altering the judge's authority. See *id*., at 127 S. Ct., at 1939-1940, 167 L. Ed. 2d, at 843-844. The Court then continues, "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id*., 127 S. Ct., at 1940, 167 L. Ed. 2d, at 844.

This holding implements AEDPA's purpose of reducing delays in execution. See *ibid*.

The passage emphasizes factual findings that dispose of the claim because that was the situation presented by the case history in *Landrigan*. As a matter of historical fact, Landrigan had forbidden all mitigating evidence, and that fact precluded any possibility of establishing prejudice under *Strickland*. See *id*., 127 S. Ct., at 1941-1942, 167 L. Ed. 2d, at 846-847. However, the "otherwise precludes" language indicates that the principle is not limited to dispositive facts. A reasonable application of the correct precedent to the facts before the state court also "precludes habeas relief" on that claim. Therefore, the district court is not *required* to hold an evidentiary hearing on a claim if the state court decided that claim on the merits and neither exception applies.

Is a district court *permitted* to hold a hearing on such a claim? There is no reason to hold one. If the claim is precluded by § 2254(d) on the basis of the state record, no facts introduced in federal court can lift that bar. A hearing would be an unnecessary delay and a waste of resources. An unnecessary delay is an unreasonable delay and therefore a violation of the rights of the victims. See 18 U. S. C. § 3771(a)(7), (b)(2)(A), (b)(2)(D).

The question *Landrigan* did not reach is squarely presented in the present case. The District Court held an evidentiary hearing based on a finding that the petitioner had merely a "colorable claim" that the criteria of § 2254(d) were met. App. to Pet. for Cert. 83a-84a; Brief for Respondent 21-22. That was error and an abuse of discretion. The correct procedure is to decide whether the criteria are met or not based solely on the record in state court. If not, the claim should be finally denied at that point. If so, petitioner has cleared

that hurdle and must now establish his claim on the merits, just as before AEDPA. If a hearing is needed for that purpose and not precluded by § 2254(e)(2), the court should hold one.

We will touch only briefly on the issue of procedural adequacy of factual determinations, as we understand that issue will be covered in another *amicus* brief. That issue is not actually presented in the present case. The state habeas court in the present case did not refuse to consider any evidence proffered by the petitioner and did not resolve against him any genuinely disputed issue of material fact. The state court decided that he was not entitled to relief assuming the truth of his factual allegations. See Brief for Respondent 11-12. This is a perfectly proper way to proceed. Federal habeas rules provide for dismissal without an evidentiary at two points in the process. See Rules 4 and 8(a) of the Rules Governing Section 2254 Cases in the Federal District Courts; see also Fed. Rule Civ. Proc. 56(c) ("no genuine issue of material fact and that the movant is entitled to judgment as a matter of law").

Conceivably, there might be a case where a state court acts unreasonably in summarily deciding material factual questions against the petitioner despite a proffer of solid evidence. When and if that case arises, the Court can consider whether § 2254(d)(2) provides relief. This is not that case. The evidence proffered to the state court was weak and insubstantial, see Brief for Respondent 63-64, and the state court's appointment of two attorneys and an investigator far exceeded any constitutional obligation of the state in collateral proceedings. See *Murray* v. *Giarratano*, 492 U. S. 1, 10 (1989). Congress considered the question of adequate funding for defense counsel on state habeas in capital cases and decided to allow federal review of that adequacy only for the purpose of Chapter 154, not Chapter

153. See 28 U. S. C. § 2265(a)(1)(A). Where Congress has made an express provision for Chapter 154 and has not included similar language in Chapter 153, the courts cannot read it in to Chapter 153. See *Lindh* v. *Murphy*, 521 U. S. 320, 329-330 (1997). The only criteria for review of the state court determination of the merits by the federal court are those stated in the statute.

