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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH MASSARO, :
Petitioner :

v. : No. 01-1559

UNITED STATES. :

- - - - -X

Washington, D. C.
Tuesday, February 25, 2003

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:13 a.m.

APPEARANCES:

HERALD P. FAHRINGER, ESQ., New York, New York; on behalf
of the Petitioner.

SRIKANTH SRINIVASAN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D. C. ; on
behalf of the Respondent.

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

2 (10:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 01-1559, Joseph Massaro
5 versus The United States.

6 Mr. Fahringer.

7 ORAL ARGUMENT OF HERALD P. FAHRINGER

8 ON BEHALF OF THE PETITIONER

9 MR. FAHRINGER: Mr. Chief Justice, and may it
10 please the Court:

11 We urge that the appropriate rule for the
12 resolution of ineffective assistance claims of counsel
13 guaranteed by the Sixth Amendment to the United States
14 Constitution is best handled in a collateral proceeding in
15 the first instance, without first resorting to direct
16 appeal and, if that claim might qualify for direct appeal,
17 it should not be a procedural bar.

18 QUESTION: What is the source of -- of law for
19 our decision? Is it our supervisory powers, whatever we
20 think best, or --

21 MR. FAHRINGER: Well, certainly, Your Honor,
22 that is implicated, your supervisory powers. I also think
23 that under the Fifth Amendment, which has often been
24 construed to contain the equivalent of equal protection of
25 the law, that this is a circumstance, with the division in

1 the circuit, that calls out for uniformity.

2 QUESTION: Well, you -- you're saying that if
3 there's a circuit different, there's a denial of equal
4 protection of the law under the Fourteenth Amendment?

5 MR. FAHRINGER: In this circumstance, Your
6 Honor, and I'm not urging the Fourteenth Amendment. What
7 I'm urging is, you have in the past had this circumstance
8 with, for instance, the Wade hearings, where it was deemed
9 necessary that you unify the system in the country so that
10 there is the equal protection, particularly in an area as
11 important as criminal prosecution. Certainly, we would
12 all agree that the -- the most important right a defendant
13 possesses in a criminal proceeding is the right to
14 effective assistance of counsel --

15 QUESTION: Well, you know, that's why we grant
16 certiorari in cases, because we don't think one -- one
17 rule should be -- obtained in New York and another rule in
18 New Orleans, but I don't think we ever thought it was the
19 Equal Protection Clause that --

20 MR. FAHRINGER: Well, Your Honor, if -- if I've
21 overstated, that I apologize, but certainly under your
22 supervisory powers, I think that this case calls for
23 unity.

24 QUESTION: We could unify it the way that you
25 don't want.

1 MR. FAHRINGER: Well, I -- I appreciate that,
2 Your Honor. I -- I would urge that it is -- it lends some
3 force to our argument up here that certainly a majority of
4 the circuits and the highest courts of 36 States have
5 embraced the collateral review, and -- and the reason --

6 QUESTION: Well, let -- would -- would it
7 ever -- would the basis for an inadequate assistance of
8 counsel claim ever be apparent on the trial court record
9 without resort to extrinsic evidence?

10 MR. FAHRINGER: I don't think so, Your Honor. I
11 think that --

12 QUESTION: Never?

13 MR. FAHRINGER: -- it -- there may be one, one
14 rare case, but -- as Judge Easterbrook in the Seventh
15 Circuit said so eloquently, and that is that in the --
16 because of the unique nature of the ineffective assistance
17 of counsel, because of the relationship between the
18 attorneys, and the -- and so much is a matter of omission
19 and the confidential relationship that he stated in every
20 case there is something that you could do to add to the
21 record that might reinforce the claim. The Second
22 Circuit, most respectfully, Your Honor, has said that only
23 in a very few cases would it be completely clear on the
24 record.

25 The other reason that I think this rule is

1 superior to the procedural default rule is that it would
2 bring certitude to this area, where people would know with
3 some degree of confidence that it should be brought in a
4 collateral proceeding. It has the element of efficiency,
5 in that it brings together in the 2255 proceeding all of
6 the ineffectiveness claims, so they can be resolved in an
7 adversary hearing, which is certainly the best method of
8 raising these claims, particularly when you need a full
9 record.

10 QUESTION: Is your position that it's 2255 only,
11 or that it is the new counsel's option whether he thinks
12 it's appropriate to raise the ineffective assistance claim
13 on direct appeal, or whether he thinks it's best to wait
14 until the 2255 stage?

15 MR. FAHRINGER: Yes.

16 QUESTION: Or are you saying he can't bring it
17 earlier, even if he thinks that --

18 MR. FAHRINGER: No, Your Honor, I think it
19 should be an option. I don't think we can ever stop a
20 defendant from raising it on direct appeal if he makes
21 that choice. He -- he assumes the risk, then, most
22 respectfully, that he -- it -- it will be resolved,
23 whether he could have expanded the record or not, but
24 my -- my suggestion to the Court is, and I think logic
25 supports me in this respect, that with the 2255 collateral

1 available to him proceeding, that certainly the
2 overwhelming majority of cases would be brought in that
3 forum

4 QUESTION: But there's something to be said for
5 winding the thing up and getting it over with, isn't
6 there?

7 MR. FAHRINGER: But those fears, Your Honor,
8 that were expressed in Frady, for example, have not been
9 pretty much put to rest by AEDPA, because now you have a
10 statute of limitation, so that these are not going to go
11 on and on. As a matter of fact, if you --

12 QUESTION: If you -- if you have a choice
13 between two proceedings and one proceeding, certainly
14 there's something to be said for one proceeding, although
15 your argument is that one proceeding simply isn't as
16 effective as two, but I think you have to recognize that
17 all things being equal, it would be better having one
18 proceeding than two.

