JENNINGS V. STEPHENS AND JUDICIAL EFFICIENCY IN HABEAS APPEALS

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INTRODUCTION

The writ of habeas corpus was once seen as the great protector of the people against the overwhelming power of the State;[1] now its reputation has shrunk to little more than a stall tactic.[2] As Congress and the courts have increasingly disfavored the "Great Writ," its power to grant relief has nearly evaporated.[3] Although some of the writ's recent diminishment was necessary to keep judicial proceedings from dragging on too long,[4] some commenters believe that the writ's power has been curtailed too much, and that it is no longer an effective enough tool for those in need of its protection.[5] As the courts continue to stake out the borders of habeas procedure, some jurisdictions have continued to impose even greater restrictions on habeas petitioners, such as requiring successful petitioners to file unnecessary motions and cross-appeals to fully defend their judgments. These courts have overstepped, however, and the Supreme Court has before it a chance to stop the erosion of the writ's power.

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1. *See* Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law but an Essential Right*, 64 ME. L. REV. 379, 380–81 (2012) (noting that habeas corpus has long been known "the Great Writ of Liberty").

2. *See* Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT'G. REP. 329, 330 (noting that many have concluded that prisoners file habeas petitions solely to delay execution of capital sentences).

3. *Id.* at 384–85 (noting that habeas petitions are granted so infrequently that some have argued the writ is no longer needed in non-capital cases).

4. *See* John H. Blume, Sheri Lynn Johnson, & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 441–42 (2011) (compiling recent changes in habeas law and noting Congress's intention for these changes to shorten judicial proceedings).

5. *See, e.g.*, Adelman, *supra* note 1, at 384.

The question presented in *Jennings* v. *Stephens*[6] is whether a habeas petitioner, after winning at the district court on a claim of ineffective assistance of counsel, needs to file a cross-appeal and a motion for a certificate of appealability for the circuit court of appeals to consider an additional argument supporting that ineffective assistance claim, even though the district court rejected that additional argument.[7] This question has received mixed answers from the federal circuit courts. The Supreme Court should rule in favor of the petitioner, Jennings, because by prevailing at the district court level, habeas petitioners have shown the merit of their claims. Forcing habeas petitioners to present motions and briefs, which no longer serve their gate-keeping functions, only hinders judicial efficiency.

This case also presents the Court with an opportunity to weigh in on another deep circuit split over whether an attorney's errors can be considered cumulatively in ineffective assistance of counsel cases. This is an important question because repeated errors by counsel can sometimes be just as harmful as one egregious error, and can just as easily deny a defendant his Sixth Amendment right to effective assistance counsel.[8] The Court should therefore rule in favor of the habeas petitioner on this issue as well, as the petitioner's stance has the better policy rationale and brings greater uniformity to habeas law.

I. FACTUAL AND PROCEDURAL HISTORY

On July 19, 1988, Robert Jennings shot and killed Officer Elston Howard of the Houston Police Department during a botched robbery attempt at a local adult bookstore. Jennings was tried for capital murder and found guilty by the jury after one hour of deliberation.[9] During the penalty phase, the State sought the death penalty and presented evidence of Jennings's extensive criminal history.[10]

6. Jennings v. Stephens, 537 F. App'x 326 (5th Cir. 2013), *cert. granted in part*, 134 S. Ct. 1539 (2014).

7. Petition for a Writ of Certiorari at 37, Jennings v. Stephens, No. 13-7211 (U.S. Oct. 28, 2013), 2013 WL 8116856, at *37.

8. *See* Michael C. McLaughlin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 GA. ST. U. L. REV. 859, 879 (2014) (calling for the Supreme Court to take up the issue of the theory of cumulative prejudice at its first opportunity).

9. Brief for the Respondent, Jennings v. Stephens at 2, No. 13-7211 (U.S. Aug. 12, 2014), 2014 WL 3945237, at *2.

10. The prosecution introduced evidence that Jennings had been declared a delinquent and placed on probation when he was fourteen and was sent to a trade school as a condition of his probation at fifteen. *Jennings*, 537 F. App'x at 328. At age sixteen, Jennings was sent to a

Jennings's trial counsel hoped to mitigate the sentence by having Jennings testify about his troubled upbringing—he had been conceived as the result of rape, grew up in poverty with no father figure, and was raised by a drug-addicted mother who resented him for being born and disrupting her education.[11] Jennings's counsel also requested that Jennings be allowed to testify without being subject to cross-examination, but the trial court denied this request, and Jennings did not testify.[12]

