INTRODUCTION TO HABEAS CORPUS REVIEW
OF STATE COURT CONVICTIONS

MACDL
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I. TIMING AND SEQUENCE. State court proceedings as to each federal habeas claim should be exhausted before the federal petition is filed.

A. **ONE YEAR** STATUTE OF LIMITATIONS. §2244(d). An *APPLICATION* for a writ of habeas corpus must be filed within a year after the latest of:

1. The date on which the **judgment** became final by the conclusion of direct appellate review or the expiration of the time for seeking such review.

2. If state action created an impediment to filing the application, and that impediment violated federal law or the Constitution, and prevented the applicant from timely filing, the date on which the impediment was removed.

3. The date on which a newly recognized constitutional right asserted was initially recognized by the Supreme Court and made retroactive to cases on collateral review.[1] OR

4. The date on which the factual predicate of the **claim or claims** could have been discovered through the exercise of due diligence.

5. TOLLING.

a. Statutory: The time during which a properly filed application for State post-conviction or other collateral review **with respect to the pertinent judgment or claim** is pending shall not be counted.

b. Equitable. Petitioner has been "pursuing his rights diligently, but some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U.S. 631 (2010); Trapp v. Spencer, 479 F3d 53 (1st Cir. 2007); Neverson v. Farquaharson, 366 F3d 32, 41 (1st Cir. 2004).

B. EXHAUSTION. Each ground for relief must be **presented** to the state courts **as a federal claim**.

Total Exhaustion. Every ground for relief must be exhausted; a petition

[1] See, Dodd v. United States, 545 U.S. 353, 358-359 (2005)[statute of limitations will probably expire before cause of action accrues].

consisting of exhausted and unexhausted claims must be dismissed or the unexhausted claims eliminated. Rose v. Lundy, 455 U.S. 509 (1982). Each claim must have been resented to the state courts as a federal claim, but satisfaction of the exhaustion requirement does not turn on whether the state court actually addressed or ruled on the ground in question; only presentation is required. Fortini v. Murphy, 257 F3d 39, 45 (1st Cir. 2001), Smith v. Digmon, 434 U.S. 332, 333 (1978).

Where the petition contains a meritorious but unexhausted claim, the district court has discretion to stay the petition for a limited period to permit the petitioner to present it to the state courts, then return to federal court if necessary, without running afoul the statute of limitations. Rhines v. Webber, 544 U.S. 269 (2005).

Post-SOL amendments. F.R. Civ.P. 15(c)(1)(B) may be used to amend the petition to add new claims that arise out of the same set of facts that an exhausted claim is based on. Amendments based on a new set of facts would defeat the statute of limitations, and are not permitted. Mayle v. Felix, 545 U.S. 644 (2005).

C. SECOND OR SUCCESSIVE APPLICATION. §2254(b). Magwood v. Patterson, 561 U.S. 320 (2010). See Part V below.

II. SUBJECT MATTER JURISDICTION.

A. CUSTODY. "In behalf of a person in custody pursuant to the judgment of a state court." 28 U.S.C. §2254(a). Magwood v. Patterson, supra. Variations: consecutive sentences, Wilkinson v. Dotson, 544 U.S. 74 (2005), Garlotte v. Fordice, 515 U.S. 39 (1995), Maleng v. Cook, 490 U.S. 488 (1989); probation or parole, Jones v. Cunningham, 371 U.S. 236 (1963); bail or recognizance after conviction, Lefkowitz v. Newsome, 420 U.S. 283 (1975), Hensley v. Municipal Court, 411 U.S. 345 (1973), post-conviction detainer, Braden v. 30th Judicial Cir. Ct., 410 U.S. 484 (1973), civil contempt, Duncan v. Walker, 533 U.S. 167, 176 (2001)..

B. FEDERAL CLAIM. **Legality of custody challenged** on the ground that it is "in violation of the Constitution or laws or treaties of the United States." Id., Rule 1, Rules Governing 2254 Cases in the United States District Courts (2010)["2254 Rules"].

1. Grounded in federal law as opposed to state law. Swarthout v. Cooke, 131 S.Ct. 859 (2011); Bradshaw v. Richey, 546 U.S. 74, 76 (2005).

