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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 13-7211, Jennings v. Stephens.
5 Mr. Schaffer.

6 ORAL ARGUMENT OF MR. RANDOLPH SCHAFFER, JR.

7 ON BEHALF OF THE PETITIONER

8 MR. SCHAFFER: Mr. Chief Justice, and may it
9 please the Court.

10 Ninety years ago, this Court held in
11 American Railway that an appellee need not cross-appeal
12 to raise an argument in support of the judgment that
13 does not seek to enlarge his rights. Petitioner, who
14 prevailed on an ineffective assistance of counsel claim
15 in the district court, did not have to cross-appeal here
16 for two reasons.

17 First, he did not seek more relief than the
18 new punishment hearing granted to him in this -- in the
19 judgment.

20 Second, he raised an argument that the
21 district court rejected as an alternate basis to affirm
22 the judgment, and if he did not need to cross-appeal, he
23 did not need a COA.

24 We made --

25 JUSTICE SOTOMAYOR: I'm sorry. He -- I

1 don't know if this is a new argument or a new issue.
2 And the reason I raise that is when the judgment issued
3 here by the district court, it specified two errors that
4 had occurred and basically told the State court, fix
5 those two or you have to release the defendant.

6 Let's assume they fixed those two, and then
7 could you come back and say release him anyway because
8 they didn't fix the third that I lost on?

9 MR. SCHAFFER: No, not under those
10 circumstances.

11 JUSTICE SOTOMAYOR: So how is it not more
12 relief?

13 MR. SCHAFFER: I beg your pardon?

14 JUSTICE SOTOMAYOR: How is it not more
15 relief or different relief?

16 MR. SCHAFFER: Because the single error is
17 that he was denied the effective assistance of counsel.
18 That is a single claim, and it was based on three
19 allegations of deficient performance.

20 JUSTICE SCALIA: Well, now, wait a minute.
21 I -- you know, I have -- we -- we don't evaluate whether
22 you had good counsel or bad counsel. You may have
23 Clarence Darrow and still be denied effective assistance
24 of counsel if Clarence Darrow makes one mistake. I
25 mean, when -- when we find that there has been

1 ineffective assistance of counsel, I think that means
2 counsel failed to do one thing that he should have done.
3 But there's -- there's no such general finding that
4 counsel was -- was, in gross, ineffective.

5 You're -- you're -- you're describing it as
6 though -- as though that's what the finding is. That --
7 that's not what we hold when we find ineffective
8 assistance of counsel. We find that this particular
9 counsel made this mistake. That's it.

10 MR. SCHAFFER: Well, let's take that a step
11 further. What the Court does to analyze an IAC claim is
12 to first isolate the errors of counsel. It could be
13 one; it could be a hundred. It doesn't matter. You
14 accumulate them and consider them together to determine
15 prejudice.

16 If the deficiencies in performance
17 constitute sufficient prejudice to undermine confidence
18 in the verdict, then counsel was constitutionally
19 ineffective, not because of A, B, C, or D, but because
20 the totality of his representation did not meet the
21 constitutional standard.

22 So it's not a matter of fixing any
23 particular error of counsel. And that's where I believe
24 the -- the State's position is a little awry because a
25 Federal court judgment in a habeas case is different

1 than a direct appeal judgment. On a direct appeal
2 judgment, the -- the court tells the district court,
3 We're sending the case back to you, do A, B, C, and D or
4 don't do X, Y, and Z.

5 A Federal habeas judgment is a lawsuit
6 against the warden having to do with the body of the
7 prisoner. The Federal court doesn't have authority to
8 tell the State to do or not do any particular thing.
9 The effect of the Federal court judgment is to basically
10 say release the prisoner unless within, in our case, 120
11 days you resentence him to life or you give a new
12 punishment hearing.

13 JUSTICE ALITO: Would your argument be the
14 same if all of the claims in this case were not
15 ineffective assistance of counsel claims? Let's take an
16 example that's in the briefs --

17 MR. SCHAFFER: Sure.

18 JUSTICE ALITO: -- where there's
19 ineffective assistance -- of -- there's a ineffective
20 assistance of counsel claim and there's a coerced
21 confession claim. And so the -- the petitioner wins on
22 the ineffective assistance of counsel claim, loses in
23 the district court on the coerced confession claim. The
24 judgment is that he's entitled to resentencing or, let's
25 say, it's resentencing due to the ineffective assistance

1 of counsel, but there will be not be the opportunity to
2 introduce -- to exclude a coerced confession. So would
3 you -- does your argument apply in that situation as
4 well?

5 MR. SCHAFFER: Assuming the coerced
6 confession involves the punishment phase as opposed to
7 the guilt/innocence phase.

8 JUSTICE ALITO: The same phase, yes.

9 MR. SCHAFFER: Okay. I think that's a
10 situation where the State has a decent argument that
11 because it's a different claim, that would perhaps
12 entitle you to more relief under the judgment, that is,
13 not just a new punishment hearing, but a new punishment
14 hearing without the unconstitutional confession, that on
15 the state of the law today, I would file a cross-appeal
16 and move for a COA on a separate claim because I think
17 that would be Pfeiffer, Alexander, El Paso Natural Gas,
18 where you're seeking to modify the judgment and obtain
19 more relief than it would be American Railway.

20 JUSTICE ALITO: If you say that --

21 JUSTICE SCALIA: Well, why do you -- go
22 ahead. Sorry.

23 JUSTICE ALITO: Well, if I -- yeah, just a
24 follow-up on that. If you say that, could not the same
25 situation arise with respect to different ineffective

1 assistance of counsel claims?

2 Let's say that in this case, you won on your
3 Spisak claim, things that were said during the closing.
4 You lost on the Wiggins claim. Let's say the Wiggins
5 claim was that there was money available from the
6 court -- from the State to hire experts, but the
7 attorney didn't apply for the money, didn't do an
8 investigation, that was ineffective assistance of
9 counsel. So if you win on the -- on the Spisak claim,
10 you'll -- you'll get a new sentencing hearing,
11 presumably, free from the errors in the closing, but you
12 won't get the opportunity to -- to go back and do the
13 time or the money to -- to do the investigation.

14 MR. SCHAFFER: I would respectfully disagree
15 with that. Because if you get a new sentencing hearing,
16 you get to do whatever you want to do at the new
17 sentencing hearing. And for our purposes, if you now
18 know for -- in Federal court that the lawyer didn't
19 investigate mental history and discover X, Y, and Z, you
20 now know it.

21 JUSTICE ALITO: But on -- on remand, they --
22 they say, well, that -- you lost that claim.

23 MR. SCHAFFER: No. It --

24 JUSTICE ALITO: You lost it, so there's
25 no -- there's no need for more money. There's no need

1 for more time. Let's do it over with what -- you know,
2 with a -- with a proper closing.

3 MR. SCHAFFER: And that's the thing. The
4 Federal habeas judgment cannot direct the State court
5 what to do or not do at a retrial. All it can do is
6 tell them we're releasing this person unless the
7 constitutional error is fixed.

8 JUSTICE SCALIA: Well, that's not true.
9 It -- it can tell them what to do. The -- the basis on
10 which the conviction was set aside cannot be repeated by
11 the State court. You're -- you're saying that the State
12 court can -- is -- is free to make the same mistake
13 again?

14 MR. SCHAFFER: Well, it's actually not me
15 saying. It's this Court's opinions have said that on a
16 Federal habeas judgment does not decide what a State
17 court may do or not do on remand. We just direct them
18 to fix the constitutional error. We don't tell them how
19 to do it.