Jennings's counsel subsequently presented only one witness during sentencing: George Burrell, a chaplain in the Harris County Sherriff's Office.[13] Burrell testified that he had met Jennings shortly after his most recent arrest. Based on his multiple visits each week, Burrell testified that he did not think that Jennings was "incorrigible."[14] Burrell was also unaware of any disciplinary violations committed by Jennings during his time in jail and felt that Jennings had "changed" since their first meeting.[15] He further testified that Jennings was an asset to his ministry, and that Jennings helped provide support to other inmates.[16]

No other mitigating evidence was presented in Jennings's defense.[17] In his closing argument, Jennings's attorney said, "I feel like I ought to just sit down. Shoot, you twelve people know what the evidence is. You've heard it. You've probably already decided what you're going to do with Jennings in this case."[18] He urged the jurors to consider all of the facts and to refrain from voting too quickly for death.[19] He stated that because he lived and worked in the same county as the jurors and cared about the safety of the community, he

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juvenile facility for a probation violation, and at seventeen, he was convicted of aggravated robbery and sentenced to five years' imprisonment. *Id.* Then, at twenty, he was convicted of burglarizing a home and two more aggravated robberies (this time, he was sentenced to two concurrent thirty-year sentences, and while serving that sentence, he committed thirteen prison disciplinary violations); and within two months of his release, he committed six aggravated robberies and killed Officer Howard. *Id.*

11. Jennings v. Thaler, No. H–09–219, 2012 WL 1440387, at *3 (S.D. Tex. Apr. 23, 2012).
12. *Id.*
13. *Id.*
14. *Jennings*, 537 F. App'x at 328.
15. Petition for a Writ of Certiorari, *supra* note 7, at *3.
16. Brief for the Respondent, *supra* note 9, at *2.
17. *Jennings*, 537 F. App'x at 328.
18. Brief for the Petitioner at 4, Jennings v. Stephens, No. 13-721 (U.S. June 6, 2014) 2014 WL 2601476, at *4.
19. Brief for the Respondent, *supra* note 9, at *2–3.

could not "quarrel with" a decision to put Jennings to death,[20] but said, "[I]f you can, I ask you to find . . . mitigation."[21] The jury, however, found no mitigating factors and Jennings was sentenced to death.[22]

Jennings appealed to the Texas Court of Criminal Appeals, which affirmed his death sentence in an unpublished decision.[23] He next appealed to the United States Supreme Court, but the Court denied certiorari.[24] The Texas Court of Criminal Appeals subsequently denied his state habeas corpus application in 2008, and his petition for certiorari to the United States Supreme Court was again denied.[25]

In 2009 Jennings filed a *federal* habeas corpus petition in the Southern District ofTexas.[26] In his petition, Jennings asserted that he had received ineffective assistance of counsel during his sentencing hearing.[27] He argued that his trial counsel was deficient for failing to call Jennings, his sister, or his mother, for failing to find and present any evidence of Jennings's mental health issues, and for offering a closing argument that was prejudicial to Jennings.[28] The district court found that, although there were definite risks involved in calling Jennings or his mother to the stand, counsel's reasons[29] for not calling Jennings's sister "made no sense," and that refusing to call any member of the Jennings family "was not sound trial strategy."[30] In reaching its decision that counsel was deficient, the court pointed to *Wiggins v. Smith,*[31] which it said "makes clear that failure to present available significant mitigating evidence resulting in the virtual absence of a mitigation case is deficient performance."[32]

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20. Jennings v. Thaler, No. H–09–219, 2012 WL 1440387, at *5 (S.D. Tex. Apr. 23, 2012).
21. Brief for the Respondent, *supra* note 9, at *3.
22. *Jennings*, 2012 WL 1440387, at *3.
23. Brief for the Petitioner, *supra* note 18, at *4.
24. Jennings v. Texas, 510 U.S. 830, 830 (1993).
25. *Jennings*, 2012 WL 1440387, at *1.
26. *Id.*
27. *Id.* at *3.
28. *Id.* at *3–6.
29. Counsel stated that he did not think Jennings's sister, who was ten when Jennings entered the juvenile justice system, was old enough to remember pertinent events. *Id.* at *4.
30. *Id*. Moreover, "[w]hatever damage counsel may have feared from cross examination of Jennings or Mrs. Jennings's hostility toward her son is far outweighed by the damage caused by presenting *no* evidence at all of Jennings's background, *i.e.*, giving the jury no reason not to impose a death sentence." *Id.* (emphasis in original).
31. Wiggins v. Smith, 539 U.S. 510 (2003).
32. *Jennings,* 2012 WL 1440387, at *4.