Cognizable federal claims can involve misapplication of state law, as in

sufficiency of the evidence [Coleman v. Johnson, 132 S.Ct. 2060 (2012), O'Laughlin v. O'Brien, 568 F3d 287 (1st Cir. 2009)] and ineffective assistance of counsel. But see, Estelle v. McGuire, 502 U.S. 62 (1991)[reserving question whether admission of irrelevant or strictly propensity evidence could warrant habeas relief].

2. Call into question the lawfulness of conviction or confinement, challenge the fact, length, or conditions of confinement, or seek immediate or speedier release from custody. Hill v. McDonough, 547 U.S. 573 (2006); Heck v. Humphrey, 512 U.S. 477 (1994).

3. Cumulative effect of multiple errors. Kyles v. Whitley, 514 U.S. 419 (1995)[ineffective assistance of counsel], O'Neal v. McAninch, 513 U.S. 432 (1995)[instructional error combined with improper prosecution summation].

The range of potential federal constitutional errors is very broad, and a very useful sample is set out in Chapters 9 and 11 of Hertz & Liebman, Federal Habeas Corpus Practice and Procedure [6th ed, as supplemented, 2014]. This two-volume treatise is an invaluable resource for habeas practitioners.

III. THE PETITION, OR APPLICATION, AND RELATED PLEADINGS.

A. IDENTIFYING POTENTIAL CLAIMS. The general rule in 2254 litigation is nothing new can be asserted: no new claims, and no new facts. As a practical matter, in many cases the only source you need consult in searching for potential claims is the petitioner's appellate briefs. In other cases, you may need to develop facts outside the state court record to obtain relief. The one year statute of limitations with its statutory tolling provision creates the possibility that a habeas petitioner may be able to create the opportunity to present a new claim or two [that is, discovered and developed after the close of direct review] and file a motion for new trial, thus **interrupting** the limitation period while exhausting the new claims before filing the petition.

B. PREPARING AND FILING THE PETITION: FACT PLEADING. The petition must be filed in the form supplied by the clerk of the district court. Rule 2(d), 2254 Rules. Only fact pleading is allowed; the form specifically instructs that no legal principles be pleaded. See, e.g., McFarland v. Scott, 512 U.S. 849 (1994) ["habeas petition, unlike a complaint, must allege the factual underpinnings of the petitioner's claims"]; Hill v. Lockhart, 474 U.S. 52 (1986)[general allegation of IAC is insufficient, petitioner must allege specific facts establishing both unprofessional error and prejudice prongs of IAC standard]; Strickland v. Washington, 466 U.S. 668 (1984)[failure to plead specific facts of prejudice].

C. JUDICIAL SCREENING. Rule 4 instructs the district court judge to review the petition and summarily dismiss it if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief[.]" My practice is to file a Rule 4 Memorandum with the petition, not arguing the merits, but articulating each ground for relief and demonstrating that there is a factual and legal basis for each.[2] Many practitioners file a brief on the merits with the petition, particularly where they do not plan to ask for discovery or an evidentiary hearing.

D. ANSWER AND REPLY. The respondent need not answer the petition unless the court so orders. Rule 5(a), 2254 Rules. The answer must respond to the allegations in the petition, and it must state whether respondent alleges that petitioner has failed to exhaust state remedies, whether any claim is subject to a state procedural bar [procedural default or waiver], whether any claim depends on non-retroactive federal law, and whether the application is barred by the statute of limitations. Rule 5(b).

THE STATE COURT RECORD. Respondent must include in the answer an accounting for the transcripts of the state court proceedings, by [1] filing those transcripts that he or she considers to be relevant to the petition, [2] indicating what pretrial, trial, sentencing and post-conviction transcripts are available that have not been filed, and [3] identifying what proceedings were recorded but not transcribed. The judge may order that respondent file other transcripts, and/or that respondent have recorded proceedings transcribed and furnished. If a transcript cannot be obtained, respondent may submit a narrative summary of the evidence. Rule 5(c). This is the first step in establishing the fact record on which the case will be decided. **Counsel must review this filing carefully to insure that all of the state record evidence on which petitioner's claims depend is made part of the record at this stage**.

Respondent must also file the petitioner's state appellate briefs, and the opinions and dispositive orders of the state appellate courts. Rule 5(d). Trial level opinions and orders, including postconviction rulings, are not required, but are often included by the Attorney General's office, as are the Commonwealth's appellate briefs.