20 JUSTICE SCALIA: But -- but -- but once you
21 say we direct them to fix the constitutional error, that
22 is something that they have to do on remand, isn't it?

23 MR. SCHAFFER: Or -- or the Federal court
24 will release the prisoner.

25 JUSTICE SCALIA: Fix that constitutional

1 error.

2 MR. SCHAFFER: Correct.

3 JUSTICE SCALIA: But this other
4 constitutional error, which we didn't rule on in the
5 habeas thing, they don't have to fix. It's up to them.

6 MR. SCHAFFER: But let's remember, in an IAC
7 claim, it's different than a freestanding admission or
8 exclusion of evidence claim because a Federal court
9 habeas judgment cannot -- for example, in this case, the
10 State says, we sought to enlarge our rights under the
11 judgment by asking the Federal court to order the State
12 to fix any closing argument error and require a new
13 trial free of this error.

14 We didn't ask that. We could not have asked
15 that. A Federal court cannot order a State court to fix
16 any error of defense counsel or tell defense counsel how
17 to try the case, what to offer, what not to offer, what
18 arguments to make. All the Court can do is provide a
19 remedy for the petitioner if he does not have effective
20 counsel at the retrial.

21 CHIEF JUSTICE ROBERTS: And that remedy is a
22 new -- a new trial.

23 MR. SCHAFFER: Or a new punishment.

24 CHIEF JUSTICE ROBERTS: What if -- what
25 if -- what if one claim is the ineffective assistance

1 and the other claim is a violation of the confrontation
2 clause?

3 MR. SCHAFFER: Separate -- sure.

4 CHIEF JUSTICE ROBERTS: And you -- and
5 you -- when -- when you go back, they can repeat the
6 error or they can choose not to call their witness,
7 either way. And it would seem to me that if you didn't
8 file a cross-appeal, that the Federal court decision
9 would be an advisory opinion on the confrontation
10 clause.

11 MR. SCHAFFER: And so in that circumstance,
12 if you were seeking additional relief, i.e., keep out
13 the non --

14 CHIEF JUSTICE ROBERTS: Right.

15 MR. SCHAFFER: -- constitutional admission
16 of evidence, then in that situation, I would file a
17 cross-appeal and move for a COA because I would be
18 seeking to enlarge my rights under the judgment.

19 The judgment that we got here didn't really
20 give us anything more than the Constitution gives any
21 citizen the day that he walks into a courtroom, which is
22 the right to a trial with the effective assistance of
23 counsel.

24 JUSTICE SCALIA: No, no, no, no. The -- the
25 right to a trial that did not have this -- this failure

1 of counsel, this particular failure. You're not
2 entitled to -- to competent counsel. You're -- you're
3 entitled to counsel who doesn't make a mistake. He
4 could be the dumbest counsel around so long as he
5 doesn't make a mistake. And he could be the smartest
6 around, and if he does make a mistake, that's
7 ineffective assistance of counsel.

8 MR. SCHAFFER: Respectfully, it's not by
9 itself. The mistakes may be mistakes, but unless the
10 totality of those mistakes constitute sufficient
11 prejudice to undermine confidence of the verdict --

12 JUSTICE BREYER: But was that an issue here?
13 I mean, I -- I -- looking at the blue brief and the --
14 and the red brief, it seemed to me that the issues here
15 have turned on a mistake, how many mistakes are there.
16 It wasn't a question of prejudice. That is, the lower
17 court said, even if you're -- if you're right -- and
18 they thought you were right --

19 MR. SCHAFFER: Correct.

20 JUSTICE BREYER: -- that these two errors in
21 failing to investigate the background created prejudice.

22 So I don't think there was an argument on
23 appeal about whether there was enough prejudice. It was
24 a question of was this a mistake.

25 Am I right or not?

1 MR. SCHAFFER: Well, my position on appeal
2 was I'm --

3 JUSTICE BREYER: No, I know. I'm just
4 saying was there an argument about that? Did they
5 disagree about that?

6 MR. SCHAFFER: I think the State certainly
7 disagreed with --

8 JUSTICE BREYER: Did they -- and they argued
9 that before the court.

10 MR. SCHAFFER: They -- they disagreed --

11 JUSTICE BREYER: They said even if their --
12 they said the issue before the -- the Fifth Circuit is
13 whether all together these three things amount to
14 prejudice because our view of the State's view was, all
15 right, even if there were errors here, it didn't amount
16 to prejudice?

17 MR. SCHAFFER: What they basically said is
18 that the district court didn't defer to the State court
19 findings and conclusions regarding those matters.

20 So -- but let's -- let's play the State's
21 argument out to its logical conclusion.

22 Under their theory, let's assume the same
23 thing happened to the district court. We win on
24 A and B, we lose on C, and they say we're not going to
25 appeal. Go back to State court, we'll give you a trial,

1 and you can introduce the evidence of alleged mental
2 deficits and disadvantaged background. We'll give you a
3 chance to save your guy's life by laying it all out to a
4 jury and letting them decide.

5 And I say, nope, I'm going to appeal the
6 closing argument to the circuit. And so I file a notice
7 of appeal and move for a COA. And the district court --
8 let's see how that would play out. The district judge
9 would say, did you read my opinion? You won. Why do
10 you need a COA? Why do you want to take this up? And I
11 would say, Judge, because I need an order for you to
12 tell me that I cannot argue to a jury that I would agree
13 with the death sentence. I need that order to keep me
14 from doing that. And the judge would say: You are out
15 of your mind; COA denied.

16 I would appeal to the circuit. The State
17 would take the exact opposite position they are taking
18 they are. They would say this is a frivolous appeal, he
19 got all the relief he wanted in the judgment, which is a
20 new punishment hearing, he doesn't have the right to
21 appeal this, this is an example of death row inmates
22 abusing the system and filing frivolous appeals to delay
23 things.

24 JUSTICE ALITO: The predicate of the
25 argument is again that ineffective assistance of counsel

1 claims are different. You wouldn't think that it was
2 crazy in the situation where you've got the ineffective
3 assistance of counsel claim and a coerced confession
4 claim. You win on the ineffective assistance of counsel
5 claim, they don't reach the coerced confession claim or
6 the confrontation clause claim. It wouldn't be crazy
7 for you to appeal the loss on either of those things
8 because if you don't get relief on that then you are
9 going to have the same thing when you go back, right?

10 MR. SCHAFFER: That's right. And in that
11 situation I would be seeking to enlarge my rights under
12 the judgment by having evidence excluded at a retrial
13 that's beyond the scope of the judgment. In this case
14 the judgment gave me everything I wanted. There is not
15 a word in that judgment that's adverse to me. There's
16 not a thing I could have asked for.

17 JUSTICE GINSBURG: The argument is that what
18 the judgment was is the relief that you got is a new
19 sentencing hearing shorn of the particular errors the
20 district court found and those particular errors did not
21 relate to the closing argument. So you are trying to
22 say we had a judgment, we won, and ordinarily a judgment
23 winner can appeal if they won and if there is an
24 argument that was made on which the judgment won or
25 lost, that is not preclusive because he didn't have a

1 chance to appeal. A judgment winner can't appeal. But
2 this is peculiar because the -- there were -- the -- the
3 order is you are entitled to a new trial shorn of these
4 particular errors. The court of appeals says they are
5 not errors. And then you want to bring up another
6 error.

7 MR. SCHAFFER: Well, I want to -- let's --
8 let's break down the way IAC is analyzed. The issue in
9 this case was, was Petitioner -- denied the effective
10 assistance of counsel at the punishment phase. In the
11 vernacular, we made an IAC claim. We made -- an IAC
12 claim, this Court said in Strickland, has two
13 components: Deficient performance and prejudice. We
14 made three arguments in support of deficient
15 performance. We won two; we lost one.