The district court also found that Jennings's counsel was deficient for failing to find and present evidence of Jennings's mental health.[33] A prior psychological evaluation performed on Jennings to determine his competence to stand trial revealed that he had an IQ of 65 and mild organic brain dysfunction as the result of a childhood injury.[34] However, the evaluation also noted that Jennings was "malingering" during his evaluation in order to appear incompetent to stand trial.[35] The district court found the state court's determination that counsel was not deficient for failing to present this evidence to be unreasonable. The state court had considered the report unreliable because Jennings was malingering during his examination, but the district court noted that the report acknowledged Jennings's malingering but still concluded he had mild organic brain dysfunction.[36]

The federal district court was not persuaded, however, that the closing argument constituted deficient performance.[37] The court determined that Jennings's counsel was attempting to identify with the jurors while still convincing them that a death sentence was inappropriate, and therefore found that the state court was reasonable in determining that the closing argument did not constitute deficient performance.[38]

Finally, the court held that the deficiencies of Jennings's counsel prejudiced him during the sentencing phase.[39] The court dismissed the State's motion for summary judgment and granted Jennings's habeas petition.[40] The State was ordered to release Jennings from custody unless it granted Jennings a new sentencing hearing or resentenced him to a term of imprisonment within 120 days.[41]

The State appealed to the Fifth Circuit, which reversed the district court.[42] The Fifth Circuit found that Jennings was not prejudiced by his counsel's failure to present testimony of his disadvantaged background or to investigate and present evidence of his mental

33. *Id.* at *5.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at *6.
38. *Id.*
39. *Id.* at *6–7.
40. *Id.* at *7.
41. *Id.*
42. Jennings v. Stephens, 537 F. App'x 326, 339 (5th Cir. 2013).

health.[43] The court also held that Jennings was barred from arguing that his counsel provided ineffective assistance at closing argument because Jennings had not filed a notice of appeal, had failed to seek a certificate of appealability from the district court, and had not filed a motion for a certificate of appealability with the circuit court until well after the appeal had already been briefed.[44] The court denied his motion for a certificate of appealability, dismissed his "cross-point" of counsel's ineffective closing argument, and reversed the district court's judgment granting habeas relief on the merits.[45]

In response to the Fifth Circuit's ruling, Jennings filed a petition for a writ of certiorari in the United States Supreme Court.[46] He claimed, inter alia, that the Fifth Circuit erred by holding: (1) that Jennings's counsel's failure to present evidence of Jennings's background was not deficient;[47] (2) that his counsel's failure to present evidence of his mental impairment was not prejudicial;[48] and (3) "that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected."[49] The Supreme Court granted certiorari limited to the question of whether Jennings needed to file a cross-appeal and a motion for a certificate of appealability after being granted his habeas petition in federal district court.[50]

II. LEGAL BACKGROUND

A. AEDPA and the Tightening of Habeas Corpus Standards

In 1996 Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[51] with the purpose of streamlining habeas corpus cases.[52] The Supreme Court, which had been putting

43. *Id.* at 334–35.
44. *Id.* at 338.
45. *Id.*
46. Petition for a Writ of Certiorari, *supra* note 7, at *1.
47. *Id.* at *6.
48. *Id.* at *7.
49. *Id.* at *11.
50. Jennings v. Stephens, 134 S. Ct. 1539 (2014).
51. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.A.).
52. Brooke N. Wallace, *Uniform Application of Habeas Corpus Jurisprudence: The Trouble with Applying Section 2244's Statute of Limitations Period*, 79 TEMPLE L. REV. 703, 703

restrictions on habeas review in the years immediately preceding the bill, interpreted the AEDPA's purpose to be "further[ing] the principles of comity, finality, and federalism."[53] The bill was promoted as a way to reduce the number of successful death penalty challenges and to reduce the delay from those proceedings.[54] Further, the bill sought to curtail the reach of the federal courts into state court proceedings.[55]

The bill enabled these ends by heightening the standards for relief.[56] AEDPA speaks specifically to federal court review of state court decisions in 28 U.S.C. § 2254.[57] This section requires a federal court to determine that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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."[58] This constraint requires the federal court to give great deference to the state court's ruling, and does not require the state court to be correct, but only "reasonable."[59] This in turn has served to lessen the effectiveness of the federal habeas petition by making it more difficult for petitioners to overcome the state court's ruling.