REPLY. The federal court may permit petitioner to file a reply to the answer "or other pleading." Rule 5(e). Rule 12 permits the court to utilize the

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[2]Deciding issues such as whether the petitioner exhausted his state court remedies with regard to a specific claim or ground for relief can depend on the terms in which the claim is stated. See, e.g., Sanchez v. Roden, 753 F3d 279, 293-296 (1st Cir. 2014).

Rules of Civil Procedure when they are consistent with the rules. Harris v. Nelson, 394 U.S. 286 (1969). In view of a respondent's answer, a petitioner may want to request permission to amend the petition to address, for example, an exhaustion issue.

IV. FACT DEVELOPMENT.

Recent Supreme Court decisions have sharply narrowed the petitioner's opportunity to develop new facts in the habeas proceedings to support habeas claims. Section 2254(e)(1) states that findings of fact made by the state courts [interpreted to include appellate courts], "shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The fact development tools available in 2254 proceedings are discovery, expanding the record, and evidentiary hearing.

Before reaching this stage of the litigation, petitioner will almost surely have to satisfy the "eligibility" screening required by AEDPA, codified in 28 U.S. C. §2254(d). Cullen v. Pinholster, 131 S.Ct. 1388 (2011)[2254(d) screening is done on the record at the time of the state court adjudication on the merits of the claim in question].

A. DISCOVERY. On a showing of good cause, the federal judge may authorize **a party** do conduct discovery under the Federal Rules of Civil Procedure, and may limit that discovery. If necessary for effective discovery, the judge "must" appoint an attorney for an indigent petitioner.[3] Rule 6(a), 2254 Rules. The request for discovery must state the reasons for it, and must be accompanied by the proposed interrogatories, requests for admission, and/or request for documents. Rule 6(b). If a deposition is authorized, the judge may order the respondent to pay the travel expenses, subsistence expenses and fees of the attorney to attend the deposition. Rule 6(c). S e e , Bracey v. Gramley, 520 U.S. 899 (1997). See, Schneider, "Discovery and Fact Development in Habeas Corpus Cases," in Maidman, et als., Habeas Corpus in the Federal Courts, Section 5, pp. 73-184 (2010) for sample materials.

B. EXPANDING THE RECORD. The judge may direct the parties to expand the record by filing additional materials, which the judge may require to be authenticated. These may include letters predating the filing of the petition, documents, exhibits, affidavits, and **answers under oath to written interrogatories propounded by the judge**. The party against whom these supplemental materials are filed must be allowed to admit or deny their

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[3] Counsel may be appointed for an indigent defendant at any time during the habeas proceeding. See, Hertz & Liebman, supra, Chapter 12.

correctness. Rule 7, 2254 Rules. See, Harris v. Nelson, supra.

C. EVIDENTIARY HEARING. The judge may hold an evidentiary hearing, subject to the limitation imposed in Pinholster, supra. In deciding whether to do so, the judge must review the answer, the transcripts and other records of the state court proceedings, and the Rule 7 materials, if any. The responsibility of holding the hearing may be delegated to a Magistrate Judge. If the judge decides to hold an evidentiary hearing, and petitioner is unrepresented at that point, counsel must be appointed if the petitioner is indigent. The hearing must be conducted as soon as practicable after giving the attorneys adequate time to investigate and prepare. Rule 8(c), 2254 Rules.

Section 2254(e)(2) further limits the federal courts' power to conduct an evidentiary hearing. Like other aspects of AEDPA, the design is to confine the fact development to the state courts if possible. "If the applicant has failed to develop the factual basis of a claim in State court proceedings[4], the court shall not hold an evidentiary hearing on the claim unless the applicant shows that: [a] the claim relies on [i] a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [ii] a factual predicate that could not have been discovered through the exercise of due diligence," AND [b] the facts underlying the claim establishes "by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." See, McQuiggin v. Perkins, 133 S.Ct. 1924 (2013)[the statutory exceptions to the bans on evidentiary hearings and second or successive petitions are narrower and more demanding than the equitable exception of Schlup v. Delo, 513 U.S. 298 (1995) and House v. Bell, 547 U.S. 518 (2006), which is applicable only to first petitions].