V. The District Court decided the prejudice issue after *de novo* review and correctly denied the claim on the merits.

Petitioner insists that the District Court in this case decided his ineffective assistance claim under the standard of 28 U. S. C. § 2254(d) rather than applying the rule of *Strickland* v. *Washington*, 466 U. S. 668 (1984) *de novo*. See Brief for Petitioner 17-18. He is mistaken. Although *amicus* CJLF agrees with respondent that the District Court should not have held an evidentiary hearing, a federal court that has sufficient facts before it to deny a claim on the merits without reference to the state court decision *may* do so. That is what the District Court did in this case. Its decision on the prejudice prong of *Strickland* was correct and reached the correct disposition of the case, notwithstanding the errors that preceded it.

A. The Decision in the District Court.

After the evidentiary hearing, District Judge Jones issued an oral opinion from the bench. J. A. 797. In his opinion, Judge Jones reviewed the evidence presented during the hearing and determined that the evidence did not support a finding that Bell had been prejudiced by the errors of his trial counsel. J. A. 803-804.

As explained in Part IV, *supra*, it is an abuse of discretion to hold an evidentiary hearing when the state court has decided the claim on the merits, and a review of that decision on the state court record shows no exception to § 2254(d) applies. In this case, though, the district judge did hold an evidentiary hearing and made "findings of fact and conclusions of law," J. A. 797, based on "my opportunity to observe the witnesses and make judgment of their credibility, as well as my review of all of the evidence presented." J. A. 798. At no point during his oral opinion did Judge Jones mention the § 2254(d) standard. Instead it appears that Judge Jones reviewed Bell's ineffective assistance of counsel claim *de novo*. J. A. 798 ("I am required to 'reweigh the evidence in aggravation against the totality of available mitigation evidence' "). Reweighing is *de novo* determination of the merits.

When the Fourth Circuit reviewed the District Court's denial of habeas relief it noted, "Although the district court's oral order dismissing Bell's petition did not explicitly apply [the § 2254(d)] standard of review, we read the district court's oral order as consonant with its written order." *Bell* v. *Kelly*, 260 Fed. Appx. 599, 604, n. 2 (CA4 2008). The Fourth Circuit reasoned that because the District Court's written order granting the evidentiary hearing had "noted" § 2254(d)'s deference standard, that must be the standard that the District Court applied when it issued its oral opinion denying Bell habeas relief. *Ibid*. This presumption was unjustified.

In *Price* v. *Vincent*, 538 U. S. 634, 639 (2003), this Court chided the Sixth Circuit because it "recited" 28 U. S. C. § 2254(d), but "proceeded to evaluate respondent's [double jeopardy] claim *de novo* rather than through the lens of § 2254(d) . . . ." After rejecting the argument that the Michigan Supreme Court decision

resolved a factual issue rather than a legal one, see *Vincent* v. *Jones*, 292 F. 3d 506, 511 (CA6 2002), the Sixth Circuit proceeded to discuss the case and reach its conclusion with no further reference to the state court decision or the § 2254(d) standard. See *id*., at 511-512. This Court understood that to be a *de novo* decision. The inference the Fourth Circuit made in the present case is even weaker than the one this Court rejected in *Vincent*. In the present case, the Fourth Circuit drew that inference from a reference in another opinion five months earlier, as opposed to earlier in the same opinion. On the basis of *Vincent* alone, then, the District Court opinion in this case should be understood as a *de novo* opinion on the merits of the *Strickland* claim. But there is an additional reason to understand it that way. Denials are different from grants.

B. Grants, Denials, and § 2254(d).

On its face, § 2254(d) is a limitation on the power to *grant* habeas relief on a claim previously decided by the state court. It says nothing about denying a claim. For the exhaustion rule, Congress has made the distinction explicit. See 28 U. S. C. § 2254(b)(2). Denying a petition on the merits implicates few, if any, of the concerns of respect for state courts, state procedure, and finality that the exhaustion rule, the procedural default rule, and § 2254(d) protect. When a claim is patently meritless and procedural questions are more difficult, a swift denial on the merits may be the most efficient resolution of the case, entirely consistent with the purpose of AEDPA. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997); *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005); *Smith* v. *Texas*, 550 U. S. 297, 127 S. Ct. 1686, 1703-1704, 167 L. Ed. 2d 632, 650-651 (2007) (Alito, J., dissenting).