B. Habeas Review of Ineffective Assistance of Counsel

The Supreme Court has taken the restrictive standards of AEDPA and extended them even further for habeas claims of ineffective assistance of counsel. The current standard for ineffective assistance was set pre-AEDPA in 1984 by the Court's holding in *Strickland v. Washington*.[60] In *Strickland*, the Court laid out the two prongs of an ineffective assistance of counsel claim: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) "the deficient

(2006). For a comparison of pre- and post-AEDPA habeas law. see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996),

53. Duncan v. Walker, 533 U.S. 167, 178 (2001) (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).

54. Adelman*, supra* note 1, at 384.

55. Yackle, *supra* note 52, at 329–30.

56. Adelman, *supra* note 1, at 384.

57. Harrington v. Richter, 131 S. Ct. 770, 783 (2011).

58. 28 U.S.C.A. § 2254(d) (West 2014).

59. Adelman, *supra* note 1, at 384.

60. Strickland v. Washington, 466 U.S. 668, 687 (1984).

performance prejudiced the defense."[61] To satisfy the prejudice prong of the claim, the Court required the errors to be "so serious as to deprive the defendant of a fair trial."[62] In death penalty sentencing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[63] Though the Court did not specifically define what constitutes a "reasonable probability," they gave some guidance by stating that the probability must be "sufficient to undermine the confidence of the result."[64]

AEDPA heightened the standard under which all federal habeas cases are reviewed even further. Under AEDPA, a federal court deciding a habeas claim "must determine what arguments or theories supported or . . . 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 in a prior decision of [the Supreme] Court."[65] The standard for ineffective assistance in habeas is thus "doubly deferential" to the state court.[66]

Though the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct,"[67] it has provided several examples of attorney performances that do not satisfy the highly deferential standards. In *Williams v. Taylor*, the Court held that counsel's failure to search for records describing the petitioner's "nightmarish childhood," because counsel mistakenly thought access to the records was barred by state law, constituted deficient performance.[68] Additionally in *Wiggins v. Smith*, the Court concluded that the attorney's performance fell below the deferential standard for ineffective assistance where counsel, in a death penalty case, failed to investigate beyond the presentence report and social services record for mitigating factors.[69]

61. *Id.*
62. *Id.*
63. *Id.* at 695.
64. *Id.* at 694.
65. Harrington v. Richter, 131 S. Ct. 770, 786 (2011).
66. Knowles v. Mirzayance, 556 U.S. 111, 112 (2009).
67. Wiggins v. Smith, 539 U.S. 510, 521 (2003).
68. Williams v. Taylor, 529 U.S. 362, 395 (2000).
69. *Wiggins*, 539 U.S. at 524.

The federal circuits are split on several issues related to determining the standards for ineffective assistance of counsel. First, the circuits differ on whether each instance of deficient performance should be considered individually or cumulatively when determining whether the petitioner was prejudiced under the second prong of *Strickland*.[70] The Fourth, Sixth, Eighth, and Tenth Circuits have rejected the theory that deficiency can be cumulated,[71] while the Second, Seventh, and Ninth Circuits have accepted the theory.[72] The Eleventh Circuit recently noted the lack of Supreme Court precedent on this topic, and deferred to a state court's decision rather than take a position.[73] Not surprisingly, the circuit courts are also split the same way over whether multiple instances of deficiency are part of one unitary ineffective assistance claim or if they are each their own individual claim.[74]

C. Cross-appeals and Certificates of Appealability

Petitioners whose habeas petitions are denied at the district court level are required to do two things before they can have their cases heard by the circuit court: (1) file a timely notice of appeal;[75] and (2) obtain a certificate of appealability.[76] While filing a notice of appeal is

70. *See generally* McLaughlin, *supra* note 8.

71. *See, e.g.*, Sutton v. Bell, 645 F.3d 752, 755 (6th Cir. 2011); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996); Jones v. Stotts, 59 F.3d 143, 147 (10th Cir. 1995).

72. *See, e.g.*, Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995); Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991).

73. *See* Forrest v. Fla. Dep't of Corr., 342 F. App'x 560, 564–65 (11th Cir. 2009) ("The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim.").

74. *See*, *e.g.*, *Fisher*, 163 F.3d at 852 ("To the extent this Court has not specifically stated that ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively, we do so now."); United States v. Galloway, 56 F.3d 1239, 1241 (10th Cir. 1995) (rejecting the theory that "an ineffectiveness claim may be viewed as unitary, regardless of the number of separate reasons advanced in support of the claim"); *but see* Peoples v. United States, 403 F.3d 844, 847–48 (7th Cir. 2005) (holding that ineffectiveness is a single claim); Babbitt v. Woodford, 177 F.3d 744 (9th Cir. 1999) (holding that two deficiencies constituted the same ineffective assistance claim).