16 We won the claim. We got the new punishment
17 hearing. So at the new punishment hearing -- let's
18 assume we got one, and I was -- it doesn't mean I would
19 have to put on the evidence of mental health history and
20 disadvantaged background. I can make a strategic
21 decision based on the landscape of the retrial what to
22 use or not use. So the Federal court order would give
23 the Petitioner a new punishment hearing, but it would
24 not dictate to me what evidence I had to put on, what
25 arguments I had to make, nor could the State or the

1 trial court compel me to do or not do anything. It
2 could only provide a remedy if I didn't do it correctly.

3 JUSTICE SCALIA: Yes, but if you fail to put
4 on the same evidence which the court of appeals had said
5 the failure to produce constituted ineffective
6 performance of counsel, if you do the same thing again,
7 why wouldn't be that ineffective assistance of counsel?

8 MR. SCHAFFER: Well, it might or might not
9 depending on how the case was retried. What if, for
10 example, on the mental -- let's just take an example:
11 The mental health history. Okay. The State went out
12 and got a doctor to controvert the opinions of our
13 doctors. What if I decided at the retrial, you know, I
14 think that getting into this mental health history would
15 create more harm than good based on what the State's
16 doctor is going to say. I'm not going to put that on,
17 I'm just going to go with the disadvantaged background
18 and argued that they haven't proven future dangerousness
19 because he's got no history of violence when he is
20 incarcerated. I can make that strategic decision. If
21 somebody wanted to come along later and grade my papers,
22 they could, and they could say it was thumbs up or
23 thumbs down as the case may be.

24 Let's examine the State's argument --

25 JUSTICE BREYER: Now, you couldn't put -- if

1 all things otherwise were the same, you couldn't do what
2 the lawyer did here without being ineffective
3 assistance. That's what -- isn't that their holding,
4 the holding of the district court? The district court
5 says the lawyer in these circumstances did not give
6 effective assistance as to two things. So of course
7 things could change in the new trial, and then you could
8 act differently, but if they didn't change, you would
9 have to do -- act -- what the district court said,
10 wouldn't you?

11 MR. SCHAFFER: I would agree with regard to
12 the evidence of disadvantaged background, because that
13 is written in stone. That doesn't change.

14 JUSTICE BREYER: All right. Now, once that
15 is so, there is nothing in the order that would, things
16 being identical, stop the prosecutor from making
17 precisely the same remarks that you are challenging.

18 MR. SCHAFFER: Well, but see, it wasn't the
19 prosecutor.

20 JUSTICE BREYER: Is that --

21 MR. SCHAFFER: It wasn't the prosecutor that
22 made the argument. It was the defense --

23 JUSTICE BREYER: All right, fine. Whatever
24 the third error is --

25 MR. SCHAFFER: Right.

1 JUSTICE BREYER: -- there is nothing in the
2 order that would prevent the lawyer from doing precisely
3 the same thing. There is something in the order that
4 would prevent you from doing the same first two things,
5 other things being precisely equal.

6 MR. SCHAFFER: If I may, let's look at the
7 mental health history for a moment. The mental health
8 history was not even known by the trial lawyer. Okay?
9 So if he was ineffective, he was ineffective based on a
10 Wiggins failure to investigate type of situation.

11 That's a different question. Let's assume
12 he had investigated and he found the same things that I
13 found during the habeas, and he decided not to put it
14 on. Then it would be a strategic decision which he
15 would have to defend. And so that's where we come back,
16 because that evidence was never known --

17 JUSTICE GINSBURG: But why are we talking
18 about the claim on which you lost on appeal? You are
19 not going to get a chance to go back with disadvantaged,
20 with mental health, because you lost on those on appeal.

21 MR. SCHAFFER: I don't think --

22 JUSTICE GINSBURG: I thought the Wiggins
23 claims were rejected on appeal.

24 MR. SCHAFFER: They were. But let's play
25 this -- let's assume that we get merits review on the

1 closing argument. And remember, it's not a claim, in my
2 view. It's an argument in support of a claim. And I
3 think that the key portion of the government's --

4 JUSTICE GINSBURG: May I just clarify it?

5 MR. SCHAFFER: Sure.

6 JUSTICE GINSBURG: Everything that you are
7 arguing rides on our treating ineffective assistance of
8 counsel as one claim rather than ineffective assistance
9 of counsel, confrontation clause, some other violation.
10 If we don't buy your argument that ineffective
11 assistance of counsel is one monolithic claim and we
12 think the division between what they -- what they're
13 calling Wiggins error and the -- those --

14 MR. SCHAFFER: The two Spisak claims.

15 JUSTICE GINSBURG: -- you would lose.

16 MR. SCHAFFER: I disagree. I don't think
17 you even need to reach the issue of is IAC one claim or
18 not. It's here because they've split my claim into
19 thirds by saying I made three claims instead of one. I
20 can still win under a pure interpretation of American
21 Railway because I am not seeking greater relief than
22 what I got in the judgment, which is a new punishment
23 hearing.

24 JUSTICE KENNEDY: Would -- would you agree
25 that to include all of the counsel's errors it's

1 important to show the substantiality of the error?

2 MR. SCHAFFER: That's what I did in the
3 Fifth Circuit, was say, look --

4 JUSTICE KENNEDY: All right. Would you
5 agree that that goes to show how substantial the
6 incompetence was?

7 MR. SCHAFFER: The combined effect
8 relates --

9 JUSTICE KENNEDY: Yes.

10 MR. SCHAFFER: -- to the prejudice --

11 JUSTICE KENNEDY: All right.

12 MR. SCHAFFER: -- inquiry, but of course one
13 alone can be sufficiently prejudicial.

14 JUSTICE KENNEDY: With that in mind, I want
15 to turn to the COA statute.

16 MR. SCHAFFER: Sure.

17 JUSTICE KENNEDY: Let's assume that we
18 accept your argument that you did not have to file a
19 separate notice of appeal.

20 MR. SCHAFFER: Okay.

21 JUSTICE KENNEDY: Does that mean that you
22 automatically comply with the COA? Because the COA
23 statute says that the certificate of appeal --
24 appealability must show that the applicant has made a
25 substantial showing. And you've conceded that all

1 aspects of the incompetence of counsel go to
2 substantiality, so why is it that you have complied with
3 the COA statute?

4 MR. SCHAFFER: Well, I haven't complied --

5 JUSTICE KENNEDY: And the under -- and the
6 overlying question is once you -- if you were to
7 convince us that no notice of appeal was required, does
8 it automatically follow that you are not required to
9 have a COA?

10 MR. SCHAFFER: I think that's the key issue.
11 The rule I propose, that I think is based on the statute
12 and the -- and the text of the rules, is if you need to
13 cross-appeal, you need a COA. If you do not need to
14 cross-appeal, you don't need a COA. And let me give you
15 two -- let me hit the government's arguments head-on,
16 and I think this is key.

17 They say the COA requirement should be read
18 into the statute or adopted as a matter of Federal
19 common law. That is a tacit acknowledgment that the
20 statute does not require a COA for the non-appealing
21 petitioner appellee. In their brief, they do not rely
22 on the text of 2253(c) or the associated rules,
23 FRAP 22(b), or Habeas Rule 11(a). They want you all
24 to -- the Court to read that into the statute. And that
25 is not appropriate where the text is clear, where

1 Congress --

2 JUSTICE GINSBURG: Are you saying that the
3 COA statute itself says you need a COA to appeal from
4 the final order and you don't want to appeal from the
5 final order because you like the final order?

