No. 13-7211

IN THE

Supreme Court of the United States

ROBERT MITCHELL JENNINGS,
Petitioner,

vs.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

In this case, a habeas corpus petitioner made multiple allegations of ineffective assistance of counsel in the penalty phase of a capital case. The District Court rejected one, accepted others, and granted relief, and the state appealed.

The question presented is whether, in these circumstances, a notice of appeal by the petitioner and a certificate of appealability are required to bring the rejected allegation before the court of appeals?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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.

This case involves the procedure for what is often the fifth review of a capital case already reviewed four times by three different courts. Uncertainty and confusion regarding procedure at this late stage can result in unnecessary litigation over purely procedural matters, causing unnecessary delays in cases that are already badly delayed by the time they reach this stage. Resolution of these issues in a manner that provides clear guidance would serve the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Fifth Circuit summarized the facts of the case as presented at trial:

> "On July 19, 1988, Jennings shot and killed Elston Howard, an officer with the Houston Police Department. Officer Howard was in the process of arresting the clerk of an adult bookstore when Jennings entered the store, intending to commit a robbery. Jennings shot Officer Howard four times in the back and head and then robbed the store clerk.
>
> "A jury convicted Jennings of capital murder. During the punishment phase, the State of Texas presented evidence of Jennings' lengthy criminal history. At the age of fourteen, Jennings was declared a delinquent and placed on probation. At seventeen, he was convicted of aggravated robbery and sentenced to five years' imprisonment. At twenty, he was convicted of two more aggravated robberies and a burglary and sentenced to concurrent thirty-year sentences. Within two months of his release, he committed six more aggravated robberies, including the one that resulted in Officer Howard's death.

> "George Burrell, the jail chaplain, was the only defense witness called during the punishment phase. Burrell testified that he met Jennings in the county jail shortly after Jennings' arrest for Officer Howard's murder. Burrell saw Jennings two to three times a week, and he testified that he did not believe Jennings was 'incorrigible.' No other mitigation evidence was presented." J. A. 42-43.

The Texas Court of Criminal Appeals affirmed on direct appeal in an unpublished opinion. *Jennings* v. *State*, No. 70,911 (Jan. 20, 1993). See App. to Pet. for Cert. 32. Under Texas procedure, the state habeas corpus petition is returnable in the Court of Criminal Appeals, see Tex. Code. Crim. Proc., Art. 11.071, § 4(a), but the trial court made findings of fact, conclusions of law, and a recommended disposition. See App. to Pet. for Cert. 42-60.

Petitioner's second ground for relief was on effectiveness of trial representation, making arguments regarding evidence of mental impairment, presentation of background evidence, failure to reopen voir dire, and closing argument. App. to Pet. for Cert. 43-54. The trial court found all without merit, along with Petitioner's other contentions, and recommended denial of the petition. App. to Pet. for Cert. 58. The Court of Criminal Appeals reviewed the order and found that the mitigating evidence allegation was sufficiently substantial to warrant further consideration, along with a claim under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). See App. to Pet. for Cert. 32. Following further review, the court denied relief. See App. to Pet. for Cert. 41.

On federal habeas corpus, the District Court found merit in the allegations regarding counsel's performance on mitigating evidence but not on closing argument and granted relief. J. A. 22-34.

Respondent appealed. See J. A. 36. The Court of Appeals found that the state court's rejection of the claims accepted by the District Court was reasonable under the deferential standard of 28 U. S. C. § 2254(d). See J. A. 49-60.

The Court of Appeals found that Petitioner's "cross-point" regarding trial counsel's closing argument was not properly before it because Petitioner did not file a timely notice of cross-appeal, did not seek a certificate of appealability from the District Court, and did not seek one from the Court of Appeals until six months after the Respondent's appeal. See J. A. 65-68. The Court of Appeals noted a division of authority in the federal courts of appeals on whether a certificate of appealability is required when the state appeals a grant of habeas relief and petitioner seeks review of a ground not accepted. See *ibid*. On March 24, 2014, this Court granted certiorari limited to this issue.