V. SECOND OR SUCCESSIVE PETITIONS.

No second or successive petition can be filed in the district court without first obtaining an authorization order from the Court of Appeals. Rule 9, 2254 Rules; 28 U.S.C. §2244(b). Here, the AEDPA's extremely restrictive exception to its no second or successive petitions rule applies. McQuiggin, supra. The petitioner must not only show actual innocence, but also meet a higher standard of proof – clear and convincing evidence – and **satisfy a diligence requirement.**

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[4] This phrase was interpreted in Williams v. Taylor, 529 U.S. 420 (2000) to apply only to petitioners who had the opportunity to develop the facts in state court but failed to do so.

VI. AVAILABILITY OF HABEAS RELIEF: THE CHOKEHOLD AND THE WAY OUT.

In the AEDPA, Congress imposed a screening device that is designed to strictly limit habeas review of state convictions. When the claim at issue has been decided by the state courts on its merits, habeas relief is barred unless the petitioner can establish that the state court decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent[5], or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. §2254(d)(1) & (2).

Clearly established federal law refers to the holdings, as opposed to the dicta of the Supreme Court's decisions as of the time of the last state court decision on the merits. Greene v. Fisher, 132 S. Ct. 38 (2011). A decision is "contrary to" a Supreme Court holding "if the state court arrives at a conclusion opposite to that reached by the [Court] on a question of law, or if the state court decides a case differently that the Court has on a set of materially indistinguishable facts." Id., at 413. An unreasonable application of clearly established federal law occurs when the state court identifies the correct governing legal principle but applies it unreasonably to the facts of the petitioner's case. Id., at 407. The state court's application must be "objectively unreasonable." The Supreme Court has never defined "objectively unreasonable," but it has said that it is beyond "clear error."[6] White v. Woodall, 134 S.Ct. 1697, 1702) (2014).

If the federal claim has been presented to a state court and the state court has denied relief, the federal court will presume [rebuttably] that the state court decided the federal claim on the merits. Harrington v. Richter, 131 S.Ct. at 784-785. Under this presumption, "**a habeas court must determine what arguments or theories supported, or as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of this Court**. Id., at 786.

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[5] Limited to Supreme Court holdings and not including dicta, as declared in a dictum in Williams v. Taylor, 529 U.S. 362, 412 (2000).

[6] "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 786-87 (2011).

The goal of every 2254 petitioner is de novo review of each ground for relief. If one of the §2254(d)(1) or (2) standards is met [the state court decision is contrary to, or involved an unreasonable application of, one or more Supreme Court holdings, or the decision is based on unreasonable determinations of fact], the petitioner is entitled to de novo review of his claim for relief. Wiggins v. Smith, 539 U.S. 510, 527-529, 534 (2003). Furthermore, if the state court decides one aspect of a claim but not another, the second aspect is reviewed by the habeas court de novo. Id., at 535 ["In this [IAC] case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis"]. See also, Norton v. Spencer, 353 F3d 1 (1st Cir. 2003).

A state court decision on the merits can also be reviewed de novo if the petitioner establishes that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. §2254(d)(2). Wiggins, supra at 528-531, 534.

VII. HARMLESS ERROR.

The only harmless error standard applicable to habeas claims is the Brecht v. Abrahamson standard. Fry v. Pliler, 551 U.S. 112 (2007). The Supreme Court has granted certiorari in Ayala v. Wong, 756 F3d 656 (9th Cir. 2014), to decide whether 2254(d) requires the federal court to first determine whether, if the state court made a Chapman v. California, 386 U.S. 18 (1967) judgment, that decision was contrary to, or involved an unreasonable application of, Chapman. Sub nom., Chappell v. Ayala, 190 L.Ed.2d 288 (2014). The First Circuit decision on this issue, see Connolly v. Roden, 752 F3d 505 (2014) misapplies Chapman and of Brecht in the same opinion].

ADDENDUM: AN EXHAUSTION ARGUMENT
WHAT CONSTITUTES A "CLAIM"?

B. Ground One Is Fully Exhausted As A Single Sixth Amendment Ground For Habeas Relief.

The Respondent does not allege that Petitioner's Ground One, stated as a single public trial claim, is not exhausted. Rather, he asks the Court to join him in subdividing Petitioner's Ground One into several grounds, and finding one or two of the subdivisions to be unexhausted. The Court must reject this mode of analysis.