6 MR. SCHAFFER: Well, correct -- in part
7 correct. 2253(c) says a COA is required for an appeal
8 to be taken to the court of appeals. Now, we know that
9 doesn't apply to the government for two reasons. First,
10 under (c)(2) a governmental entity could never show the
11 denial of a Federal constitutional right. Secondly,
12 under FRAP 22(b)(3) the government is expressly
13 excluded. So if it doesn't apply to the government, who
14 does it apply to? Who did Congress intend for 2253(c)
15 to apply to?

16 The answer is clear. Petitioner-appellants
17 who take the appeal, or petitioner-appellees who take a
18 cross-appeal.

19 JUSTICE BREYER: So why wouldn't you have to
20 take a cross-appeal?

21 MR. SCHAFFER: Because, well, I -- that gets
22 us back to where we were --

23 JUSTICE BREYER: It's the same problem,
24 isn't it? I mean, do you help yourself by saying, okay,
25 we need to cross-appeal, it only applies there, because

1 then we get into exactly the same argument, whether you
2 need to cross-appeal.

3 MR. SCHAFFER: Well, I'd say I don't need to
4 cross-appeal because I'm not seeking to enlarge my
5 rights in the judgment.

6 JUSTICE BREYER: Well, yes, you are, because
7 then --

8 MR. SCHAFFER: -- and IAC is a single claim.

9 JUSTICE BREYER: -- we're back to the same
10 argument. What?

11 MR. SCHAFFER: IAC is a single claim, and
12 I --

13 JUSTICE SOTOMAYOR: Let's assume that we
14 disagree with you that you needed a cross-appeal. Could
15 you answer or didn't -- or agree with you, you didn't
16 need a cross-appeal.

17 MR. SCHAFFER: Okay.

18 JUSTICE SOTOMAYOR: Answer Justice Kennedy's
19 question of why you don't need the COA.

20 MR. SCHAFFER: Sure.

21 JUSTICE SOTOMAYOR: Because a cross-appeal
22 doesn't have to make a substantial showing of -- of a
23 denial of a constitutional right.

24 MR. SCHAFFER: A cross-appeal is just a
25 piece of paper that you file. It doesn't have to show

1 anything. It just says I want to appeal. It's the
2 COA --

3 JUSTICE SOTOMAYOR: Exactly. So why are the
4 two tied together, in your mind?

5 MR. SCHAFFER: Well, because I think when
6 you read 2253(c) it's clear it applies only to the
7 petitioner appellant who lost, obviously, on everything
8 below or the petitioner appellee who lost on a separate
9 claim that he's now desiring to appeal. And -- and this
10 is kind of, I think, obvious to me if you look at habeas
11 Rule 11(a), which says that, "The district court must
12 issue or deny a COA when it enters a final order adverse
13 to the applicant." The applicant is the party taking
14 the appeal.

15 Here the district court did not enter a
16 final order adverse to me, and I didn't take the appeal.
17 So you don't reach that part of 11(a) that says if a COA
18 is required, it has to specify the issue or issues that
19 satisfy the showing of the denial of the Federal
20 constitutional right.

21 JUSTICE ALITO: Do you agree that a
22 petitioner who has to take a cross-appeal, because the
23 petitioner wants to enlarge the judgment, does not have
24 to get a certificate of appealability?

25 MR. SCHAFFER: Do I agree that he does or

1 does not?

2 JUSTICE ALITO: Does not.

3 MR. SCHAFFER: No.

4 JUSTICE ALITO: He has to.

5 MR. SCHAFFER: I think if you take a
6 cross-appeal, you need a COA.

7 And here's -- here's the other thing and I
8 do want to hit this. The government -- the State says
9 the COA should be required as a matter of policy to
10 screen frivolous appeals, and indeed, that's the most
11 attractive argument they make because what court doesn't
12 want to screen frivolous appeals.

13 I want you to bear in mind, please, that
14 there's only a few cases each year in which the
15 petitioner prevails in the district court under the
16 daunting AEDPA standard of review and the State appeals,
17 the information we received off of the public databases
18 that we were able to check. And so I put an asterisk
19 next to this, is that in 2013, there were 18 cases in
20 the Federal circuits that have our scenario where the
21 petitioner won and the State took the appeal. So that's
22 less than 2 per -- per circuit. That's a speck of sand
23 on the beach of cases.

24 Where a petitioner prevails in the district
25 court under the AEDPA standard of review, that appeal is

1 not a frivolous appeal. The appellate court is going to
2 have to spend its time on it. It's serious, especially
3 in a death penalty case. And the briefing rules, the
4 page limits, the fact that the petitioner would have an
5 incentive to protect his judgment and focus his efforts
6 on the claim he won would certainly discourage people
7 from doing what the government says, which is to raise
8 100 frivolous arguments in response.

9 If that were to happen in this speck of sand
10 number of cases in the appellate courts, I'm totally
11 confident that the circuit courts can dispose of
12 frivolous arguments in a sentence, a footnote or a
13 paragraph like that.

14 Before I reserve the rest of my time for
15 rebuttal, I want you -- I don't know whether this Court
16 appreciates irony, but I suspect that you do, and I
17 consider it ironic that the State is basically trying to
18 scare this Court into reading a COA requirement into the
19 statute for a petitioner appellee under the guise of the
20 appellate courts being inundated with 100 frivolous
21 arguments by prevailing petitioners in a case where the
22 prevailing petitioner raised exactly one argument, and
23 it comprised 3 pages out of a 53-page brief in which the
24 first 50 pages sought to protect the judgment.

25 A final thought. If this Court were to rule

1 in our favor, I don't see there being any seismic shift
2 in the Federal habeas landscape. This case, in the
3 great scheme of things, is a blip on the Federal habeas
4 radar. But if you accept the State's position and rule
5 in their favor, in my judgment, the Court would have to
6 find that ineffective assistance of counsel constitutes
7 separate claims based on the number of allegations of
8 deficient performance and that cannot be harmonized with
9 Strickland.

10 Under the State's theory, there would be no
11 circumstances, there would be no case in which the
12 petitioner appellee did not need to cross-appeal and
13 obtain the COA. Viewing this in context and boiling it
14 down to the bottom line, I filed one IAC claim. I had
15 one child, and I named him Strickland. The State cannot
16 come back now and tell you that I had triplets and their
17 names are Wiggins I, Wiggins II and Spisak.

18 JUSTICE ALITO: In other contexts, however,
19 IAC is not a unitary concept, is it? I don't want to
20 take up your rebuttal time, but in other contexts like
21 repetitive litigation or exhaustion, IAC is not a
22 unitary concept.

23 MR. SCHAFFER: Well --

24 JUSTICE ALITO: Talk about it on rebuttal if
25 you --

1 MR. SCHAFFER: I don't want to get too far
2 into that, but it's a totally different situation there,
3 because those cases, Trevino and so forth, they're based
4 on principles -- principles of federalism and comity.
5 It's not a lack of jurisdiction. It's that the Court
6 can decide to excuse some procedural default based on
7 cause and prejudice. In our case, it's a pure question
8 of appellate court jurisdiction. Does the court of
9 appeals have jurisdiction to rule on an argument in
10 support of ineffective assistance where I've already won
11 on the claim? All I'm asking them to do is consider the
12 argument as an alternate basis to affirm the judgment of
13 the district court.

14 And for that reason, this Court should
15 reverse the judgment of the Fifth Circuit and remand for
16 consideration of the closing argument on the merits.