SUMMARY OF ARGUMENT

Appeals in cases of collateral attacks by prisoners on criminal judgments are different from other appeals. Congress has repeatedly seen fit to impose additional restrictions due to a flood of meritless contentions by persons with nothing to lose. For this reason, the standard rule for civil cases that an appellee can assert other grounds for the same relief without a cross-appeal should not be blindly extended to collateral review cases. In order to implement the certificate of appealability requirement imposed by Congress according to its purpose and intent, a cross-appeal supported by a certificate of appealability should be required to place before the merits panel on appeal any claim for relief rejected by the District Court.

Ineffective assistance of counsel is a single claim or ground for relief as to each phase of the trial. It was so understood in long-established case law before AEDPA regarding the successive petition rule. Creating a new category of "specific issue" for the purpose of appeals would create uncertainty and confusion, and the resulting delays would be contrary to the purpose of the statute.

The one issue that the Fifth Circuit erroneously failed to consider on the merits in this case is so patently without merit that the procedural error is harmless, and remand is unnecessary. Unnecessary delay is unreasonable delay, in violation of the rights of victims of crime under 18 U. S. C. § 3771.

ARGUMENT

The question in this case is whether a Federal District Court's grant of habeas corpus relief as to sentence on the ground of ineffective assistance of counsel in the penalty phase of a capital case, with an appeal of that ruling by the State, brings before the Court of Appeals particular allegations of ineffectiveness made by the petitioner but rejected by the District Court, or whether a certificate of appealability and cross-appeal is necessary to bring those additional allegations before the appellate court. There are two parts to this question.

First, is a certificate of appealability and cross-appeal necessary at all when the habeas petitioner seeks to argue on appeal claims rejected by the District Court but not seeking to expand the scope of relief beyond that granted by the District Court? Stated another way, does the grant of habeas relief by the District Court (1) open the floodgates to any and all claims seeking the same relief, even those obviously without

merit, or (2) give the Court of Appeals jurisdiction over only that claim, the same as if the District Court had denied the claim but granted a certificate of appealability on it?

For the reasons stated in Part I of this brief, *amicus* CJLF believes that the answer is (2). This raises the additional question of the scope of a "claim." For the reasons stated in Part II of this brief, *infra*, *amicus* CJLF submits that ineffective assistance of counsel in the penalty phase is a single claim, within the jurisdiction of the Court of Appeals in its entirety.

Given that the Court of Appeals held that the petitioner's "closing argument" point was not before it, the final question is what remedy this Court should grant. Although the usual procedure is to leave such questions to be decided on remand, this case calls for a different disposition. The omitted point is so patently meritless that leaving it open for decision on remand would cause a needless further delay in justice that is already long overdue. The additional point adds so little to the argument already rejected that the judgment of the Court of Appeals is clearly correct, and it should be affirmed.

I. The State's appeal of a grant of habeas relief brings before the Court of Appeals only the Petitioner's granted claim of a violation of a constitutional right, not other claims denied by the District Court.

"[A] habeas corpus petitioner to whom the writ has been granted may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted, unless the petitioner obtains a certificate of appealability permitting him or her to argue that ground." 20A J. Moore, Federal Practice § 322.12[2][a],

pp. 322-10 & 322-11 (3d ed. 2013) (citing *Jones* v. *Keene*, 329 F. 3d 290, 296-297 (CA2 2003); *Manokey* v. *Waters*, 390 F. 3d 767, 773-774 (CA4 2004); *Rios* v. *Garcia*, 390 F. 3d 1082, 1087-1088 (CA9 2004)); see also *Wiley* v. *Epps*, 625 F. 3d 199, 204, n. 2 (CA5 2010); *Lawhorn* v. *Allen*, 519 F. 3d 1272, 1285, n. 20 (CA11 2008).

In his petition for certiorari, Petitioner did not challenge the correctness of the rule as stated in *Wiley* but instead expressly stated that the rule "*should* apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied." Pet. for Cert. 38 (emphasis added). His argument was that the rule should not apply to separate allegations of ineffective assistance of counsel, which he contends is a single "claim" or "ground." See *ibid*. In Part I of his brief on the merits, though, Petitioner rejects his own prior position and asks this Court to adopt the outlier view of the Seventh Circuit in *Szabo* v. *Walls*, 313 F. 3d 392 (2002). *Amicus* submits that Petitioner had it right the first time.