1. A Ground For Relief Is Exhausted By Fair Presentation Of That Ground To The State Courts.

When challenged on exhaustion, a habeas petitioner must establish that each of the grounds he is presenting for habeas relief has first been presented to the state courts in federal constitutional terms clearly enough to alert them to the federal nature of the ground. Vasquez v. Hillery, 474 U.S. 254, 257-258 (1986); Humphrey v. Cady, 405 U.S. 504, 516 n. 18 (1972)[The standard of exhaustion is whether the ground presented in federal court "is so clearly distinct from the claims . . . presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim"]. Exhaustion is a federal question; the federal court determines the sufficiency of the petitioner's efforts to comply with state requirements. See, Granberry v. Greer, 481 U.S. 129, 136 n. 9 (1987).

Respondent here does not argue that Petitioner failed to present Ground One to the state courts. His argument is that Ground One has three "aspects' – jury selection, closing argument, and jury instruction – and that Petitioner did not make the "tripartite nature" of Ground One clear to the state courts. To Respondent's mind, these are three "discrete claims." Memorandum, 8-9. He points out that Petitioner did not present the exclusion of Fay and Alan Rosenstein from jury selection, closing argument and jury instruction to the state courts as separate grounds for relief, the latter two are not exhausted. Id. Respondent appears to concede that Petitioner fully presented the substance of these grounds, but argues that his failure to set them apart, under a distinct heading.

In fact, Petitioner repeatedly presented both the law and the facts constituting these challenged "aspects" of Ground One to the state courts.[7] Contrary to Respondent's asseverations, these presentations were not passing references, conclusory assertions, or scattered references lost in hundreds of pages of briefing. They were not sequestered in an obscure document. To the Supreme Judicial Court, Petitioner asserted that the exclusion of the Rosensteins from closing argument and jury instruction, considered alone, constituted grounds for relief. SA:01856. Each assertion of Respondent's "aspects" was made in the context of an overarching Waller argument, and

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[7] Respondent's argument that a ground for relief is not exhausted unless it is presented to each state court (both trial and appellate) rests on a misstatement of the law. Castille v. Peoples, 489 U.S. 346, 350 (1989)[once a ground has been ruled on by the highest state court, it has been exhausted, citing Smith v. Digmon, 434 U.S. 332, 333 (1978)(per curiam). In any event, Petitioner presented Ground One to the Superior Court and to the SJC.

could be easily discerned by any state jurist who was intent on meeting her constitutional obligation to adjudicate the federal constitutional claims presented to her. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 340-342, 344 (1814).

The premise of Respondent's "aspects" argument is that a habeas respondent is entitled to subdivide a single ground for relief pleaded in the petition, re-characterize a subdivision as an independent ground, and challenge the newly-minted ground as unexhausted.[8] This premise and approach is inconsistent with Supreme Court precedent.

[a] The Exhaustion Requirement Is Adjudicated In The Terms Of The Grounds For Relief As Pleaded In The Petition.

The analytical unit to be utilized when in evaluating habeas issues is "grounds for relief":

> 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**. So also, identical grounds may often be supported by different legal arguments, cf. Wilson v. Cook, 327 U.S. 474, 481; Dewey v. Des Moines, 173 U.S. 193, 198, or be couched in different language, United States v. Jones, 194 F.Supp. 421 (D. C. D. Kan. 1961) (dictum), aff'd mem., 297 F.2d 835 (C. A. 10th Cir. 1962), or vary in [***162] immaterial respects, Stilwell v. United States Marshals, 192 F.2d 853 (C. A. 4th Cir. 1951) (per curiam). **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 v. United States,, 373 U.S. 1, 15-16 (1963)[establishing framework for

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[8] **The First Circuit rejected a very similar gambit by the Respondent in Sanchez v. Roden, 753 F3d 279 (1st Cir. 2014). There, Respondent argued that Petitioner had defined the protected class to which he belonged in several inconsistent ways, to the effect that the formulation he presented in the habeas proceeding had not effectively been presented to the state courts. Id., at 293-296.**

evaluating "abuse of the writ" issues](emphasis added). Exhaustion issues are likewise analyzed in terms of the grounds for relief pleaded by the petitioner. Picard v. Connor, 404 U.S. 270, 277-278 (1970) ["a ready example is a challenge to a confession predicated upon psychological as well as physical coercion. See *Sanders v. United States*, 373 US. 1, 16 (1963)"].[9] "Ground for relief" is the pleading unit called for by the Form O241, followed by Petitioner in his petition when he stated his public trial claims as his first ground for relief.