17 Thank you. I will save the rest of my time
18 for rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counselor.

21 Mr. Oldham.

22 ORAL ARGUMENT OF ANDREW S. OLDHAM

23 ON BEHALF OF THE RESPONDENT

24 MR. OLDHAM: Mr. Chief Justice, and may it
25 please the Court:

1 It's now common ground that Petitioner would
2 need to cross-appeal to add some conditions to a
3 conditional release order issued by the district court.
4 The only question in this case now is whether the
5 particular condition requested by this particular
6 Petitioner was necessary or sufficient to add to the
7 conditional release order, and we think that it was. We
8 think that this particular condition, the Spisak error,
9 was a meaningful condition and it necessitated a
10 cross-appeal for two reasons.

11 First, if Petitioner had cross-appealed and
12 prevailed on the Spisak claim, the State would have been
13 obligated to fix that error, to cure that error upon
14 pain of immediate release of the prisoner. And that is
15 a dramatically form -- dramatically expanded form of
16 relief that would necessitate a cross-appeal.

17 CHIEF JUSTICE ROBERTS: How would you do
18 that? How would you cure the Spisak error?

19 MR. OLDHAM: Well, there are many ways that
20 the State and the defense and -- I'm sorry, I should say
21 the prosecution and the defense and the State court
22 could cure the Spisak error. It starts with the
23 enunciation of the standard from the Federal district
24 court as to exactly what the Sixth Amendment requires of
25 a closing argument, which then guides both the --

1 CHIEF JUSTICE ROBERTS: Well, the Spisak
2 error is something that the lawyer said in closing
3 argument.

4 You're going to have a new trial, right?
5 Well, presumably, I mean, the lawyer may say the same
6 thing or the new lawyer may say the exact same thing or
7 he may not. It seems to me that it's a fairly academic
8 dispute as to whether or not you have a separate claim
9 once you have the relief of a new trial.

10 MR. OLDHAM: Well, we don't think it's an
11 academic claim with respect to adding the condition that
12 requires a certain level of constitutional performance
13 for the defense counsel --

14 CHIEF JUSTICE ROBERTS: There's always --
15 you always have the same level of constitutional
16 performance. This is only going to come up as a
17 particular problem if for some reason the lawyer says
18 exactly the same thing in closing as the prior lawyer
19 did. And I don't anticipate that happening.

20 MR. OLDHAM: Well, this actually happens in
21 ineffective assistance of counsel claims in other
22 contexts where the State court has the power, for
23 example, to conduct a colloquy with the defense lawyer
24 to probe what the judgment is that has informed the
25 defense lawyer's representation, what the defense lawyer

1 has done, what the defense lawyer plans to do. And, of
2 course, the State has the ability to object and move for
3 curative instructions if the error recurs.

4 But the fundamental -- the really important
5 point is that if the error recurs or if the State fails
6 to fix it, the remedy is immediate release, which we
7 should all agree is a dramatically expanded form of --
8 of relief, which would necessitate a cross-appeal.

9 JUSTICE SCALIA: Mr. Oldham, some of my
10 questions to -- to your opposing counsel suggest that
11 ineffective assistance of counsel is mistake by mistake.
12 That there are here three claims of ineffective
13 assistance, not just one. Maybe that's so.

14 What do you do with this case where the --
15 the trial court finds two instances of ineffective
16 assistance, the State agrees that those two are valid.
17 But appeals on the ground that it was harmless error,
18 that the cumulative effect of those two mistakes was not
19 enough to change the outcome of the trial.

20 The defendant, on the other hand, wants to
21 raise the issue that there was, indeed, a third instance
22 of ineffective assistance, and then if you combined all
23 three, there would have been sufficient harm to enable
24 setting aside the verdict.

25 What do you do with that case? There --

1 there the three separate instances have sort of been
2 combined into one where -- where the issue is the
3 harmful effect.

4 MR. OLDHAM: The answer, Justice Scalia,
5 would turn on the particularities of the third error of
6 the hypothetical. That is, if the third error was
7 sufficient to push it across the line of the Sixth
8 Amendment in the deficient performance standard, then
9 that would be the contours of the ineffective assistance
10 of counsel claim.

11 JUSTICE SCALIA: Okay. So you would allow
12 that one to be -- to be raised without a cross-appeal.

13 MR. OLDHAM: But it would --

14 JUSTICE SCALIA: So long as it -- it
15 would -- or at least so long as it's argued that that
16 would produce the incremental effect of reversing the
17 judgment.

18 MR. OLDHAM: Yes. We agree with the
19 Clarence Darrow hypothetical from the top half of the
20 argument, which is that you measure the constitutional
21 error based on where the lawyer's performance
22 transgresses the balance of the Sixth Amendment. And so
23 if in the hypothetical, if that happened, it would have
24 been on the third error, then that would be the contours
25 of the ineffectiveness claim.

1 To return to the Chief Justice's --

2 JUSTICE BREYER: Before you leave that, I
3 thought that your opposing counsel said that did happen
4 here. It was -- you did raise a question of -- of
5 whether there was enough prejudice and, therefore, they
6 were entitled to bring in the third as showing that even
7 if the first two weren't sufficient, the third made up
8 for it.

9 MR. OLDHAM: Justice Breyer, we disagree
10 with that characterization of what happened in the court
11 below. What happened in the court below and in the
12 District Court was that petitioner raised three
13 allegations of deficiency. This is how he characterized
14 it in his own certiorari petition to this Court. Three
15 allegations of deficiency, each of which standing alone
16 both transgressed the bounds of the Sixth Amendment and
17 was a prejudicial error.

18 We fought back on two because the District
19 Court had granted two, and those were reversed in the
20 Fifth Circuit. He raised a third independent error and
21 if he wants to add that third independent error to the
22 conditional release order, that is he wants the State to
23 be held responsible and a constitutional error imputed
24 to the State sufficient to command his immediate release
25 upon failing to fix it at the second trial --

1 JUSTICE SCALIA: The first two were thrown
2 out on the grounds that there was no error; right?

3 MR. OLDHAM: That's correct.

4 JUSTICE SCALIA: Not on the ground that the
5 effect was not harmful enough to warrant setting aside
6 the judgment.

7 MR. OLDHAM: That's correct. They were
8 under -- that's correct. And although the State did
9 brief it --

10 JUSTICE SOTOMAYOR: Counsel, what do you do
11 with the COA? I mean, however we rule, we may be
12 creating headaches. Okay.

13 So petitioner wins on two and he loses on
14 the third issue, the -- the closing summation.

15 Does he have to then go for the COA? He
16 can't wait for you to appeal and then make that
17 decision, can he?

18 MR. OLDHAM: Well, under our view and under
19 the hypothetical given on the top side of the argument
20 he could cross-appeal and that actually -- and of course
21 would have to get a COA. But this is actually --

22 JUSTICE GINSBURG: Cross-appeal when there's
23 no appeal?

24 MR. OLDHAM: He could have -- he could have
25 taken the first appeal.

1 JUSTICE GINSBURG: He could not have taken
2 an appeal. Only the State could take an appeal; right?

3 MR. OLDHAM: Our view is that on this
4 particular judgment he could have taken the first
5 appeal. And that's incredibly important because it
6 would give him an additional protection if there was a
7 second trial. In particular, if he could get a Federal
8 court to say the Sixth Amendment demands this level of
9 competence --

10 JUSTICE GINSBURG: Where does the statute or
11 the rule talk about somebody who loses on a particular
12 claim but wins the judgment, I thought -- I'm looking at
13 the order. The order is on page 33 of the appendix and
14 it doesn't say anything about Spisak or about -- what
15 was the other one -- Wiggins. It just says the order is
16 three choices, release him from custody or give him a
17 new sentencing hearing or sentence him to a term in
18 prison. That's it. That's the order that --

19 MR. OLDHAM: That's correct,
20 Justice Ginsburg, but it must be read in the context of
21 the entire opinion. As we pointed out in footnote 6 of
22 the red brief, this Court and other Federal courts often
23 write their conditional release orders differently. To
24 say, for example, as Judge Pollack did in the Lamb case,
25 these particular errors have to be fixed. And everyone

1 seems to agree that if the judgment said these
2 particular errors have to be fixed, he could have taken
3 the first appeal or he could take a cross-appeal.