A. The Purpose of the Certificate and Specification Requirements.

The long-standing challenge in the law of habeas corpus as a mechanism of collateral review has been to find the correct balance between keeping the remedy available " 'to guard against extreme malfunctions in the state criminal justice systems,' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment), and protecting properly operating justice systems from being bogged down and obstructed by "floods of stale, frivolous and repetitious

petitions [that] inundate the docket of the lower courts and swell [this Court's] own." *Brown* v. *Allen*, 344 U. S. 443, 536 (1953) (Jackson, J., concurring in the judgment). This case deals with one aspect of that challenge.

Congress's attempts to deal with the specific problem of excessive appeals date back over a century. In 1908, the House Judiciary Committee reported out a bill with the purpose "to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals therein taken just before the day set for execution . . . ." Restriction of Right of Appeal in Habeas Corpus Proceedings, H. R. Rep. 23, 60th Cong., 1st Sess., 1 (1908). "The prosecution of an appeal under these circumstances results in a delay of anything like a year or two years. The appeals are prosecuted without reference to the question as to whether there is any merit to the appeal . . . ." *Ibid*. The Committee's solution was that "no appeal can be prosecuted unless either the United States court making the final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such appeal." *Id*., at 2; Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. This act is the ancestor of 28 U. S. C. § 2253(c).[2] Its purpose, clear and simple, was to eliminate the delay caused by clearly meritless appeals, particularly in capital cases.

The vast expansion of the issues deemed to be federal constitutional issues during the Warren Court era, see generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965), brought an additional problem. Along with the large number of habeas petitions and appeals from them,

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2. All further section references are to title 28 of the United States Code unless otherwise indicated.

there arose a problem of petitions and appeals containing a large number of issues, most obviously without merit. This problem was compounded in capital cases, where the defense bar developed a "throw everything against the wall and see if any of it sticks" mentality, despite long-settled wisdom that such tactics are bad advocacy. Compare *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983) (winnowing is hallmark of effective advocacy) and *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (same, capital case), with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8, comment. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1030 (2003) (all conceivable claims). More recently, in *In re Reno*, 55 Cal. 4th 428, 443, 283 P. 3d 1181, 1195 (2012), the California Supreme Court was presented with a petition that exemplified abusive practices. It was "well over 500 pages long and by its own count raise[d] 143 separate claims."

Long before the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), some federal courts had begun to address the problem of excessive issues as distinguished from excessive appeals by "limiting the grounds of an appeal to one or more specified issues when issuing a certificate of probable cause to permit appeal from denial of a state prisoner's petition for habeas corpus." *Vicaretti* v. *Henderson*, 645 F. 2d 100, 101 (CA2 1980). The Second Circuit in *Vicaretti* upheld the practice, making an analogy to this Court's practice of limiting a writ of certiorari to particular issues and noting that "both practices involve a court's sensible attempt to focus the attention of the litigants on the issues that merit review under the relevant standard." *Id*., at 102. However, the circuits were split on whether certificates could be so limited under the pre-AEDPA version of § 2253. See *Reese* v. *Fairman*, 801 F. 2d 275, 276 (CA7 1986).

In *Roman* v. *Abrams*, 790 F. 2d 244 (1986) (*per curiam*), the Second Circuit held that the rationale of *Vicaretti* further required a certificate of probable cause when a habeas petitioner prevails on one claim and seeks review of claims that were denied.

> "Precisely the same considerations apply when, after the writ of habeas corpus has been granted on one ground, the petitioner seeks to cross-appeal from the dismissal of other grounds asserted in the district court. Requiring a certificate of probable cause in those circumstances also focuses the attention of litigants and the court on potentially meritorious issues, while avoiding the waste of judicial resources in a futile review of clearly meritless claims." *Id*., at 245.