75. FED. R. APP. P. 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4.").

76. 28 U.S.C.A. § 2253(c)(1)(A) (West 2014) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . [t]he final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]").

guaranteed as an option by law,[77] a motion for a certificate of appealability *may* be granted "only if the applicant has made a substantial showing of the denial of a constitutional right."[78] The motion also must indicate "which specific issue or issues" satisfy that substantial showing requirement.[79] These stringent requirements for the issuance of a certificate of appealability do not apply when the State takes the appeal itself.[80]

The Supreme Court held in *El Paso Natural Gas Co. v. Neztsosie* that in civil cases, a party who prevailed in the district court must file a cross-appeal when seeking an expanded judgment in their favor, beyond what the district court granted them.[81] However, the Court held in *United States v. American Railway Express Co.* that a cross-appeal is not required in civil cases for an appellee to add extra arguments on appeal to support his favorable judgment below, even if those arguments "attack" the reasoning the lower court used to reach that result.[82]

With respect to certificates of appealability in habeas cases, the federal circuits are split on whether § 2253 applies to petitioners who are granted relief in district court and subsequently requires them to acquire a certificate of appealability before advancing an argument not adopted by the district court.[83] The Seventh Circuit has held that habeas petitioners do not need a certificate of appealability after being granted relief in the distrct court, determining that § 2253 "deals only with *appeals* by prisoners; it does not mention arguments by prisoners *as appellees* offered in support of relief they have obtained."[84] However, the Fifth and Second Circuits have each held that § 2253 does apply to habeas petitioners as appellees, and have required a certificate of appealability when raising alternate grounds for relief even after the relief was ultimately obtained below.[85]

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77. FED. R. APP. P. (3)(a)(1).

78. 28 U.S.C.A. § 2253(c)(2) (West 2014).

79. *Id.* at § 2253(c)(3).

80. FED. R. APP. P. 22(b)(3) ("A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.").

81. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 473 (1999).

82. United States v. Am. Ry. Express Co., 265 U.S. 425, 435–36 (1924).

83. Jennings v. Stephens, 537 F. App'x 326, 338 (5th Cir. 2013).

84. Szabo v. Walls, 313 F.3d 392, 397 (7th Cir. 2002).

85. *See* Wiley v. Epps, 625 F.3d 199, 204 n.2 (5th Cir. 2010) (noting that petitioner failed to seek a certificate of appealability for an alternate ground and rejecting the ground as a result); Grotto v. Herbert, 316 F.3d 198, 209 (2d Cir. 2003) ("[A] habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of

III. ARGUMENTS

A. Arguments for Jennings

Jennings advances two alternate reasons for reversing the Fifth Circuit. He first argues that a habeas petitioner who was granted relief in the district court should not be required to cross-appeal or file a motion for a certificate of appealability if he is not seeking to expand his relief.[86] Alternatively, he argues that even if a certificate of appealability and a cross-appeal are required to raise a different claim from the one the petitioner prevailed on below, neither were required here because Jennings was only asserting an additional *ground* for deficient performance—not an additional *claim*—because ineffective assistance should be considered a single claim regardless of the number of instances of deficient performance by counsel.[87]

The Federal Rules of Appellate Procedure state that an appeal "may be taken" by filing timely notice of appeal.[88] Jennings argues that this does not apply to him because he was not taking an appeal—the State was.[89] He further contends that the cross-appeal rules from the civil cases, *American Railway* and *Neztsosie*, are applicable to habeas cases as well and only requires a cross-appeal when the petitioner seeks to enlarge the judgment in his favor by requesting additional relief, such as when a party is granted some injunctions and denied others in district court, but seeks to have all those injunctions granted on appeal.[90] Because Jennings was granted all the relief he requested—a new sentencing hearing—raising arguments that the district court rejected would not enlarge his relief.[91] He supplements his point[92] with the policy argument advanced by now-Chief Judge Easterbrook in *Jordan v. Duff & Phelps, Inc.*, that cross-appeals solely for advancing an argument in support of the judgment are unnecessary and waste judicial resources by adding to the number of briefs, thereby delaying the case.[93]

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appealability permitting him to argue that ground.").

86. Brief for the Petitioner, *supra* note 18, at *7.
87. *Id.* at 8.
88. FED. R. APP. P. 3(a)(1).
89. Brief for the Petitioner, *supra* note 18, at *9.
90. *Id.* at *12–14.
91. *Id.* at *16–17.
92. Brief for the Petitioner, *supra* note 18, at *17.
93. Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987).