4 JUSTICE BREYER: If he could take his first
5 appeal, how does it work? That is, it seems to me that
6 I've seen lots of petitions in habeas where an
7 incarcerated person will bring up 40 arguments. Now,
8 suppose that he loses on 39 and he wins on one and he
9 gets his new trial, and the court -- the prosecution
10 says fine, we'll go ahead, we'll give you the new trial.
11 Is the lawyer then supposed to appeal his 39 losses?

12 MR. OLDHAM: Well, as a practical matter,
13 the notice of appeal deadline would be far in advance of
14 the retrial decision.

15 JUSTICE BREYER: No, no. You said he could
16 take the first appeal. So before the new trial goes on
17 he says, I think I'll take the first appeal on the other
18 39 that I lost on. Can he do that?

19 MR. OLDHAM: Absolutely. And for --

20 JUSTICE BREYER: Well, then a lot of people,
21 you know, I'm not saying they're badly motivated,
22 they're in prison, they might think this sort of
23 interesting, I might lose at trial, let's just see if I
24 can't find a few other grounds here.

25 MR. OLDHAM: Well, it's obviously not a lot

1 of people. It's --

2 JUSTICE BREYER: I've never heard of that.
3 Have you found examples where that's happened?

4 MR. OLDHAM: Well, as the petitioner points
5 out, there's only 18 of these cases in the Court of
6 Appeals from last year, but a great example --

7 JUSTICE BREYER: Wait. Have you found many,
8 one, cases where a petitioner won in the District Court,
9 there is no State appeal, but he did lose on other
10 grounds and he decided to take a first appeal on several
11 of those other grounds?

12 MR. OLDHAM: I'm unaware of any but I --
13 only because the State --

14 CHIEF JUSTICE ROBERTS: Well, the reason
15 there might not be any, I mean, any decision by the
16 Federal court in that situation would be, I think, a
17 purely advisory opinion. Let's say he loses on a
18 confrontation clause claim, he wins on inadequate
19 assistance of counsel. He takes the appeal. If I'm the
20 judge on appeal I say, well, in the new trial, they may
21 not call the witness that you said shouldn't have been
22 called and you want me to issue an advisory opinion just
23 in case they do. I don't see how he can do that.

24 MR. OLDHAM: Well, it wouldn't be an
25 advisory opinion in this sense. It would say that what

1 happened in the previous trial transgressed the
2 confrontation clause or the Sixth Amendment, depending
3 on which case -- which claim it lost below and it would
4 give him a very valuable procedural protection at the
5 second trial.

6 JUSTICE SCALIA: No. It's superfluous in
7 the sense that it is unnecessary to the judgment. He
8 got the judgment, he won it. The trial was set aside.
9 The conviction was set aside, he got a new trial. And
10 he's saying, oh, there are additional reasons why I
11 should have gotten a new trial. I'm not going to listen
12 to that. That's absurd. You got what you wanted. Now
13 go away.

14 (Laughter.)

15 MR. OLDHAM: That -- Justice Scalia, our
16 view of the conditional release order is significantly
17 weightier than that. What we think a conditional
18 release order is and what we think that this Court's
19 habeas cases demand is that a conditional release order
20 is a Federal court's order on a constitutional claim
21 that says the State must release, that is the actual
22 quintessential habeas remedy, or fix these errors.
23 Never does the conditional release order say, you get a
24 new trial.

25 JUSTICE SOTOMAYOR: But let's -- you may

1 be -- this one did, said release -- give him a new
2 hearing or release him.

3 But I would say -- I do want you to answer
4 my COA question, okay, because what you're saying is
5 exactly what Justice Scalia is worried about, which is,
6 is he going to go present the COA and are we going to
7 even entertain it since he won his release? But if he
8 -- does he have to get a COA?

9 But more importantly, what happens when
10 there's a new hearing? Those two mistakes are not
11 repeated but a new one is introduced and the old one is
12 repeated.

13 Are you saying he can't appeal again?

14 MR. OLDHAM: No.

15 JUSTICE SOTOMAYOR: On the old one or the
16 new one?

17 MR. OLDHAM: Our rule is actually much more
18 -- much more protective of the prisoner than that.
19 Because if the old error is recommitted he gets
20 immediate release. And that's the --

21 JUSTICE SOTOMAYOR: No, that's -- you're
22 saying he only gets immediate release if it's the old
23 error that the judge found on the first habeas.

24 MR. OLDHAM: That's right.

25 JUSTICE SOTOMAYOR: But let's assume that

1 the second error is -- the third error is committed and
2 even a new one is committed that wasn't a part of the
3 first function, can he appeal?

4 MR. OLDHAM: Of course. Of course. And he
5 has -- yes, he has a new judgment. He can challenge the
6 new judgment. The only question is how much relief
7 affords to him. Because he agrees with us, to go back
8 to Justice Scalia's example, he agrees with us that he
9 could --

10 JUSTICE GINSBURG: Let's get down to basics.
11 Isn't it true that a judgment winner does not have to
12 appeal an issue on which he lost but he is -- if he's
13 content with the judgment, he can present arguments that
14 would entitle him to relief. He can assert defensively.
15 A judgment winner doesn't have to appeal, doesn't have
16 to cross-appeal. That is the general rule; right?

17 MR. OLDHAM: Yes, we agree. The only
18 question is whether he's a judgment winner and we
19 pointed out many examples where people can be prevailing
20 parties in the sense that the judgment imposes no
21 liability on them but they can nonetheless appeal and we
22 would submit that this is one of them, and it's
23 precisely because he wants the additional protection.

24 To go back to Justice Scalia's example,
25 everyone agrees that if the petitioner wins on one claim

1 but he wants to raise a coerced confession claim he can
2 file a first appeal or a cross-appeal.

3 JUSTICE KAGAN: Mr. Oldham, suppose a lawyer
4 had just had two Wiggins claims. One was the lawyer
5 didn't find the psychological report and the other was
6 the lawyer failed to put on the mother as a character
7 witness. He loses one, he wins the other. Does he have
8 to take a cross-appeal on that?

9 MR. OLDHAM: He has to take a cross-appeal
10 if he wants the one he lost on added to the conditional
11 release order. That is, he wants the protection that
12 the Federal court would provide against that error being
13 either recommitted or failing -- the State failing to
14 fix it.

15 CHIEF JUSTICE ROBERTS: But they -- you keep
16 talking about the conditional release order. It doesn't
17 say anything about what the State must do, what errors
18 it must correct, it's on page 35, it just says give him
19 a new sentencing hearing or sentence him to a term of
20 imprisonment. It doesn't say, because of this, because
21 of that, because of this.

22 MR. OLDHAM: And that's absolutely correct.
23 But we -- it seems like both sides agree that it could
24 have said exactly what the opinion says. That is, I
25 found two errors here, I have not found an error on the

1 third ground and therefore, it could have been
2 incorporated in the text, as they often do.