B. Implementing AEDPA.

In AEDPA, Congress did more than take the *Vicaretti* side of the circuit split. It went considerably further. Congress made the previously discretionary procedure mandatory in every habeas corpus appeal. See § 2253(c)(3). Although not jurisdictional, the language is unmistakably mandatory. See *Gonzalez* v. *Thaler*, 565 U. S. __, 132 S. Ct. 641, 651, 181 L. Ed. 2d 619, 633-634 (2012). The overarching purpose of the habeas reforms of AEDPA is the same as it was when Congress first imposed the certificate requirement 88 years earlier—to reduce delay. See *id*., 132 S. Ct., at 650, 181 L. Ed. 2d, at 632-633. "The COA [certificate of appealability] process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Id*., 132 S. Ct., at 650, 181 L. Ed. 2d, at 633. Given the purpose of the requirement, this screening is every bit as necessary when the petitioner has prevailed on one

claim out of many as it is when one claim out of many is found to be substantial but short of requiring relief.

To illustrate, let us suppose that two death-sentenced state prisoners, A and B, file petitions like the one in *In re Reno*, *supra*. Both are over 500 pages and have 143 claims each. Now let us vary the facts slightly and say that in both petitions, 142 claims are so clearly meritless as to not warrant a COA but one claim is a close call. It involves a subjective judgment of materiality for a nondisclosure issue or prejudice for an ineffective assistance issue, and the decision as to whether it is just barely meritorious or just barely short of that level may depend on which judge is assigned to the case. Let us say that A is granted relief, and the state appeals; B is denied relief, but the district judge issues a COA limited to that claim. Either way the close claim is before the Court of Appeals for briefing, argument, and decision.

What about the other 142 claims, all meritless beyond the limits of reasonable disagreement? Should these 142 claims be properly before the Court of Appeals in A's case but in not B's? That would be the result if the outlier rule of *Szabo* v. *Walls* 313 F. 3d 392, 397-398 (CA7 2002) is adopted. That is a wrong result, contrary to the purpose of AEDPA.

Szabo simply notes the rule in civil cases regarding additional arguments by an appellee not asking for additional relief and sees no reason for habeas corpus cases to be different. See 313 F. 3d, at 397. "Federal habeas, however, *is* different." *Manokey* v. *Waters*, 390 F. 3d 767, 773 (CA4 2004) (emphasis added). The *Szabo* court appears to have received inadequate briefing of the issue. The statement that "no court has demanded that a prisoner obtain a certificate of appealability in order to present an extra issue in a case already before the court on the state's appeal," 313

F. 3d, at 397-398, is mistaken and badly so. As noted above, there was already a history in the Second Circuit of exactly such a requirement before AEDPA, and the Eighth Circuit had upheld this requirement in *Fretwell* v. *Norris*, 133 F. 3d 621, 623 (1998), after AEDPA and four years before *Szabo*. There are also indications of such a practice in other circuits post-AEDPA, with certificates being granted and cross-appeals being filed. See *Scott* v. *Mitchell*, 209 F. 3d 854, 862-863 (CA6 2000); *Williams* v. *Cain*, 125 F. 3d 269, 273 (CA5 1997).

Szabo says "we are content to apply § 2253 as it is written," 313 F. 3d, at 398, but before AEDPA that section already had a long history of being applied to effectuate its purpose rather according to a strict parsing of its words. Taken literally, § 2253 from the beginning would have required a certificate of probable cause when the state appealed. This literal interpretation was rejected by four of the five circuits to consider it, and when this Court adopted the Federal Rules of Appellate Procedure in 1967, Rule 22 expressly negated the requirement when the state appeals. See Advisory Committee's Notes on Fed. Rule App. Proc. 22, 28 U. S. C. App., p. 689 (2012 ed.); see also *id*., at 690 (text of pre-1996 Rule 22). By the time of AEDPA, this usage was so well established that Congress did not bother "fixing" § 2253(c)(1) in this regard, even while amending the certificate requirement substantially in other ways.

Petitioner's argument consists largely of claiming that the certificate and cross-appeal requirements ought not apply to petitioners collaterally attacking convictions when they do not apply to other parties and other types of cases. As most of the courts to consider the matter have recognized, however, the requirement should apply to the cases and parties presenting the problem to which it is addressed and not to others.