19 MR. FAHRINGER: And -- and that one proceeding,
20 Your Honor, I -- I understand with the exception of an
21 individual choice that one proceeding really should be the
22 2255. What I might say, as an example to this Court,
23 think of the dilemma a defense lawyer faces in the Second
24 Circuit where one, if he sees evidence of ineffectiveness
25 but it's not fully developed, and he doesn't raise it

1 because he doesn't think he's obliged to, there's a risk
2 of procedural default.

3 If he does raise it and it's not been fully
4 developed, it may be resolved by the court on a partial
5 record, whereas if he'd been in a 2255 proceeding, he
6 could have expanded and amplified the record, which would
7 have strengthened the claim.

8 The third option is, that the Second Circuit
9 seems to direct is, raise it at the earliest possible
10 moment, identify it, and then perhaps we will send it back
11 for remand. Well, that, that seems to just complicate the
12 matter.

13 And then finally, Your Honor, I think one of the
14 most compelling arguments, which the Solicitor General
15 agrees with, that this would put an end to needless
16 expenditure of judicial resources on resolving the -- the
17 cause and prejudice rule. Remember, in a circuit like the
18 Second Circuit, every single man, woman that goes into a
19 2255 proceeding because they have this direct appeal rule
20 as an exception must establish cause and prejudice at the
21 threshold.

22 QUESTION: Well, not -- not everyone. I -- I
23 mean, only one who -- who got new counsel on the direct
24 appeal.

25 MR. FAHRINGER: That's right, Your Honor. I'm

1 sorry. I'm speaking in the terms of that. Obviously, if
2 you had the same lawyer, that would -- Your Honor, that
3 would really be cause, so it may be that he would be able
4 to easily overcome the cause aspect, but he still has the
5 prejudice aspect that he has to establish.

6 In the other circuits, he can go right in on a
7 2255, and -- and 2255 itself says that unless it's
8 conclusively established that his -- his papers are
9 without merit, a hearing shall be granted, so there's a
10 terrible disparity in the way defendants are treated who
11 are trying to -- to restore this most important right.

12 QUESTION: Suppose you have a case where -- and
13 you stated earlier that this doesn't happen very often,
14 but suppose it's evident on the face of the record that
15 the counsel was ineffective. He stands up and says on the
16 record, Your Honor, I wish the record to show I've been
17 asleep for an hour during the key cross examination.

18 Isn't it there also an efficiency in just
19 sending it back for new trial right away, rather than
20 going through all of the other claimed errors?

21 MR. FAHRINGER: Well, Your Honor, I think yes.

22 I --

23 QUESTION: I mean, if it's evident that the case
24 has to go back, why have the district court -- or, pardon
25 me, the appellate courts examine the entire record and --

1 and give a lengthy opinion that's obviously going to be
2 unnecessary?

3 MR. FAHRINGER: And Your Honor, I hope I'm
4 answering your question, because I want to be direct. You
5 avoid that by the 2255 collateral review rule. Right now,
6 the Second Circuit is involved in a large number of cases
7 where they come up and they just say, well, this really
8 should go back, and -- and that -- that prolongs the
9 appellate process.

10 QUESTION: Well, I'm a little confused on the
11 same point. I thought that, suppose -- does -- would you
12 say that a defendant is forbidden to raise an ineffective
13 assistance claim on direct appeal?

14 MR. FAHRINGER: No.

15 QUESTION: No. You're just saying that if he
16 doesn't, you can -- he can raise it later in 2255.

17 MR. FAHRINGER: That's right.

18 QUESTION: And the appellate court can't say to
19 him, oh, you should have raised it earlier, so you're out?

20 MR. FAHRINGER: Precisely, Your Honor. The --

21 QUESTION: All right, and so all we're doing is
22 defining the -- the scope of the procedural bar rule when
23 a person goes into 2255. We're not controlling what he
24 says on his appeal.

25 MR. FAHRINGER: That's correct, Your Honor,

1 and --

2 QUESTION: We're not.

3 MR. FAHRINGER: -- it seems to me that if -- but
4 please understand, I think I have to say in all fairness,
5 if he takes and goes up on the direct appeal with his
6 ineffectiveness claim and the appellate court resolves it,
7 then he may be barred.

8 QUESTION: Yes, so -- so in other words, if he
9 chooses to go and appeal, direct appeal --

10 MR. FAHRINGER: Yes.

11 QUESTION: -- he's not going to be able to make
12 exactly the same claim later in 2255.

13 MR. FAHRINGER: Precisely.

14 QUESTION: But if he doesn't make it on direct
15 appeal, you want him to be able to make it on 2255 and not
16 be met with the argument, oh, you should have brought it
17 on direct appeal.

18 MR. FAHRINGER: Your Honor, in response to that,
19 there really is --

20 QUESTION: Yes, all right. I --

21 MR. FAHRINGER: -- unanimity among all of the
22 circuits that the best forum -- the best -- the Second
23 Circuit agrees with this, too. The best forum for
24 resolving ineffectiveness claims is in the collateral
25 proceeding, when you have access to discovery.

1 QUESTION: May I ask you about this -- this
2 possibility? Sometimes there are -- there are claims in
3 which there are two bases for challenging the competence
4 of counsel. Assume that one of them is plain on the face
5 of the record, he didn't object to -- you have a whole
6 bunch of, line of interrogation was plainly improper, and
7 the second ground is not plain on the record. Supposing
8 he raises the first ground on direct appeal and loses. Is
9 he barred, in your view, from raising the second ground on
10 collateral review?

11 MR. FAHRINGER: No, Your Honor. He would be
12 able to do that. The -- the -- but if I may, Your Honor,
13 that's triggered another grave concern here. In -- under
14 Strickland you indicated that, you know, ineffectiveness
15 claims really should be judged in aggregate because one
16 lends force to another. It ought to be the overall
17 performance of the attorney.