Jennings also argues that he was not required to file a motion for a certificate of appealabilty in order to raise an alternate ground for affirmance.[94] He again points to the text of the relevant statute, § 2253, emphasizing that "an appeal may not be taken" without a certificate of appealability. Because the State "took" the appeal, Jennings maintains that the statute does not require him to request a certificate of appealability.[95] He argues that allowing alternate arguments without the certificate would not waste judicial resources because habeas petitioners who have won below have already established that their claims are not "frivolous."[96] Also, winning below gives habeas petitioners an incentive to advance only their best arguments because they now have a judgment in their favor to zealously defend.[97]

Jennings alternatively argues that even if a habeas petitioner is required to obtain a certificate of appealability on a claim distinct from the claim he prevailed on, Jennings is only advancing an additional argument for his single ineffective assistance claim and is not raising a separate claim here.[98] He argues that *Strickland* requires courts to weigh the cumulative effect of each act of deficient performance, and points to the Court's use of the plural "errors" in its decision.[99] He also argues the *Strickland* Court established that prejudice analysis for habeas is similar to the materiality analysis for suppression of evidence under *United States v. Agurs*.[100] Just as a materiality analysis requires considering the cumulative effect of all evidence suppressed,[101] so should a prejudice analysis consider all instances of deficient performance.

In a final alternative argument, Jennings states that if all other arguments fail, the Fifth Circuit *still* had jurisdiction to grant a certificate of appealability because an appellee's failure to request a certificate of appealability is not jurisdictional, even if an appellant's failure is.[102] Pursuant to this last argument, Jennings requests the case

94. Brief for the Petitioner, *supra* note 18, at *18.

95. *Id.* at *19.

96. *Id.* at *22.

97. Petitioner's Reply Brief, Jennings v. Stephens, No. 13-7211 (U.S. Sep. 11, 2014), 2014 WL 4557506, at *4.

98. Brief for the Petitioner, *supra* note 18, at *26.

99. *Id.* at *31 (quoting *Strickland* and compiling instances of uses of the plural when the Court is relating errors to prejudice).

100. Brief for the Petitioner, *supra* note 18, at *32.

101. *See id.* (citing United States v. Agurs, 427 U.S. 97, 104, 112–13 (1976)).

102. Brief for the Petitioner, *supra* note 18, at *35 (citing Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) (holding that the requirement for an appellant petitioner to request a certificate of

be remanded to the Fifth Circuit, arguing that the circuit court did not issue a decision on the merits regarding his counsel's deficient closing argument.[103]

B. Arguments for the State

The State argues that Jennings sought to raise two distinct claims on appeal, one which the district court accepted, and the other which the court rejected.[104] Jennings was therefore required to cross-appeal and to file a motion for a certificate of appealability on his claim that his counsel was ineffective in his closing argument, as both are needed to raise an alternate ground for affirmance.[105] Further, because AEDPA requires a certificate of appealability to indicate the "specific issue or issues" that are debatable, Jennings needed a certificate for each additional issue within his ineffective assistance claim, even if all his allegations of deficient performance were part of the same claim.[106] The State contends that even if the Court rejects its arguments, the only relief available to Jennings is a remand for the consideration of his counsel's closing argument, an issue that, the State contends, was rejected on the merits.[107]

The State argues that Jennings's appeal raised a claim rejected by the district court and requested additional relief from the court's judgment.[108] The district court's conditional-release order was based on trial counsel's failure to find and present mitigating evidence—errors that constituted deficient performance under *Wiggins*.[109] The State maintains that this *Wiggins* error was distinct from anything counsel did in his closing argument, and that the closing argument should be judged instead under the standard of *Smith v. Spisak*,[110] which only allows relief to be granted when there is a "reasonable probability" that an improved closing would have made a "significant difference."[111] Jennings was thus granted the relief of a new trial free from the *Wiggins* errors committed by counsel, and was requesting additional relief by asking the Fifth Circuit to grant him a trial free

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appealability is jurisdictional, but "defects" in the certificate process are not)).

103. Petitioner's Reply Brief, *supra* note 97, at *20.
104. Brief for the Respondent, *supra* note 9, at *7.
105. *Id.* at *5–6.
106. *Id.* at *6.
107. *Id.*
108. *Id.* at *7.
109. *Id.* at *8.
110. 558 U.S. 139, 151 (2010).
111. Brief for the Respondent, *supra* note 9, at *47.

from *Spisak* errors.[112]

The State supports this theory with language from *Strickland*, contending that because a "convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of professional judgment," that each failure to use "reasonable professional judgment" is the basis for its own ineffectiveness claim.[113] The State also cites *Trevino* v. *Thaler*,[114] which held that a petitioner had defaulted on a claim of ineffective assistance under *Wiggins* but that he had properly raised a claim that counsel was ineffective for failing to object to hearsay.[115] Because the *Trevino* Court differentiated the two theories of ineffectiveness and called each a "claim," the State asserts that ineffective assistance of counsel cannot always be a single claim.[116]Viewing the two claims as independent leads not only to the conclusion that Jennings was requesting additional relief, but also that he was attempting to change the disposition of a claim, and therefore must cross-appeal even if he had not been requesting additional relief.[117]