Petitioner notes that civil litigants can argue alternate grounds for the relief granted by the District Court without a cross-appeal. See Brief for Petitioner 8-13. Civil litigants are not similarly situated with prisoners attacking their convictions. Most civil litigants are represented by counsel, paid either with fees or a contingent share of the relief. The waste of the client's money or the attorney's time serves as a partial check against the kind of abusive, frivolous filings that motivated Congress to impose limits in collateral review cases in 1908 and again in 1996. The check is not 100% effective, of course, and frivolous appeals are taken, but not in the same degree. Additionally, other measures are available to deal with frivolous appeals in civil cases. See, *e.g.*, Fed. Rule App. Proc. 38 (monetary sanctions); *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (forbidding further *in forma pauperis* applications in noncriminal matters).

Petitioner contends that "[h]abeas cases are no exception" to the rule that a cross-appeal is unnecessary to argue an alternate ground for the same relief. See Brief for Petitioner 14. However, "habeas cases" and collateral attacks on convictions are not the same set of cases, though they very largely overlap. The problem noted at the beginning of this part, see *supra*, at 7, exists for habeas corpus when used as a means of collateral attack on final criminal judgments, and that is where Congress has directed its restrictions. See §§ 2244, 2254. It also exists for federal prisoners making motions under § 2255, which are not habeas corpus proceedings. See *United States* v. *Hayman*, 342 U. S. 205, 212-219 (1952) (history and purpose of § 2255). Accordingly, Congress has restricted appeals not in habeas cases generally or exclusively, but in the cases of habeas corpus petitions by persons in custody by virtue of orders of state courts, § 2253(c)(1)(A) and federal prisoner motions seeking relief from criminal

judgments. § 2253(c)(1)(B). Tellingly, Petitioner does not rely on a habeas case collaterally attacking a criminal judgment but instead on a deportation case. See Brief for Petitioner 14 (citing *Drax* v. *Reno*, 338 F. 3d 98 (CA2 2003)). That case is inapposite.

Also inapposite are cases where the state argues an alternate ground on appeal without taking a cross-appeal. See Brief for Petitioner 14 (citing *Neverson* v. *Farquharson*, 366 F. 3d 32 (CA1 2004)). As noted above, § 2253's restriction on appeals was widely held inapplicable to appeals by the state before there was textual support for an exception. Flooding the appellate courts with a host of patently meritless claims in appeals by the state has not been seen as a problem to date. *Amicus* is unaware of a single case where a court has been subjected to a pleading by a state with over 100 contentions, all meritless, but such abuse is common in prisoners' pleadings in capital cases. See, *e.g.*, *In re Reno*, 55 Cal. 4th, at 442-443, 283 P. 3d, at 1195. Petitioner contends "[i]t would plainly be inequitable to apply a different cross-appeal rule to a habeas petitioner than to a warden," Brief for Petitioner 14, but that asymmetry is exactly what Rule 22 and the long-standing interpretation of § 2253(c)(1) do with the certificate requirement. There is no inequity in applying different rules to persons who are not similarly situated. If symmetry is required, though, the purpose of the statute would be better served by requiring cross-appeals on both sides rather than neither side.

The rule that Petitioner relies on is a "general rule," not a hard and fast one, in this Court on certiorari as well as in regular appeals. See E. Gressman, *et al.*, Supreme Court Practice 489 (9th ed. 2007). Respondents are sometimes denied consideration of additional arguments for affirmance due to failure to cross-petition even when a straightforward application of *United*

States v. *American Railway Express Co.*, 265 U. S. 425 (1924), would allow the issue to be considered. The rule is one of policy, not statutory mandate, and the policy considerations need to be weighed anew for each type of review proceeding.

For example, in *California* v. *Acevedo*, 500 U. S. 565, 568 (1991), the state appellate court granted the remedy of suppression of evidence after finding that police officers had probable cause to believe a paper bag in Acevedo's car had marijuana and legally seized it but could not open the bag without a warrant. On the state's petition for certiorari, this Court reviewed the warrant question but "decline[d] to second-guess the California courts" on probable cause, noting that Acevedo did not cross-petition on that question. See *id.*, at 573, n. 2. Acevedo was not asking for any expansion of the relief granted by the lower court. A finding of no probable cause would produce the same result, suppression of the evidence. Yet this Court declined to consider the argument. The pre-AEDPA rationale for limiting issues in habeas appeals was based in part on an analogy to this Court's practice of limiting issues on certiorari. See *supra*, at 9.