18 What you have in the Second Circuit now is the
19 very piecemeal type of resolution of ineffectiveness
20 claims that you just described. What has actually
21 happened, and we cite the cases in our brief, they take
22 one because that's, they say is fully developed on the
23 record. They resolve it. Two more go back down to the
24 2255 proceeding, and that seems to be in direct defiance
25 of the spirit, at least, of the Strickland rule that they

1 should all be decided together in one proceeding, and so
2 that, you know, it's -- the -- the powerful arguments of
3 efficiency, simplicity, and fairness to all parties seems
4 to -- to argue for the -- the collateral review rule.

5 The only argument they lean against this is this
6 notion of -- of finality, but -- but I submit to the Court
7 most respectfully that that's an -- that's in a -- an
8 almost nonexistent, narrow margin of cases, because
9 there's always more you're going to develop on the record.
10 The lawyer's explanation, for instance, you know, you
11 never have that --

12 QUESTION: Well, you know, you could go -- you
13 could have an entire separate proceeding, Mr. Fahringer,
14 and just have exhaustive discovery and so on, but there --
15 there comes a time when there is an interest in finality,
16 that you don't want the thing just postponed to another
17 day, which this does.

18 MR. FAHRINGER: But Your Honor -- and -- and I
19 welcome that question, Mr. Chief Justice, and that is
20 this, that if, as the Second Circuit itself says, it is
21 only in a very few cases where it would be fully developed
22 on the record, that seems to me to be a small price to pay
23 for a much simpler, more straightforward rule that
24 everybody knows where they stand. Lawyers are not
25 struggling with this decision in the Second Circuit,

1 should I raise it, should I not raise it, am I at risk,
2 and now what you've done is, under the Second Circuit's
3 rule, you have spawned a whole generation of -- of second
4 ineffectiveness claims, because if the lawyer doesn't
5 raise it and the defendant understandably says, well, you
6 should have raised it because they say it was fully
7 developed on the record and you thought it wasn't, now you
8 have another whole level that is added to this, so the
9 complexity is staggering that is developed.

10 QUESTION: Mr. Fahringer, is -- does AEDPA
11 require that all such claims have to be brought within 1
12 year in any event?

13 MR. FAHRINGER: It does to this respect, Your
14 Honor, yes, because as a practical matter now, under AEDPA
15 as it had amended 2255, if you bring an ineffectiveness
16 claim in a 2255 proceeding, and they are resolved, and you
17 want to try to bring another one, you have to get
18 permission of the circuit court, of course, so you've got
19 some control over it, and -- and then all claims have to
20 be brought within a year in any event, so the fears that
21 were expressed in Frady have been put to rest, I believe,
22 and there's really no good reason. I -- I think the
23 reason the Solicitor General endorsed this rule for over
24 20 years, and they've changed their mind now, but
25 certainly we've cited case after case where they argued to

1 this Court that -- that this is the best way to do it, to
2 bring it in a collateral proceeding, because that is the
3 fairest, the simplest.

4 QUESTION: Am I right in thinking that most
5 cases, even in the Second Circuit, do go into the 2255
6 mold, because in most cases it will not be clear on the
7 record, and the Second Circuit rule that you must bring it
8 on direct review applies only when it is clear, the
9 ineffectiveness is clear on the record, if you need to
10 look outside the record, then the Second Circuit agrees it
11 doesn't belong on direct review?

12 MR. FAHRINGER: Your Honor, in all due respect,
13 I'm not sure that's right. Since Billy-Eko came down, 35
14 cases that we were able to find in addition to this one
15 were defaulted, because the Second Circuit said it should
16 have been brought, there was enough on the record. So
17 this is a terribly ambiguous and controversial -- and we
18 don't know how many cases where district courts just
19 simply issued an order. These are written opinions, many
20 of them, Your Honor, unpublished, but it --

21 QUESTION: But there -- but are there not cases
22 where the Second Circuit has recognized this particular
23 claim depends on extra-record material?

24 MR. FAHRINGER: Absolutely, Your Honor.
25 Absolutely. As a matter of fact, what I think lends force

1 to our argument here is that even the Second Circuit
2 acknowledged it, and yet they persist in holding to that
3 narrow exception that it should be raised on direct
4 appeal, and that narrow exception means that in every 2255
5 proceeding, a defendant must overcome what is a fairly --
6 a large hurdle of -- of cause and prejudice, and that's
7 not true in the other -- in the other circuits, so we
8 believe, on balance, the better rule, and the one that
9 will more effectively administer justice, should be this
10 one.

11 With that being said, I'd like to close by just
12 simply urging the Court that since one of the most
13 cherished policies of this Nation is that, and of the
14 criminal justice system is that a person is entitled to
15 the effective assistance of counsel, but if that right is
16 rendered meaningless because if he's denied that
17 safeguard, he has no effective remedy to cure it, then it
18 seems to me the right has been sadly lost, and I would ask
19 this Court to adopt the rule that we urge.

20 Thank you so much.

21 QUESTION: Do you wish to reserve your remaining
22 time, Mr. Fahringer?

23 MR. FAHRINGER: Yes. Thank you, Mr. Chief
24 Justice.

25 QUESTION: Yes. Mr. Sri nivasan.

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ORAL ARGUMENT OF SRIKANTH SRINIVASAN
ON BEHALF OF THE RESPONDENT

QUESTION: Mr. Srinivasan, suppose you start by telling us why the SG changed the position that it had -- that he had taken for so long on this point?