Weeks v. *Angelone*, 528 U. S. 225 (2000), decided while the meaning of § 2254(d) was still in dispute, illustrates that a claim can be denied on the merits without violating § 2254(d). *Weeks* involved the trial judge's response to a question from the jury. *Id*., at 227. This Court affirmed the denial of habeas relief by referencing § 2254(d)'s deference standard, but not without first addressing the merits of Weeks' claim. *Id*., at 237.

In the first six pages of the opinion, this Court examined whether the jury instruction had violated the Constitution. *Id*., at 231-236. The bulk of this Court's opinion discussed the "adequacy of the jury instructions" and "their sufficiency" with regard to earlier Supreme Court precedent. *Id*., at 233. The Court held that "[g]iven that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's questions by directing its attention to the precise paragraph of the constitutionally adequate instruction . . . the Constitution [does not] require[] anything more." *Id*., at 234. This certainly reads like a *de novo* determination of the merits, just as much as the Sixth Circuit opinion in *Vincent*.

In the last full paragraph of *Weeks*, this Court addressed whether § 2254(d) precludes relief. *Id*., at 237. "For the reasons stated above, it follows *a fortiori* that the adjudication of the Supreme Court of Virginia affirming petitioner's conviction and sentence neither was 'contrary to,' nor involved an 'unreasonable application of,' any of our decisions." *Ibid.*

The "reasons stated above" were the reasons the claim had no merit. In other words, examination on the merits has established that the defendant had no claim, and a correct decision is necessarily reasonable.

In the present case the District Court granted Bell an evidentiary hearing to determine whether his sentence had resulted from a violation of his constitutional rights under "*Strickland*, *Williams*, *Wiggins* and *Rompilla* line of Supreme Court precedent." *Bell* v. *True*, 413 F. Supp. 2d 657, 699 (WD Va. 2006). Before the District Court could have granted Bell habeas corpus relief, § 2254(d) required a determination that one of the exceptions applied. However, no such determination was required for the federal court to deny Bell's habeas petition. The District Court was free to follow the example set by this Court in *Weeks*. There is, therefore, no good reason to interpret the opinion as anything other than what it appears to be on its face—a *de novo* determination that Bell's showing of prejudice falls far short of the *Strickland* threshold for overturning the judgment. As further explained in the Brief of Respondent, the evidence presented in the evidentiary hearing in District Court did not meet the threshold of prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984), and the District Court's *de novo* holding to that effect was correct.

In summary, the state court decision that Bell was not entitled to relief under the standard of *Strickland* as applied to the facts before the state court, assuming controverted facts in petitioner's favor, was reasonable. Subdivision (d) of 28 U. S. C. § 2254 therefore barred federal habeas relief, and the petition should have been denied at that point. Holding an evidentiary hearing was error. However, the decision that followed was nonetheless correct on the merits. The bottom line is that the Court of Appeals decision denying relief on the basis of § 2254(d) and the District Court decision denying relief on the merits are both correct.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

September, 2008

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX

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Molina v. Rison, 886 F.2d 1124, 1128-1129 (CA9 1989):