3 As I say, footnote 6 of the red brief
4 collects a series of the ways that Federal courts phrase
5 them, and it would be a bizarre cross-appeal that would
6 turn on the particular phraseology of the conditional
7 release order when everyone agrees that the meaning of
8 it is the same.

9 JUSTICE KENNEDY: Let -- let me just ask you
10 this question about COAs. Let's just take a case --
11 there's no cross-appeal or anything. The prisoner
12 alleges in -- inadequate assistance of counsel, and he
13 loses. He files a COA. He says, my counsel was
14 inadequate because there were two Wiggins errors, he did
15 not -- two Wiggins errors. That is what he says in the
16 COA.

17 The COA is granted. Now he files his brief.
18 Can he allege a Spisak error as well?

19 MR. OLDHAM: As far as I know, no court in
20 the United States -- no circuit court in the United
21 States would allow him to do that because of 2253(c)(3).

22 JUSTICE KENNEDY: So -- so can he -- so in
23 other words, in a COA, you have to list every error that
24 counsel made and at -- at -- on -- on pain of not being
25 able to argue that in your brief?

1 MR. OLDHAM: Yes, Your Honor. That is what
2 2253(c)(3) says, issue-by-issue specification. And
3 every court of appeals in the United States agrees, even
4 the Seventh Circuit, that would seem to -- would say all
5 three of the errors that you hypothesize would be the
6 same. Even in the Seventh Circuit, you would have to
7 get a certificate of appealability in that circumstance.

8 JUSTICE GINSBURG: But that's -- (c)(3)
9 comes after (c)(1). And (c)(1) says you need a COA to
10 appeal from the final order. And so if you don't need a
11 COA to appeal from the final order, you go on and appeal
12 from the final order. The final order is fine. You
13 would never get to (c)(3).

14 (C)(3) says if you need a COA, then you will
15 indicate which specific issues. But it doesn't --
16 (c)(3) doesn't tell you when you need a COA. (C)(1)(A)
17 tells you that.

18 MR. OLDHAM: That's correct, Justice
19 Ginsburg. And (c)(1), as it's currently written,
20 predated even AEDPA. And even before AEDPA, that is in
21 1986, the Second Circuit interpreted (c)(1) as it is
22 currently written to require prisoners, when they are
23 the appellees, to nonetheless get COAs.

24 And as we sit here today, 6 out the 8 --

25 JUSTICE GINSBURG: Where does that -- where

1 does that come from in the statute? I mean, the statute
2 says you need the COA to appeal from the final order in
3 a habeas proceeding. Well -- in the final order. I
4 don't want an appeal from the final order. It's good.

5 MR. OLDHAM: So the pre-AEDPA standard was
6 the certificate of probable cause standard, which courts
7 of appeal, starting with the Roman decision in 1986,
8 required prisoners to satisfy the issue -- the -- the
9 CPC requirement even as the appellee. And as we sit
10 here today, 6 out of the 8 courts of appeals would
11 require the Petitioner in this case to get a certificate
12 of appealability.

13 JUSTICE BREYER: All right. Suppose the --
14 isn't it --

15 JUSTICE GINSBURG: In fact, you get it from
16 the language of the statute, which says you need a
17 certificate to appeal from the final order.

18 MR. OLDHAM: Well, Justice Ginsburg, as this
19 Court has said twice in both the Miller-El and in Slack,
20 the language of this statute, 2253(c), imposes a list of
21 necessary but not sufficient conditions. And it is
22 entirely within the provenance of the courts of appeals,
23 who deal with these issues on a regular basis, to
24 interpret that language to also apply to a prisoner who
25 is the appellee, who wants to raise an issue for the

1 court of appeal's consideration, both because that's the
2 purpose of the statute and because it was the pre-AEDPA
3 standard upon which the statute was enacted.

4 And so if I might just return to the Chief
5 Justice's hypothetical about the potential for something
6 not happening again. This is -- it's much more
7 significant than simply that. If you think about the
8 quintessential error that could never recur, it would
9 be, for example, a Brady violation, that is, the
10 withholding of exculpatory evidence. Once it's in the
11 possession of the defendant, how could it ever recur?

12 But it's in precisely that circumstance that
13 one of the most powerful exhibitions of a conditional
14 release order has worked out because in the -- in the
15 *Wolf v. Clark* case, the Fourth Circuit, the Commonwealth
16 of Virginia received a Brady remedy, that is, it -- it
17 had its conviction vacated because the -- the particular
18 evidence had not been turned over to the defense.

19 Now, that error, that particular error could
20 never be recommitted, but the Commonwealth violated the
21 spirit and the intention of that conditional release
22 order by interviewing the jailhouse informant that gave
23 the evidence, threatening him with perjury, and
24 convincing him not to testify at the second trial.

25 And in that circumstance, because the

1 conditional release order -- which was phrased
2 materially identically to ours, by the way -- the
3 phraseology did not mention Brady, but because he had
4 the power of a Federal conditional release order,
5 instead of having to sit through another trial, instead
6 of having to have the Brady evidence excluded, he was
7 able to go back to the Federal district court that
8 issued the original conditional order and --

9 CHIEF JUSTICE ROBERTS: Oh, sure. I mean,
10 there may be situations in which the State or the
11 ineffective counsel, they do repeat the error, or they
12 may not.

13 MR. OLDHAM: Well, this one couldn't have
14 been repeated. It was, by definition, not repeatable.
15 But it was because the State failed to fix it. See,
16 it's actually a significantly greater obligation on the
17 State than not -- than simply not doing the same thing
18 over again. Right?

19 JUSTICE BREYER: Thinking here to the -- the
20 Criminal Justice Foundation filed a brief, and -- and as
21 I read it, I thought, well, the point -- the point of
22 this is don't make it too complicated. So they say,
23 well, let's just consider what Estelle says, you
24 can't -- you have to make a substantial showing of the
25 denial of a Federal right.

1 So they're saying the Federal right here
2 that we're deprived of is a Sixth Amendment right to --
3 to counsel, period.

4 There are a lot of different bases for it.
5 There are a lot of different things that happen, but
6 that's the single ground or right or, in this case,
7 issue doesn't change the word of -- that it used to
8 mean. So call it this one thing. It's so simple, and
9 at that point, let the court of appeals deal with it.

10 As soon as we try to separate different
11 bases for saying that this was a deprivation of the
12 right to counsel, we are going to produce a pretty good
13 nightmare because they shade into each other often.
14 They're related in a variety of ways. They may be or
15 may not be related through the prejudice problem. And
16 lawyers will start wondering when they have to file a
17 court cross-appeal, and we will create a -- a mess.

18 So that's the basic argument, I think, of
19 this brief, and it is one of the arguments that they're
20 trying to make.

21 Now, what is your simple, clear answer to
22 that?

23 MR. OLDHAM: The current rule in 6 out of
24 the 8 Courts of Appeals is not a nightmare. And the
25 current rule reads issue in 2250(c)(3) to mean issue,

1 not to mean a single claim. And so the nightmare that's
2 predicted or the -- the pragmatic solution isn't in want
3 of a problem in the sense that this is the -- the rule
4 that we have advanced on the certificate of
5 appealability is the majority rule. And as far as --

6 JUSTICE SOTOMAYOR: But isn't that a rule
7 that was set up, as Justice Ginsburg said, only when the
8 petitioner hasn't won. But here, there's a judgment for
9 resentencing. As the Chief Justice indicates, the error
10 may or may not -- the third error may or may not be
11 repeated. So go back to that point, which is if you're
12 a successful litigant, do you even have a right to try
13 to go get a COA?