MR. SRINIVASAN: Justice O'Connor, the -- the Solicitor General's Office today, as before, believes that in the majority of the cases, in the overwhelming majority of the cases, claims asserting ineffective assistance of counsel will be better resolved on collateral review. The question has been whether the costs of applying a procedural default rule outweigh those benefits, and it has been our experience, with the application of the rule in the Second and Seventh Circuits over the past several years, that the administrative costs that initially were feared haven't -- haven't been borne out, and that the degree of uncertainty that initially led us to -- to reach the position that a procedural default rule should not be applied hasn't been borne out either.

QUESTION: So in effect you think that what's happening now in CA-2 and CA-7 is just fine?

MR. SRINIVASAN: In the main, we think that's correct, Justice O'Connor. It should not -- the rule's operation should not result in unfairness to defendants, and should not overload the courts with ineffectiveness

1 claims that are asserted prematurely on direct appeal.

2 QUESTION: How many cases are we talking about?

3 I mean, it's the -- we're arguing about a sub-class of
4 cases in which counsel changes between the trial and the
5 direct appeal. Either in percentage terms or absolute
6 terms, how many are we talking about?

7 MR. SRINIVASAN: Justice Souter, the best that
8 we can tell, and this is based on essentially anecdotal
9 reports of U.S. Attorney's Offices, it's somewhere on the
10 order of 20 to 40 percent, roughly, of cases in which new
11 counsel represents the defendant on appeal, but that --
12 I'd -- I hesitate to rely too much on that figure, because
13 it is based on the anecdotal reports --

14 QUESTION: And --

15 MR. SRINIVASAN: -- and additionally, it varies
16 significantly by locality, depending on the particular
17 rules that are in place for replacement of counsel on
18 appeal.

19 QUESTION: Within that 20 to 40 percent,
20 whatever it may be, do you have any kind of a rough guess
21 as to the number of instances of this issue that arise?

22 MR. SRINIVASAN: This issue?

23 QUESTION: I mean, how -- how many times within
24 that 20 to 40 percent category do we get into an argument
25 later on as to whether 2255 can be availed of because, in

1 fact, a -- a record was sufficiently developed to -- to
2 raise the -- the claim on direct? How -- how many cases
3 are there?

4 MR. SRINIVASAN: We don't -- we don't have the
5 figures on that. We don't -- we don't track the figures
6 by substantive claims, and so it's been difficult to come
7 up with numbers that reflect the treatment of
8 ineffectiveness claims in particular.

9 QUESTION: So it's -- it's hard to say what the
10 sort of cost to the system, if there is one, would be of
11 going one way or the other?

12 MR. SRINIVASAN: It's -- it's hard to say
13 because there's no hard scientific data, and I --

14 QUESTION: Well, how could there be? I mean,
15 what the problem is, is in a very small number of cases,
16 hardly any, you have a case in the district court where
17 the judge is serving as a habeas judge, and the Government
18 in a very small number of cases comes in and makes the
19 argument, judge, he cannot raise this ineffective
20 assistance claim because he should have raised it on
21 direct appeal, although he didn't, and then the cost to
22 the system is hidden in the mind of the judge, in the
23 minds of the lawyers who have to spend time briefing that
24 and going and finding some affidavits, and trying to get
25 around it.

1 I mean, how could you get empirical information,
2 and what led you to change your opinion? Have you been
3 investigating the minds of the judge or the minds of the
4 lawyers in some way, that you know that they aren't
5 actually aggravated, that you know that they aren't
6 actually disturbed at having to waste their time on such
7 an issue?

8 MR. SRINIVASAN: No, we haven't been conducting
9 an examination of that, of that sort, of course.

10 QUESTION: Oh, I'm sure you haven't. I'm being
11 a little facetious, but it seems to me it's not empirical
12 data. The world won't come to an end if you lose this
13 case. All it will do is save judges and lawyers a certain
14 amount of time, which, if you win this case, they will
15 have spent for no reason.

16 MR. SRINIVASAN: That -- Justice Breyer, it's
17 correct that it saves time at the stage of collateral
18 review, but the question for procedural default purposes
19 is the effect of the rule at the time of direct appeal,
20 and --

21 QUESTION: You could save no time on direct
22 appeal, it's nothing. I mean, what we're talking about is
23 cases where the person didn't raise the argument on direct
24 appeal.

25 MR. SRINIVASAN: But the consequences of having

1 a procedural default rule is that it encourages the
2 raising of ineffectiveness claims on direct appeal in any
3 essential issues.

4 QUESTION: Yes, yes. Everybody will have to go
5 and make the same argument twice. First they'll have to
6 go and make the argument on direct appeal, a lot of them,
7 and then they will have to remake the argument on
8 collateral review, this time trying to explain why it's
9 somehow different.

10 MR. SRINIVASAN: Justice Breyer, there are
11 situations in which ineffectiveness claims can be raised
12 and resolved on direct appeal, and --

13 QUESTION: There are.

14 QUESTION: Are there -- a fairly small number, I
15 would assume?

16 MR. SRINIVASAN: It is a narrow category of
17 cases, Justice O'Connor, but those cases do exist.

18 QUESTION: In any event, the AEDPA time limits
19 apply, do they not, even if we followed a different rule?

20 MR. SRINIVASAN: As a -- that's correct, Justice
21 O'Connor, the 1-year statute of limitations applies, but
22 that's also true of other substantive claims, and yet the
23 Court has continued to apply the cause in prejudice
24 standard to encourage the raising of those claims at the
25 earliest available opportunity, and that's the -- that's

1 the principal policy interest behind applying the
2 procedural default rule in this context.

3 QUESTION: Is this just a Federal question,
4 Mr. Srinivasan, or are -- does it carry over to cases
5 going through State courts, too?

6 MR. SRINIVASAN: Mr. Chief Justice, the question
7 before the Court is -- is purely a Federal question. The
8 States have adopted varying approaches, as we've suggested
9 in our briefs. A significant number of States require the
10 raising of ineffectiveness claims on direct appeal, and
11 judge the raising of an ineffectiveness claim on
12 collateral review by a cause in prejudice standard.