A month after it decided Rose v. Lundy, 455 U.S. 519 (1982), the Supreme Court repudiated the analytical device of splitting an asserted ground of relief into parts and determining whether each part of a ground was exhausted in the state courts. Engel v. Isaac, 456 U.S. 107, 124 n. 25 (1982) [courts should be "reluctant to interpolate an unexhausted claim not directly presented by the petition"]. After Engel, federal courts of appeals have followed suit where a respondent or a court have engaged in ground-splitting for exhaustion or other purposes. E.g., Henderson v. Frank, 155 F3d 159, 164-165 (3rd Cir. 1998)[claim that petitioner did not voluntarily waive counsel at suppression hearing did not constitute two claims even though he challenged waiver forms he signed in both a preliminary hearing and a suppression hearing]; McMahon v. Fulcomer, 821 F2d 934, 940-941 (3rd Cir. 1987)[district court erred in ignoring petitioner's clarification that he pleaded the single claim that he was denied counsel at trial]; Cosby v. Jones, 682 F2d 1373, 1377-1379 (11th Cir. 1982)[only ground stated in petition was constitutional insufficiency of the evidence; issue of validity of state law inference, embedded in that ground, need not be exhausted].

The petitioner's statement of the ground for relief defines the scope of that ground. Henderson, supra at 165; McMahon, supra ["Those additional facts to which the Commonwealth points as evidence of unexhausted claims were simply intended to serve as an illustration of petitioner's one sixth amendment claim"]; Cosby ["We hold that *Rose* does not apply because Cosby raised only a sufficiency issue in the district court, and therefore any subsequent raising of an *Ulster* issue in the court of appeals, whether by the petitioner or by the court, does not present grounds for dismissal"]. As stated in Sanders, supra: "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." 373 U.S. at 16. In short, it is Petitioner's ground for relief as pleaded that must be exhausted, and neither the respondent nor the court is

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[9] "[T]he ultimate question for disposition . . . [may] be the same despite variations in the legal theory or factual allegations urged in its support 'if the issue presented in federal court is the "substantial equivalent" of the issue presented in state court."

entitled to redefine Petitioner's ground for relief.

[b] Factual Amplification Of A Ground For Relief Does Not Defeat Exhaustion.

The Supreme Court has rejected the argument that factual amplification of the state court ground, presented for the first time in a habeas petition, renders a ground for relief unexhausted, where "the substance of the claim" has been presented to the state courts and the new evidence "did not fundamentally alter the legal claim already considered[10] by the state courts." Vasquez v. Hillery, supra at 257-258, 260; Satterlee v. Wolfenbarger, 453 F3d 362, 364-366 (6th Cir. 2006)[applying *Hillery* to ineffective assistance of counsel ground where underlying factual allegations allegedly varied from state court presentation].

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[10] Satisfaction of the exhaustion requirement does not turn on whether the state court actually addressed or ruled on the ground in question; only presentation is required. Fortini v. Murphy, 257 F3d 39, 45 (1st Cir. 2001), Smith v. Digmon, supra. However, the Massachusetts statute defining appellate review of first degree murder appeals provides substantial assurance that the SJC diligently scoured Petitioner's public trial arguments for every plausible ground for relief:

> "Under G.L. c. 278, §33E, this court has extraordinary powers in reviewing capital convictions on direct appeal: we consider the whole case, both the law and the evidence, to determine whether there has been any miscarriage of justice [.] Unlike appellate review of convictions of other crimes, our consideration of first degree murder cases is not limited to issues based on objections rendered at trial[.] We are empowered under G.L. c. 278, §33E to consider questions raised by the defendant for the first time on appeal, or even to address issues not raised by the parties, but discovered as a result of our own independent review of the entire record[.] This uniquely thorough review of first degree murder convictions is warranted by t he infamy of the crime and the severity of its consequences. (Citations omitted)."

Dickerson v. Attorney General, 396 Mass 740, 744 (1986); see, e.g., Commonwealth v. Gunter, 459 Mas 480, 486 (2011)[noting that Court identified issue regarding application of merger doctrine in felony murder in its own review]; Commonwealth v. Silva-Santiago, 453 Mass 782, 805-810 (2009)[reversing conviction on ground identified solely by the Court].