14 MR. OLDHAM: So the rule that I'm providing,
15 the 6 out of 8, is in the circumstance where the
16 prisoner won and wants to, nonetheless, raise additional
17 issues. So it's exactly this case.

18 And the simple fact of recurrence is both
19 a -- a difficult rule to predict ex-ante as the Wolf
20 case would illustrate, but it's also -- would give short
21 shrift to ineffective assistance of counsel claims
22 because --

23 JUSTICE GINSBURG: Why doesn't this fit --
24 why doesn't this case just fit what is the standard rule
25 that a party who's content with the judgment doesn't

1 have to cross-appeal to preserve arguments that enabled
2 him to retain the benefits of the judgment? That's the
3 standard rule.

4 MR. OLDHAM: Justice Ginsburg, it fits
5 within that rule. It just begs the question of what the
6 judgment is. And in our -- in our view, the judgment
7 entitles him to -- to -- to either release or to a
8 resentencing under particular terms. And if he wants to
9 change the terms of the resentencing, he's attacking the
10 judgment and expanding his relief.

11 We all agree that he would be attacking the
12 judgment and expanding his relief if he wanted to add
13 coerced confession. Our view is that ineffective
14 assistance of counsel is not a second class right. It
15 is not one that can be subordinated to a coerced
16 confession claim, and that for the exact same reasons
17 that the court's confession claim may come up, may not
18 come up, may be difficult to understand ex-ante, the
19 practical significance of it may be difficult to discern
20 ex-ante, he still has to cross-appeal in both
21 circumstances. Yes, he conceded in the --

22 JUSTICE KAGAN: But if I understand the
23 allocations -- this goes back to, I guess, the
24 hypothetical I asked before. Now I have 5 Wiggins
25 claims. You didn't put on my mother, and you didn't put

1 on my brother, and you didn't put on my sister, you
2 didn't put on my uncle, you didn't put on my aunt, and
3 the court says, you know, we think your brother and your
4 mother really did have something to say, we're not so
5 sure about the others.

6 Do you think I have to cross-appeal on my
7 aunt and my sister and my uncle, and not only did you
8 think I have to cross-appeal, but you think that if I
9 had won and the State had not taken an appeal, I would
10 have had to appeal myself?

11 MR. OLDHAM: Well, two things, Justice
12 Kagan. One is that on -- on that particular
13 hypothetical, I would suggest that there's just one
14 Wiggins claim, and that is failure to call family to
15 testify. And so there is sort of a tension in how we
16 conceive of the claim in this case and it's --

17 JUSTICE KAGAN: Well, you know, I could do
18 another hypothetical --

19 MR. OLDHAM: Sure.

20 JUSTICE KAGAN: -- failure to call family,
21 failure to call the psychiatrist, failure to find the
22 psychiatric report --

23 MR. OLDHAM: Sure.

24 JUSTICE KAGAN: -- failure to go investigate
25 my mental background.

1 MR. OLDHAM: Absolutely. And our position
2 is, yes, it's not that you have to cross-appeal, it's
3 that you can cross-appeal, right, in the sense that you
4 could, if you wanted to go back and have a second trial
5 without having the ones that you lost protected by the
6 Federal Constitution, then you can. But if you want to
7 have a conditional release order that commands the State
8 to fix those particular errors upon pain of immediately
9 releasing you, our rule allows you to cross-appeal,
10 whereas their rule does not.

11 JUSTICE SOTOMAYOR: So do you need a COA,
12 too?

13 MR. OLDHAM: Yes. Yes, Your Honor. You
14 would always need a certificate of appealability.

15 JUSTICE SOTOMAYOR: How do you do that?
16 If -- take Justice Kagan's example. You've won, and you
17 want to -- you're -- you're willing to forego unless
18 there's an appeal by you. Now I'm going to
19 cross-appeal. Now I need a COA, too, before I know what
20 you're doing?

21 MR. OLDHAM: Well, the prisoner -- it's
22 common ground that if the prisoner appeals on the top or
23 the bottom the prisoner needs a certificate of
24 appealability. And our position is that the particular
25 rules that we're offering here offer protection to

1 prisoners in the sense that -- and it offers protections
2 to the State as well. It lets everyone know before we
3 have to go back and have another trial about the mother
4 or the sister or the cousin or the psychiatric report
5 what the rules of the Sixth Amendment game are. It
6 allows the prisoner to know that if the State doesn't
7 fix that error he gets to go free and it allows the
8 State to make a decision as to perhaps not even
9 conducting a trial again.

10 We've offered this example in the briefs,
11 it's been -- and it's unrebutted in the reply that
12 depending on what the particular conditions are, the
13 State may forego and commute to a term of years, which
14 is the ultimate benefit to the prisoner. And so it's
15 incredibly important to give a prisoner the right to
16 cross-appeal in that circumstance. And if he wants
17 the court of appeals to address that issue he has to
18 cross-appeal because it would be expanding that relief
19 by adding a condition on a conditional release order
20 that the State must obey or fix or otherwise let him go
21 immediately.

22 If there are no further questions.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Schaffer, two minutes left.

25 REBUTTAL ARGUMENT OF RANDOLPH L. SCHAFFER, JR.

1 ON BEHALF OF THE PETITIONER

2 MR. SCHAFFER: I'm a -- as the Court can
3 probably tell, I'm a fairly simple-minded person, and
4 when I looked at this and said is there anything I need
5 to do to get this closing argument in front of the
6 circuit in response to the State's appeal, I said:
7 Well, no; I won on ineffective assistance of counsel.
8 I'm just making another argument in support of the
9 judgment as to why there was prejudice, end of story.
10 That's the extent of my thought.

11 The bulk of these Federal habeas cases, as
12 I'm sure the Court knows, 90 percent or more are pro se
13 State court prisoners trying to navigate the treacherous
14 AEDPA waters without any help at all. And it's tough
15 enough to win on the merits. To create the procedural
16 nightmare of even getting into the ballpark that the
17 State would have you create is like throwing out the
18 baby with the bath water. The simple thing is we want
19 to make it easy for the courts to acquire jurisdiction.

20 JUSTICE SOTOMAYOR: The only way you can win
21 this, according to you, is if we rule IAC claims are one
22 claim?

23 MR. SCHAFFER: No. I can also win, Justice
24 Sotomayor, on the basis that, even if IAC is multiple
25 claims, I did not seek to enlarge my rights under the

1 judgment. And it goes back to the State's position --

2 JUSTICE SOTOMAYOR: So when is it that you
3 have to cross-appeal?

4 MR. SCHAFFER: If I want to enlarge my
5 rights. For example, if I win on punishment phase IAC
6 and I lose on guilt phase whatever and I want more than
7 a new punishment hearing, I would have to cross-appeal
8 obviously in that situation.

9 JUSTICE SCALIA: Well, you answered no, but
10 then your explanation produces yes. You're saying you
11 don't have to cross-appeal because you won on an
12 ineffective assistance of counsel claim; right? There
13 is one, you know, omnibus ineffective assistance of
14 counsel claim. You won on that; right?

15 MR. SCHAFFER: Correct.

16 JUSTICE SCALIA: So your answer to Justice
17 Sotomayor should have been the opposite of what it was.
18 If you said yes, you should have said no.

19 MR. SCHAFFER: I do that all the time. But
20 my understanding was she was asking me when would you
21 need to cross-appeal, and I was saying the scenario in
22 which you would. This is not one of them.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 12:01 p.m., the case in the
2 above-entitled matter was submitted.)
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