13 QUESTION: Isn't it true that the majority of
14 States go the other way?

15 MR. SRINIVASAN: The majority -- it appears that
16 the majority of States go the other way, but it's not
17 entirely clear, Justice Stevens, because some of the
18 States haven't spoken directly on the question. What
19 we -- what we know is that 19 States -- it was 20 at the
20 time we filed our brief, but it's now 19, follow the cause
21 in prejudice approach and require the raising of
22 ineffectiveness claims on direct appeal, and there's at
23 least a significant number of States that don't require
24 the raising of ineffectiveness claims on direct appeal,
25 but it's unclear whether there's more than 20, and so we

1 don't know exactly whether it's a majority or not, but --
2 but there at least are a significant number that apply
3 procedural default principles to the raising of claims on
4 direct appeal, and that's --

5 QUESTION: Am I right that the Government's
6 position before the -- before we granted cert in this case
7 was, this lack of uniformity is all right, that either
8 rule will do, and that lawyers, defense lawyers in the
9 Second Circuit will file the Second Circuit's rule, and
10 defense lawyers in the Fifth Circuit will file the Fifth
11 Circuit rule, and that was okay? Wasn't that the
12 Government's original position -- you were never saying,
13 it must be direct review if it's clear on the record?

14 MR. SRINIVASAN: Justice Ginsburg, our position
15 was that there was no need for national uniformity in the
16 sense that the Court need not grant review to impose a
17 national -- national uniform rule. We didn't -- we
18 thought that there was no unfairness in the existing
19 divergence of approaches among the courts of appeals,
20 because in each court of appeals, a defendant had notice
21 of the particular approach that applied in that circuit,
22 and so a defendant knew ahead of time whether he had to
23 raise its ineffectiveness claim on direct appeal, or
24 whether he could wait without penalty and raise it on
25 collateral review.

1 QUESTION: So effectively, you told us not to
2 bother with this case, but once we granted cert, then the
3 Government had to take a position?

4 MR. SRINIVASAN: Correct, Justice Ginsburg. Now
5 that the Court has granted certiorari, we think it would
6 be appropriate for this Court to adopt a Nationwide rule
7 similar to what the Court essentially did in Bousley,
8 where the question was the proper time for raising an
9 objection to a guilty plea on grounds that the plea was
10 not voluntary, or -- or intelligent, and the Court reached
11 a resolution that required the raising of those claims on
12 direct appeal and adopted, it -- it appears, a Nationwide
13 solution, and we think a similar approach would be
14 appropriate in this case, that the Court should decide
15 whether on a national scale ineffectiveness claims can
16 always be brought on collateral review without any
17 concerns about procedural default, or, as we think is
18 appropriate, that ineffectiveness claims should be
19 required to be raised on direct appeal in those situations
20 in which counsel is new and the record -- the record for
21 the claim is fully developed in the trial record.

22 QUESTION: One can imagine, if the requirement
23 that the counsel be new in order to force you to raise it
24 on direct appeal, that in itself could be the subject of
25 controversy. That is, if you take a Public Defender

1 Office, and one Public Defender, one member of that office
2 conducts the trial, and then another member of that office
3 conducts the appeal, is that new counsel?

4 MR. SRINIVASAN: Justice Ginsburg, there --
5 there are decisions that address that issue in the State
6 courts, and I believe at least a couple that address that
7 issue in the Federal courts, and generally, the approach
8 has been that defenders from the same Public -- attorneys
9 from the same Public Defender's Office are considered the
10 same attorney for purposes of conflict, determining
11 whether there's a conflict in one alleging that the other
12 rendered ineffective assistance.

13 And that, I think, comes from the ABA
14 professional rules, and I -- and I believe it's Model Rule
15 1.1, which suggests that competence is imputed to
16 attorneys that operate within the same firm, and that
17 confirms that, at least for private firm purposes, two
18 attorneys from the same firm would be considered to be the
19 same attorney for procedural default -- default purposes,
20 and we think the same approach would follow with respect
21 to Public Defender's Offices, so I don't think that the
22 question of the same attorney is going to give rise to a
23 great deal of litigation or uncertainty. The rules in
24 that area ought to be pretty clear.

25 QUESTION: Well, there's one aspect of the

1 Government's decision, now that it has to take a position
2 one way or another. These questions, ineffectiveness of
3 counsel, deal with what went on in the trial court, and
4 ordinarily, the first view of such questions is taken by a
5 court of first instance, not an appellate court, and yet
6 here, the first look under the rule you are now supporting
7 would be taken by an appellate court.

8 MR. SRINIVASAN: Justice Ginsburg, that's
9 correct, but I think it's important to point out that that
10 question, that situation is going to arise regardless of
11 how this Court resolves the procedural default question,
12 because in all the courts of appeals a defendant can raise
13 an ineffective assistance claim on direct appeal.

14 QUESTION: What -- what is the procedure in
15 the -- in the Federal system for a collateral --
16 collateral action, they have a claim that's ineffective.
17 Does that go back to the judge who was the trial judge?

18 MR. SRINIVASAN: Typically, yes, that's the way
19 2255 works, Mr. Chief Justice.

20 QUESTION: May I ask, under the Second Circuit
21 rule, if the defendant is represented by the Public
22 Defender's Office in the trial court, and then on appeal,
23 the Public Defender's Office continues to represent him
24 but by a different lawyer, they have different -- does
25 that -- is that a different lawyer within the meaning of

1 the Second Circuit rule, or is it the same lawyer?

2 MR. SRINIVASAN: No, I think as I was -- as I
3 was attempting to suggest in response to Justice
4 Ginsburg's question, I think that would be considered the
5 same attorney, and that follows from conflicts principles.