Several cases have applied this rule to a variety of contexts. *See Lonberger v. Marshall*, 808 F.2d 1169, 1174 (6th Cir.) (ground that plea was involuntary because of failure to inform prisoner of nature of charges was not sufficiently different, under Sanders, from ground that plea was involuntary because of failure to inform prisoner of possible double jeopardy violation), *cert. denied*, 481 U.S. 1055, 95 L. Ed. 2d 850, 107 S. Ct. 2195 (1987); *In re Shriner,* 735 F.2d 1236, 1240 (11th Cir. 1984) (where ground of involuntariness of confession has been raised previously and rejected on merits, prisoner could not assert same ground simply by varying facts on which claim was based); *Williams v. United States*, 731 F.2d 138, 141-42 (2d Cir. 1984) (new factual premise for claim of involuntary confession does not present different legal ground under *Sanders*), *cert. denied*, 469 U.S. 1188, 83 L. Ed. 2d 963, 105 S. Ct. 956 (1985); *Cunningham v. Estelle,* 536 F.2d 82, 83 (5th Cir. 1976) (holding that, under *Sanders*, prisoner could not reassert ground of ineffective assistance of counsel "simply by varying the factors that he claims demonstrate incompetency"); *Raulerson v. Wainwright,* 753 F.2d 869, 873 (11th Cir. 1985) (same); *Brown v. Peyton,* 435 F.2d 1352, 1354 (4th Cir. 1970) (ground that plea had been coerced by judge was not sufficiently distinct from ground that plea had been coerced by attorney), *cert. denied*, 406 U.S. 931, 92 S. Ct. 1785, 32 L. Ed. 2d 133 (1972).

Conversely, several cases have held that an applicant can succeed in alleging a different "ground" if the nature of the legal claim is very different from the earlier one, despite the fact that there may be considerable — if indeed not total — overlap in the factual premises on which the two claims are based. *See Magby v. Wawrzaszek*, 741 F.2d 240, 242-43 (9th Cir. 1984)

(ground that confession was involuntary was sufficiently different from simple claim that confession was taken in violation of *Miranda*), *cert. denied*, 490 U.S. 1068, 109 S. Ct. 2070, 104 L. Ed. 2d 635 (1989)[5]; *McCorquodale v. Kemp*, 829 F.2d 1035, 1036-37 (11th Cir.) (per curiam) (challenge, on eighth amendment grounds, to prosecutor's improper closing argument during death penalty case was a sufficiently distinct ground from earlier claim that the same closing argument rendered the trial "fundamentally unfair"), *cert. denied*, 483 U.S. 1055, 108 S. Ct. 32, 97 L. Ed. 2d 819 (1987); *see also Bush v. United States*, 765 F.2d 683, 684 (7th Cir.) (claim that defense counsel had conflict of interest was sufficiently different from earlier claims that defense counsel had been ineffective in various particulars), *cert. denied*, 474 U.S. 1012, 88 L. Ed. 2d 472, 106 S. Ct. 542 (1985).

At the same time, however, several cases have reiterated *Sanders*' statement that a mere shift in the legal arguments supporting a particular ground is not sufficient to create a new ground for relief. *See Sanders*, 373 U.S. at 16; *Williams v. Butler*, 819 F.2d 107, 108 (5th Cir. 1987) (per curiam) (*Rule 9(b)* may not be "evaded" simply by "advanc[ing] the same claim, supported by new arguments thought up since the last time that [the prisoner] advanced it"); *Wilson v. Henderson*, 742 F.2d 741, 743 (2d Cir. 1984) (claim that prisoner's *sixth amendment* rights under *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), were violated by use of statements made to

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5. *Cf. Miller v. Bordenkircher*, 764 F.2d 245, 250 (4th Cir. 1985) (ground that right against self-incrimination had been violated by failure to give *Miranda* warnings was not sufficiently different from earlier claim that right against self-incrimination had been violated by eliciting statements while prisoner was under influence of drugs).

jailhouse informant was not sufficiently different ground from claim that use of such statements violated *sixth amendment* rights under *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980)), *rev'd on other grounds sub nom. Kuhlmann v. Wilson*, 477 U.S. 436, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986).

These cases establish that, despite the similarity or differences in the factual context of the claim, a ground is successive if the basic thrust or "gravamen" of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments. *Raulerson*, 753 F.2d at 873. Thus, whether a particular "new" issue is merely a "new legal argument" rather than a "new legal claim" will depend on whether the new issue is itself a ground for relief, as opposed to being merely a supporting argument or predicate step to a larger, basic claim. *See Sanders*, 373 U.S. at 16 (defining a "ground" as "a sufficient legal basis for granting the relief sought").