United States v. *Raines*, 362 U. S. 17 (1960), provides an informative contrast. The *Raines* Court allowed the prevailing party in the District Court to raise additional arguments against the constitutionality of the statute that the District Court had rejected, even though a cross-appeal had not been properly docketed. See *id.*, at 27, n. 7. However, the Court did not simply rely on the general rule but instead examined the policy of the special statute for the type of appeal in question, finding it "indicate[d] a desire of Congress that the whole case come up" and contrasting it with another statute providing a much more limited appeal. See *ibid.* The present case deals with a statute providing a type

of appeal that Congress has repeatedly found a need to limit, just the opposite of *Raines*.

In its most recent opinion on § 2253, this Court interpreted the statute in a way to avoid "thwart[ing] Congress' intent in AEDPA 'to eliminate delays in the federal habeas review process.' " *Gonzalez* v. *Thaler*, 565 U. S. __, 132 S. Ct. 641, 650, 181 L. Ed. 2d 619, 632-633 (2012) (quoting *Holland* v. *Florida*, 560 U. S. 631, 648 (2010)). That same consideration calls for applying a requirement of cross-appeal, authorized with a certificate of appealability, in this situation. Without it, the floodgates are open to unlimited appellate review of meritless claims, exactly what Congress sought to avoid, whenever a single claim is deemed meritorious in the District Court.

II. Ineffective assistance of counsel is a single "claim" or "ground" as to each phase of the trial.

At the certiorari petition stage of the present case, Petitioner argued:

> "The rule [requiring a separate notice of appeal and motion for a certificate of appealability (COA)] should not apply where the petitioner raises one ground of IAC [ineffective assistance of counsel]; the district court grants relief based on one or more allegations of deficient performance but rejects another allegation; the respondent appeals; and the petitioner seeks review of the rejected allegation of deficient performance." Pet. for Cert. 38.

In his merits brief, Petitioner argues that no COA was necessary because "Petitioner did not raise a separate claim on appeal that would have provided greater relief, but merely made an additional argument in support of

the single claim that he prevailed upon in the district court." Brief for Petitioner 26.

For the reasons stated below, *amicus* CJLF believes this is correct. The terms "claim" and "ground" are interchangeable in habeas corpus, the COA specification requirement applies to claims, and ineffective assistance in the penalty phase is one claim.

A. Successive Petition Cases.

The largest body of pre-AEDPA caselaw on the scope of a claim is found in the successive petition context. The pre-AEDPA habeas statute and rules used the term "ground" instead of "claim." 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, 479-489 (1991), and the Court has continued to use them interchangeably post-AEDPA. See *Gonzalez* v. *Crosby*, 545 U. S. 524, 532 (2005). 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 consistent with subsequent cases.

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.

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 tied to the particular supporting facts. *Cunningham* v. *Estelle*, 536 F. 2d 82, 83 (CA5 1976) (*per curiam*), specifically addressed ineffectiveness claims, holding that an ineffective assistance claim "simply . . . varying the factors that he claims demonstrate incompetency" was the same ground as the prior claim.

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 an approach that ties claims to the specific facts offered to support them. *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.

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 broader sense than the Court of Appeals did in the present case. *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 Post-Traumatic Stress Disorder (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, 162-165 (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)).

If "ineffective assistance of counsel is a single ground for relief" for other purposes in the law of habeas corpus, should "instances of supposed shortcomings" nonetheless be broken up for the purpose of certificates of appealability? This is the ultimate issue in this case.

B. The Certificate Standard.

Barefoot v. *Estelle*, 463 U. S. 880 (1983), established the standard for issuing a certificate of probable cause under the pre-AEDPA version of § 2253 as "a 'substantial showing of the denial of [a] federal right.'" *Id*., at 893 (quoting *Stewart* v. *Beto*, 454 F. 2d 268, 270, n. 2 (CA5 1971)). The standard was not really new in 1983, as the quotation from a 1971 case indicates, but rather reflected "the weight of opinion in the Courts of Appeals." *Ibid*. Given that the denial of federal right is the only ground for federal habeas corpus relief for a prisoner in custody pursuant to a judgment of a state court, see § 2254(a), the *Barefoot* standard was essentially congruent with a substantial showing of a ground for relief.