6 QUESTION: I see.

7 MR. SRINIVASAN: That attorneys within the same
8 office are considered to be the same attorney for purposes
9 of conflicts, and that informs the proper approach in --
10 in the procedural default inquiry, but I think it's
11 important to note that all the courts of appeals are
12 confronted with ineffective assistance claims that are
13 raised on direct appeal. No court of appeals prohibits
14 the assertion of an ineffectiveness claim on direct
15 appeal, so in every court, the court of appeals is faced
16 with one of three options at the time an ineffectiveness
17 claim is raised.

18 They can deny the claim on the merits if they
19 can conclude that in no circumstances the claim could
20 succeed, they could grant relief on ineffectiveness
21 grounds in the narrow category of cases in which
22 entitlement to relief will be apparent from the trial
23 record, or they could decline to resolve the claim and
24 remit its resolution to 2255, and that's precisely the
25 same three options that confront the Second Circuit and

1 the Seventh Circuit, who apply the procedural default
2 rule.

3 So Justice Ginsburg, in response to your
4 question, the courts of appeals are faced with the same
5 array of options whether this Court adopts a procedural
6 default principle or not, and in the Ninth Circuit, for
7 example, in 2001, the Court faced roughly on the order of
8 50 direct appeals in which ineffective assistance of
9 counsel was asserted as a basis for relief, and in 10 of
10 those cases, the Court was able to decide conclusively
11 that the claim was lacking in merit and therefore couldn't
12 be brought again under 2255, and --

13 QUESTION: Then the court of appeals can always
14 say, we think it would be better to have this aired in
15 the -- in the court of first instance, so there will be no
16 prejudice to our rejecting it now, you can bring it in
17 2255, but the one that -- the concern here is the
18 defendant and his new counsel, whether the new counsel can
19 safely say, if I have any doubt, I'm going to hold it back
20 to the 2255, and one point that was made was that on
21 direct appeal, it's important for the appellate counsel to
22 have the cooperation of the trial lawyer to help him go
23 through the record and point out possible grounds for
24 appeal.

25 But if the new counsel is going to insert

1 ineffective assistance of counsel at that stage, it will
2 make the relationship between trial and appellate counsel
3 rather tense, will it not?

4 MR. SRINIVASAN: That -- that possibility
5 certainly is there, Justice Ginsburg, but I think the same
6 possibility arises at the time of collateral review, when
7 the attorney -- when you'd expect the attorney equally to
8 desire the cooperation of trial counsel, but any effort to
9 assert ineffectiveness could create the same sort of
10 tension in the relationship.

11 QUESTION: Mr. Srinivasan, do you have any idea
12 of what percentage of cases, of criminal convictions
13 result in inadequate assistance of counsel claims? Is it
14 90 percent of them, 50 percent of them, what? Do we know?

15 MR. SRINIVASAN: I -- I don't have statistics of
16 that variety, Justice O'Connor. I think it's been
17 generally recognized by several courts that ineffective
18 assistance claims are often raised on collateral review,
19 and I think it's fair to say that in a significant portion
20 of -- of 2255 petitions, an ineffective assistance of
21 counsel claim will be at least one ground for relief.

22 And one effect of applying a procedural default
23 principle would be to encourage the raising and resolution
24 of those claims on direct appeal in those situations in
25 which it's appropriate, and I think it's important to

1 point out that there are at least some cases in which a
2 court of appeals can resolve, on the basis of the trial
3 record, that the -- that trial counsel either was or was
4 not ineffective, and this Court, for example, in its -- in
5 its Kimmelman decision, the -- pointed out that trial
6 counsel's ineffectiveness, at least in terms of the
7 performance prong of the Strickland inquiry, was apparent
8 from the trial record, and there will be situations like
9 that that arise every so often, and perhaps more
10 frequently an appellate court will be able to determine
11 that trial counsel's performance was not ineffective and
12 will be able to make that determination perhaps because,
13 no matter how deficient the performance was, the -- the
14 particular matter at issue could never have resulted in
15 prejudice for the defendant.

16 For example, if the claim of ineffectiveness is
17 that trial counsel was ineffective in failing to
18 competently impeach a particular witness, an appellate
19 court could perhaps look at the trial record and determine
20 that the testimony of that particular witness was not
21 central to the prosecution's case, and in those
22 circumstances, could a more effective impeachment have
23 given rise to a reasonable probability that the result at
24 trial would have been different.

25 So there are going to be some situations in

1 which a court of appeals can resolve an ineffectiveness
2 claim at the time of direct appeal, and in those
3 situations, it seems appropriate to encourage the raising
4 of the claim at that stage in order to promote respect for
5 the finality of criminal judgments and also to promote the
6 resolution of legal claims at the earliest feasible
7 opportunity.

8 QUESTION: Under your rule, as I understand it,
9 new appellate counsel has the obligation to search through
10 the record to show, to find ineffective assistance of
11 counsel, and the trial counsel doesn't have that
12 obligation. That, number one, seems to me a little bit
13 arbitrary and, secondly, I'm wondering if that might not
14 itself have an effect on how often petitioner gets new
15 appellate counsel as opposed to having his trial counsel.
16 Do you think there might be some effect of this rule on
17 the decision to retain new counsel at the appellate stage?

18 MR. SRINIVASAN: We're not aware that --

19 QUESTION: Or maybe even some gamesmanship
20 playing, where that trial counsel is counsel of record,
21 but he really gets new appellate counsel to help him out?

22 MR. SRINIVASAN: Well, we're not aware of any --
23 of any effect of that sort in either the Second or Seventh
24 Circuits which apply the procedural default rule, and --
25 and I think if trial counsel's involved in the

1 gamesmanship, one would have to conceive of a situation in
2 which trial counsel found it in his interest to ensure
3 that appellate counsel could confirm his ineffectiveness
4 at trial, and that situation perhaps is unlikely to arise.