Further, that state contends that even assuming arguendo that Jennings did not need to cross-appeal, he should still need a certificate of appealability.[118] Requiring a certificate even for a petitioner who is successful in district court will keep meritless alternate claims from wasting the appellate court's time.[119] The State identifies this case as a shining example of a meritless claim being raised on appeal that was rejected by the district court.[120] Section 2253's use of the phrase "specific issue or issues" shows a concern not with the appeals of habeas applicants, but with the issues they raise—it does not matter who is "taking" the appeal. A certificate of appealability is still

112. *Id.*
113. *Id.* at *32.
114. Brief for the Respondent, *supra* note 9, at *33.
115. Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013).
116. Brief for the Respondent, *supra* note 9, at *33.
117. *Id.* at *23–25. The State also cites Helvering v. Pfeiffer, 302 U.S. 247 (1937) and Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934) as examples of cases where the appellee did not seek to change the relief granted but was required to cross-appeal nonetheless because they sought to change the disposition of an individual claim. In each case, the appellee argued for a monetary judgment to be upheld on different grounds. The State argues that relief of multiple claims cannot be more "fungible" than a monetary claim and should therefore be seen as two claims. Brief for the Respondent, *supra* note 9, at *23–25.
118. *Id.* at *50.
119. *Id.* at *42.
120. *Id.* at *43.

required for the habeas petitioner if he is arguing issues not supported by the district court's judgment.[121]

IV. ANALYSIS AND LIKELY DISPOSITION

This case turns on whether or not Jennings's counsel's errors were part of the same claim for ineffective assistance of counsel, and the policy rationales for the petitioner's stance clearly outweigh those against it. The Court should rule (1) that ineffective assistance of counsel is a single claim with a deficient performance prong and a cumulative prejudice prong; and (2) that habeas petitioners who succeed at the district court level should not be required to cross-appeal or obtain a certificate of appealability to raise alternate arguments for affirmance.

The Court should first answer whether Jennings raised a single claim or multiple claims in the circuit court. Though the question of whether or not the prejudice prong of *Strickland* is cumulative was not explicitly raised in the question for which the Court granted certiorari,[122] the Court should take this opportunity to decide it, as the circuits are split on the issue and its resolution will inform the outcome of this case. As Jennings notes, the *Strickland* Court repeatedly used the plural "errors" when describing the prejudice prong of an ineffective assistance claim.[123] It logically follows that the Court's decision was based on an attorney making multiple errors together in light of this wording.[124]

Further, this holding would be good policy. Viewing each deficiency as its own claim allows a court to grant relief on habeas review only when one single mistake was bad enough to be outcome determinative.[125] If trial counsel committed numerous errors, each just below that threshold, no relief could be granted. A jury, however, views the trial as a whole, so though one of these near fatal mistakes may not have determined the outcome, the combination of several could have. Viewing ineffective assistance of counsel as a single, cumulative claim therefore allows courts to apply this outcome-determinative standard in a way that is more in line with how trials

121. *Id.* at *46.
122. Petition for a Writ of Certiorari, *supra* note 7, at *37.
123. Brief for the Petitioner, *supra* note 18, at *31.
124. *See* McLaughlin, *supra* note 8, at 880 ("[T]he Court's repeated use of *errors*, as a plural, suggests a broader intent for the ineffective assistance analysis.").
125. *Id.* at 881.

are actually decided.

If the Court finds that prejudice can be cumulated across multiple deficiencies, it should turn next to whether multiple instances of deficient performance constitute separate claims of ineffective assistance of counsel. Here, the Court should hold that ineffective assistance is indeed a single claim. The State notes that separate claims can have "overlapping element[s]" without becoming a single claim, and argues that even if prejudice is cumulative, ineffective assistance of counsel should still not be viewed as a unitary claim.[126] But such a stance does not follow logically from the language of *Strickland*. Both deficiency and prejudice are required for a claim of ineffective assistance of counsel. If multiple deficiencies can be combined for a single determination of prejudice, then the State's suggested reading of ineffective assistance would require combining the first element from several claims to satisfy the second element for each of those claims. This concept is confusing and an unnatural reading of the language. Finding ineffective assistance to be one claim instead, where the first element can include one or several instances of deficient performance, is cleaner and adheres more closely to *Strickland*'s language.