In AEDPA, Congress largely codified the *Barefoot* standard in § 2253(c)(2), although it changed "federal right" to "constitutional right." See *Slack* v. *McDaniel*, 529 U. S. 473, 483 (2000); *Medellin* v. *Dretke*, 544 U. S. 660, 666 (2005) (*per curiam*) (treaty claim). The present case involves only constitutional claims, so that wrinkle need not be addressed here.

Looking to the text, we see that Congress used the term "specific issue" in § 2253(c)(3). An argument could certainly be made that by using this term instead of the prior term "ground" or its equivalent "claim" Congress presumably meant something different. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004); but see *Clay* v. *United States*, 537 U. S. 522, 528-529 (2003) (rejecting an argument based on wording variation). In this case, though, it is difficult to formulate what that "something different" might be. There is no pre-AEDPA line of cases using the term "specific issue" to mean something different from and more focused than "claim" or "ground."

Creating a new category with uncertain boundaries would inject more complexity and uncertainty into an area of law that is already far too complex. The purpose of the COA requirement is to streamline the process for the purpose of reducing delay. See *Gonzalez* v. *Thaler*, 132 S. Ct., at 650, 181 L. Ed. 2d, at 632-633. Uncertainty over the meaning of a new category of "issues" would cause delays as the meaning is hashed out and decisions are reversed, delay that could have been avoided if the well-established meaning of "ground" or "claim" had been used. The present case is an example. If the Fifth Circuit had understood that a cross-appeal and certificate of availability are not needed for additional arguments on the same "ground," defined the same as for the successive petition rule, its own precedent in *Cunningham* v. *Estelle*, *supra*, would have told it that ineffective assistance was one ground. It could have easily disposed of Jennings' flimsy closing argument point on the merits in July 2013, and this case would not have suffered the additional delay it has been subject to.

The straightforward answer to the problem is that "specific issue" in § 2253(c)(3) means the same thing as "claim" in § 2244(b) and "ground" in the pre-AEDPA version of the latter section. Ineffective assistance of counsel is one "claim," at least as to each phase of the trial.[3]

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3. As Petitioner notes, claims in the guilt and penalty phases must be deemed separate claims, as different remedies would be required for each. See Brief for Petitioner 33, n. 5. This logic is not limited to ineffective assistance claims.

III. The District Court's disposition of Petitioner's closing argument point is so clearly correct that no remand is needed.

Normally, a procedural error such as the one made by the Fifth Circuit in this case would result in a remand with directions to apply the law as stated in this Court's opinion. In this case, however, the Court must consider whether to make an exception from that usual practice in light of countervailing considerations and the patent meritlessness of the Petitioner's argument.

The District Court rejected the Petitioner's point on trial counsel's closing argument as follows:

> "In his closing argument at the penalty phase, counsel stated that 'I can't quarrel with' a decision to sentence Jennings to death because counsel, like the jurors, lived and worked in Harris County and cared about having a safe community. He nonetheless asked the jurors to give sufficient weight to the mitigating evidence to return a life sentence. 39 Tr. [at] 239-40. Jennings now argues that this was ineffective.
>
> "Counsel was trying to convince the jury to decline to impose a death sentence on a man who they found murdered a police officer. The penalty phase evidence showed that Jennings had a long and violent criminal history. There was virtually no mitigating evidence. It is clear from the record that counsel was trying to identify with the jurors, and to convince them that he was a reasonable man who shared their interest in a safe community. In that posture, he argued that they should still impose a life sentence. In light of the extremely weak mitigation case, the state habeas court's conclusion that

this was a plausible strategy was not unreasonable." App. to Pet. for Cert. 25.

In light of the "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard," *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009), this holding is so clearly correct that the Fifth Circuit's procedural hiccup is harmless beyond any doubt.

A factor that should always be considered in habeas cases, but regrettably rarely is, is the mandate from Congress regarding victims' rights. Victims of crime have a right to proceedings free from unreasonable delay. See 18 U. S. C. § 3771(a)(7). This right extends to habeas corpus proceedings. See *id*., subd. (b)(2)(A). It extends to the families of homicide victims. See *id*., subd. (e). The present case has been delayed too long already. A remand for the Court of Appeals to merely state the obvious would be an unreasonable delay, contrary to the statute.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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