5 And in terms of the distinction between
6 appellate counsel calling into question trial counsel's
7 ineffectiveness, and trial counsel calling into question
8 his own ineffectiveness, Justice Kennedy, this Court in
9 *Kimmelman* observed what I think would -- is a common sense
10 proposition, which is that trial counsel is unlikely to
11 bring into question his own competence at trial and, in
12 fact, he would -- he would create a conflict situation,
13 and therefore the system just doesn't operate on the
14 assumption that trial counsel should be required to
15 identify his own ineffectiveness and bring it to the
16 attention of the trial court.

17 QUESTION: What about Mr. Fahringer's point that
18 if you follow your rule, you're going to get a second
19 generation of ineffective assistance claims, that is, that
20 the counsel who didn't raise or did raise something on
21 appeal was ineffective?

22 MR. SRINIVASAN: Mr. Chief Justice, it's true
23 that -- that ineffective assistance of appellate counsel
24 is -- would constitute cause for failing to raise the
25 claim of ineffective assistance of trial counsel at -- on

1 direct appeal, that that is also true in -- with all other
2 substantive claims, that ineffective assistance of trial
3 counsel for failing to raise any substantive claim at the
4 time of direct appeal could constitute cause excusing the
5 default, yet this Court has continued to apply procedural
6 default principles in the case of other substantive
7 claims, and so I'm not sure that that particular
8 consideration tips the balance decidedly in one direction
9 or the other.

10 And in fact, the Court has made clear in
11 decisions such as Murray versus Carrier and Smith versus
12 Murray, and -- and recently in Smith versus Robbins, that
13 it's difficult to make out a claim of ineffective
14 assistance of appellate counsel because appellate
15 counsel's decision whether to raise a particular claim is
16 the hallmark of effective advocacy, and one would have to
17 show that appellate counsel was unreasonable in failing to
18 present one claim instead of another at the time of
19 appellate briefing in order to establish that there was
20 cause for failing to raise ineffective assistance of trial
21 counsel at the time of direct appeal.

22 QUESTION: Of course, the Government loses one
23 thing on -- on your theory in -- in certainly some of the
24 ineffective assistance records I've had here, or seen here
25 where the -- the issue arises whether, in fact, an

1 apparently foolish move on the part of trial counsel was
2 dictated by what ultimately was a very sensible tactical
3 reason which is not apparent on the face of the record.

4 In cases like that, the Government isn't going
5 to get a chance, in effect, to make that kind of rebuttal
6 if the issue is raised on -- on direct. The Government
7 simply won't know.

8 MR. SRINIVASAN: Justice Souter, the Government
9 won't get that chance if it's resolved on direct appeal.
10 If it's raised on direct appeal, the Government, of
11 course, shares an interest in assuring that the trial
12 court -- that the appellate court, excuse me, does not
13 resolve the claim because it would say --

14 QUESTION: No, but you run the -- there's no
15 question the -- but the -- the trial court may not give
16 you the chance. I mean, you run a risk that you're going
17 to get cut short on your opportunity to get trial counsel
18 to explain what may look like a very dumb thing on the --
19 on the record.

20 The risk you run is that the trial -- that
21 the -- that the appellate court on direct appeal is going
22 to say, this was crazy, no -- you know, there -- there
23 couldn't be any sensible explanation for this, and I -- I
24 don't understand -- I don't know, just as we were saying
25 before, there's no way to tell how -- how frequently a

1 situation like this will arise, because we don't have any
2 hard statistics on any of it, but I -- I don't know why
3 you're giving that up.

4 MR. SRINIVASAN: Well, in order to ameliorate
5 that possibility, Justice Souter, the Seventh Circuit, for
6 example, has adopted a standard under which it will not
7 decide a claim of ineffectiveness in the defendant's favor
8 unless there's no possible strategic rationale for
9 counsel's decision and, of course, to the extent that
10 there may be a strategic rationale for the counsel's
11 decision, it'll be in the Government's interest to bring
12 that to the court's attention in its appellate briefing,
13 and we haven't seen too many situations in which a court
14 grants a claim of ineffectiveness on direct appeal, but
15 yet there was potentially a strategic rationale for
16 counsel's decision.

17 In fact, the court should grant relief on
18 ineffectiveness grounds on direct appeal only in
19 situations such as the one that confronted the Court in
20 *Kimelman*, where there was an extended dialogue between
21 trial counsel and the trial court concerning trial
22 counsel's assertively deficient decision --

23 QUESTION: I --

24 MR. SRINIVASAN: -- and trial counsel was able
25 to explain to the trial court the basis of its decision,

1 and from trial counsel's explanation, one could determine
2 that it wasn't based on a strategic rationale, but instead
3 was based simply on a misunderstanding of the time, of the
4 timeliness of the rejection rule that was at issue.

5 QUESTION: In a collateral proceeding,
6 Mr. Srinivasan, you're developing evidence, you have
7 the trial -- you put the trial counsel on the stand and
8 the new counsel cross examines him to see -- prove how
9 badly he did?

10 MR. SRINIVASAN: That -- that could arise,
11 Mr. Chief Justice. That's -- that's one potential
12 evidentiary way to show that trial counsel was
13 ineffective.

14 QUESTION: And is there any limit on the -- can
15 you, you know, examine the trial counsel for his mental
16 processes and that sort of thing?

17 MR. SRINIVASAN: I'm not -- I don't know the
18 answer to that, Mr. Chief Justice. I don't know to what
19 extent privileges weigh into it.