The State cautions that this holding "would shift the playing field in the State's favor" by barring claims of ineffectiveness that were discovered after the state court proceedings, as most state habeas cases contain an ineffective assistance claim.[127] There are conflicting opinions in the lower courts on what effect this finding would have,[128] however, and there are options open to the courts to remedy an inequity arising from a unitary approach to ineffective assistance of counsel.[129]

The remaining issue, whether a petitioner ever needs to file a cross-appeal or motion for a certificate of appealability after prevailing in district court, is not as clear-cut. Though here, viewing

126. Brief for the Respondent, *supra* note 9, at *35.

127. *Id.* at *38 (citing Cullen v. Pinholster, 131 S. Ct. 1388, 1395 (2011)).

128. Petitioner's Reply Brief, *supra* note 97, at *20 (comparing United States v. Galloway, 56 F.3d 1239 (10th Cir. 1995) (holding that ineffective assistance of counsel was one claim, but that raising the claim on direct appeal did not bar the assertion of another ineffectiveness on a different ground) with Peoples v. United States, 403 F.3d 844 (7th Cir. 2014) (holding that new allegations of ineffective assistance on habeas were barred by law-of-the-case doctrine)).

129. *Id.* (citing Edwards v. Carpenter, 529 U.S. 446 (2000) and Martinez v. Ryan, 132 S. Ct. 1309 (2012) as cases that would allow a court to entertain "a substantial but procedurally barred IAC claim upon an adequate showing of 'cause' and 'prejudice' for the default.").

ineffective assistance as a single claim leads to the conclusion that Jennings did not need to file a cross-appeal or a motion for a certificate of appealability, Jennings argues that neither is ever needed when the habeas petitioner is the appellee.[130] The Court could offer a narrow holding, deciding this case only on the argument that ineffectiveness is one claim and thus a cross-appeal or certificate of appealability were not required because the Fifth Circuit already had jurisdiction over that single issue. If the Court takes on this question, it should rule in favor of habeas petitioners who have already had to overcome high standards to arrive at this stage of litigation.

Requiring a habeas petitioner who prevailed below to file a cross-appeal and a motion for a certificate of appealability would seemingly eliminate the problem of petitioners throwing any conceivable argument they could find at the court, thus saving judges time from having to read, consider, and respond to meritless arguments.[131] However, the Court should still hold that neither a cross-appeal nor a certificate of appealability is required for a habeas petitioner to argue alternate grounds of affirmance for his relief. Having already overcome the extraordinarily high bar of habeas review at the district court, the petitioners will have meritorious claims to advance. Though they would also be able to raise meritless arguments on appeal if there were no requirement for a certificate of appealability, petitioners at this stage now have something precious to lose, as they have a judgment in their favor to protect, and thus they will be more inclined to advance their best arguments.

Finally, though this case presents an opportunity for the Court to resolve several significant procedural issues in habeas law, it may not matter for Jennings himself. As the state notes at the close of its brief, the Fifth Circuit is unlikely to find that his attorney's closing argument was deficient performance, and is even less likely to find that it was prejudicial.[132] Even if Jennings wins on the procedural question presented to the Supreme Court, his petition is ultimately

130. Brief for the Petitioner, *supra* note 18, at *9.

131. *Id.* at *40 (noting the need to focus attention solely on meritorious claims) (citing Romans v. Abrams, 790 F.2d 244, 245 (2d Cir. 1986)).

132. *See* Brief for the Respondent, *supra* note 9, at *49 (noting that the Fifth Circuit dismissed his motion for a certificate of appealability and thus does not consider the issue substantial); *see also* Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Neither Party at 24–25, Jennings v. Stephens, No. 13-7211 (U.S. June 17, 2014), 2014 WL 2902016 (noting that the district court correctly analyzed this point under the "doubly deferential" *Strickland* standard).

unlikely to prevail on the merits. So though his case should bring increased efficiency to habeas proceedings, Jennings may have only ended up buying himself extra time, a picture of the very inefficiency that AEDPA and this case are meant to guard against.

CONCLUSION

In *Jennings v. Stephens*, the Court has the opportunity to speak to several issues upon which the federal circuit courts need better guidance. The Court should seize this opportunity, as these cases present life or death questions, and unifying the lower courts will bolster confidence in what are crucial, often mortal, decisions. The Court should find for Jennings, as his arguments offer the clearest standards and hew closest to the text of AEDPA and *Strickland*. And though ruling for Jennings in this case may not spare him, it will help future habeas petitioners who have been denied their Sixth Amendment right to the effective assistance of counsel.