20 QUESTION: But the Government frequently in
21 these cases elicits testimony in response from the trial
22 counsel saying, well, yeah, I -- I didn't ask the question
23 because I didn't want to get into this sort of subject, so
24 I mean that --

25 MR. SRINIVASAN: That's correct.

1 QUESTION: -- I take it, is a relatively common
2 feature in these cases.

3 MR. SRINIVASAN: That's -- that's correct,
4 Justice Souter. It's in the Government -- the Government
5 does do that, and it's in their interest to do that to
6 ensure that the result of trial is upheld.

7 QUESTION: There are no privilege problems, are
8 there -- or maybe I'm wrong -- if -- if the client himself
9 has the new attorney examine the old one. He waives the
10 privilege.

11 MR. SRINIVASAN: I think that's right, Justice
12 Kennedy.

13 If I could turn just for one moment to the
14 application of a procedural default rule to the facts of
15 this case, in -- if the procedural default rule were to be
16 applied, the question at the time of collateral review is
17 whether -- is whether the defendant has introduced
18 extrinsic evidence not available in the trial record in
19 support of this claim of ineffectiveness, and the court of
20 appeals in this case found that there was no extrinsic
21 evidence material to the claim of ineffectiveness
22 introduced in the affidavits on which petitioner relies
23 because the affidavits suggests avenues of inquiry the
24 trial counsel could have pursued that trial counsel in
25 fact did pursue.

1 For example, on the facts of this particular
2 case, that there was no blood spatter remaining from the
3 wound, and that -- that no blood spatter reflected on the
4 upholstery of the car, or no blood itself on the front
5 passenger seat, or that the body of the -- the position of
6 the body wasn't consistent with the testimony concerning
7 the firing of the second shot, and I think it's important
8 to point out that in all of those avenues were, in fact,
9 explored by the trial record -- excuse me, by trial
10 counsel, and were presented to the jury, and the jury
11 evidently found them not persuasive.

12 QUESTION: And yet the -- the trial judge
13 herself said to defense counsel, aren't you going to move
14 for a continuance, when this bullet came -- was unearthed
15 after all that time. Didn't she, a couple of times, hint
16 that it would be -- might be a good idea for defense
17 counsel to seek a continuance?

18 MR. SRINIVASAN: She did. She offered a
19 continuance on repeated occasions to trial counsel, and
20 trial counsel turned it down, but I think the defendant's
21 burden at the time of collateral review now is to show
22 that the refusal of a continuance worked to the
23 defendant's detriment and resulted in a reasonable
24 probability that the result at trial would have been
25 different had he -- had he accepted a continuance, and the

1 affidavits only present avenues of inquiry that trial
2 counsel in fact pursued, which indicates, and I think in
3 some sense confirms, that a continuance would not have
4 affected the result at trial.

5 If there are no further questions, Mr. Chief
6 Justice --

7 QUESTION: Thank you, Mr. Srinivasan.

8 Mr. Fahringer, you have 14 minutes left.

9 REBUTTAL ARGUMENT OF HERALD P. FAHRINGER

10 ON BEHALF OF THE PETITIONER

11 MR. FAHRINGER: Mr. Chief Justice, I don't think
12 I'm going to have to use them, but let me go right to this
13 matter of prejudice.

14 The Court should understand that the district
15 court, nor the court of appeals, decided the prejudice
16 issue. This was decided purely on procedural ground that
17 there was a sufficient record to raise it on appeal, and
18 what I think it's important for you to understand is that
19 although in the trial record you had the justice pleading
20 with defense counsel to take a continuance, investigate
21 this bullet that became the most important piece of
22 evidence in the case -- the prosecutor stated that in the
23 Second Circuit, this was our most important piece of
24 evidence. That became the pivotal point of the trial,
25 and -- and the affidavits don't simply talk about avenues

1 the defense lawyer should have taken, what the affidavits
2 say is that it is highly unlikely that this bullet was
3 fired in that car, and they say that it is not consistent
4 with the chief and one and only witness that was involved
5 in the homicide, so what was missing, the indispensable
6 component for an ineffectiveness claim was the prejudice.
7 That was not on the record. What you had is, you're not
8 taking an adjournment, but all you have in the record is,
9 the bullet and the prosecution's proof.

10 QUESTION: Of course, we're not trying to decide
11 here whether --

12 MR. FAHRINGER: No.

13 QUESTION: -- or not this claim should be
14 sustained or rejected.

15 MR. FAHRINGER: No, I -- you're -- Mr. Chief
16 Justice, I agree. What I would like to say is, I think
17 the Solicitor General is mistaken when he responded to
18 your question and said that there would still be
19 ineffectiveness claims against appellate counsel. If this
20 Court adopts the rule that a ineffectiveness claim can be
21 brought under 2255 and does not have to be first explored
22 in those few cases on direct appeal, then there certainly
23 can be no claim made against appellate counsel for not
24 raising that claim

25 The other issue that's been identified here,

1 which is one of some moment, is new counsel. The -- the
2 Second Circuit has held in a case, it's unreported so I
3 won't discuss it, but you should know that there's a
4 holding that the Legal Aid Society, when it went over to
5 the Appeals Bureau, that was a different lawyer, even
6 though it was the same society, so it -- it is -- there's
7 ambiguity there, too.

8 What if the trial lawyer goes out and gets what
9 he thinks is a good appellate lawyer to come in Of Counsel
10 with him, and the new appellate lawyer comes in and he
11 sees the colleague who brought him into the case has
12 got -- I mean, it just is generating one complexity after
13 another.

14 If you look at the Seventh Circuit rule, they
15 have put so many exceptions onto this, as has been
16 identified, that -- that it's just becoming I think
17 unmanageable and the rule is becoming unadministratable,
18 and for that reason it cries out for a new rule.

19 Thank you, Your Honor.

20 CHIEF JUSTICE REHNQUIST: Thank you,
21 Mr. Fahringer. The case is submitted.

22 (Whereupon, at 10:58 a.m., the case in the
23 above-entitled matter was submitted.)

24

25